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Insider Trades During Pension Fund Blackout Periods; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 245 and 249

[Release No. 34–46778; IC–25795; File No. S7–44–02]

RIN 3235–AI71

Insider Trades During Pension Fund Blackout Periods

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing rules to clarify the application and prevent evasion of section 306(a) of the Sarbanes-Oxley Act of 2002. Section 306(a) prohibits the directors and executive officers of an issuer from directly or indirectly purchasing, selling, or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity securities transactions, if the equity security was acquired in connection with the director or executive officer's service or employment as a director or executive officer. In addition, the proposed rules would specify the content and timing of the notice that issuers must provide to their directors and executive officers and to the Commission about a blackout period.

DATES: Comments must be received on or before December 16, 2002.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, United States Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following electronic mail address: rule-comments@sec.gov. To help us process and review your comments more efficiently, comments should be submitted by one method only. All comment letters should refer to File No. S7–44–02; this file number should be included in the subject line if electronic mail is used. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (*http://www.sec.gov*).[1]

FOR FURTHER INFORMATION CONTACT: Mark A. Borges, Special Counsel, or Elizabeth M. Murphy, Chief, Office of Rulemaking, Division of Corporation Finance, at (202) 942–2910, at the United States Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0312.

SUPPLEMENTARY INFORMATION: We are proposing new Regulation BTR[2] under the Securities Exchange Act of 1934 (''Exchange Act'')[3] and amendments to Exchange Act rules 13a–11[4] and 15d–11[5] and to forms 20–F,[6] 40–F[7] and 8–K[8] under the Exchange Act.

I. Introduction

On July 30, 2002, the Sarbanes-Oxley Act of 2002 (the ''Act'') was enacted.[9] Section 306(a) of the Act, entitled ''Prohibition of Insider Trading During Pension Fund Blackout Periods,'' expressly prohibits any director or executive officer of an issuer of any equity security, directly or indirectly, from purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during any blackout period with respect to such equity security, if the director or executive officer acquired the equity security in connection with his or her service or employment as a director or executive officer.[10] Section 306(a) further directs us, in consultation with the Secretary of Labor, to issue rules to clarify the application of this provision and to prevent evasion thereof.[11]

Pension plan ''blackout periods'' occur for a variety of administrative purposes. Their occurrence and timing are often, but not always, within the control of the plan administrator.[12] The most common reasons for imposing a blackout period include:

- Changes in investment alternatives;
- Changes in the frequency of portfolio valuations;
- Changes in plan record-keepers or other service providers;
- Changes in plan trustees; and
- Corporate mergers, acquisitions and spin-offs that affect the pension coverage of groups of participants.[13]

Generally, during a blackout period, plan participants can contribute to their accounts, but cannot switch their account funds between investment options. Understandably, plan participants often are troubled by the prospect of a blackout, which may lock them into their existing investment choices for an extended period of time. Even participants who view their plan accounts as part of an overall long-term investment strategy may be uncomfortable with the possibility of being unable to change investment choices when an unforeseen event, such as a sudden stock price decline, occurs during a blackout period.

In the past year, several highly-publicized cases have demonstrated the catastrophic consequences that can befall employees who have invested substantially all of their retirement savings in their employer's equity securities when the issuer's securities fall sharply during a blackout period.[14] There also have been allegations that, at the time that rank-and-file employees were precluded from selling their employer's equity securities in their individual pension plan accounts, corporate executives were exercising and cashing out their employee stock options and selling other securities acquired through the company's equity compensation plans.

Section 306(a) is intended to address this problem. It prohibits an issuer's directors and executive officers from trading in equity securities of the issuer when a substantial number of the issuer's employees are unable to engage in transactions involving equity securities of the issuer through their individual pension plan accounts. Section 306(a) is designed to address the apparent unfairness of an issuer's directors and executive officers being able to sell their equity securities when the issuer's employees cannot. The statute's trading prohibition should mitigate the risk that corporate executives are putting their personal

[1] We do not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. You should submit only information that you wish to make available publicly.

[2] 17 CFR 245.100–104.

[3] 15 U.S.C. 78a *et seq.*

[4] 17 CFR 240.13a–11.

[5] 17 CFR 240.15d–11.

[6] 17 CFR 249.220f.

[7] 17 CFR 249.240f.

[8] 17 CFR 249.308.

[9] Pub. L. 107–204, 116 Stat. 745 (2002).

[10] Section 306(a)(1) of the Act.

[11] Section 306(a)(3) of the Act.

[12] These periods during which plan participants or beneficiaries are not permitted to access their accounts are sometimes also referred to as ''lockdowns,'' transition periods'' or ''quiet periods.'' Blackout periods can range from a few days to several months in duration.

[13] For example, in the case of a change in plan record-keepers, the ''blackout period'' is intended to give the old record-keeper time to perform final reconciliation of participant and beneficiary records and plan assets and to transfer the plan records to the new record-keeper. The new record-keeper then is given time to enter participant and beneficiary accounts into its administration system and to verify the accuracy of the plan records.

[14] See, for example, Ellen E. Schultz & Theo Francis, *Why Company Stock is a Burden for Many—And Less So for a Few,* Wall St. J., Nov. 2, 2001, at A1; Elizabeth Wine, *Enron Faces Lawsuits Over Handling of Pension Plan,* Fin. Times, Nov. 28, 2002, at 30.

interests ahead of their responsibilities to their companies, their employees and their companies' security holders. The required notice should ensure that directors and executive officers of an issuer, as well as investors, are aware of an impending blackout period on a timely basis.

Section 306(a) becomes effective on January 26, 2003, 180 days after the date of enactment of the Act.[15] We are proposing new Regulation Blackout Trading Restriction (''BTR'') to clarify the scope and application of section 306(a).[16]

II. Regulation BTR

A. Statutory Trading Prohibition

Section 306(a) of the Act seeks to equalize the treatment of corporate executives and rank-and-file employees with respect to their ability to engage, during a pension plan blackout period, in transactions in an issuer's equity securities that were acquired in connection with their service to, or employment with, the issuer. As proposed, Regulation BTR would clarify, and seek to prevent evasion of, section 306(a)'s statutory trading prohibition as follows:

- Proposed Exchange Act rule 100 would define terms used in the regulation.
- Proposed Exchange Act rule 101 would clarify the operation of the general statutory prohibition on trading by directors and executive officers during a pension plan blackout period and set forth exceptions to the prohibition.
- Proposed Exchange Act rule 102 would set forth exceptions to the definition of ''blackout period.''
- Proposed Exchange Act rule 103 would clarify the operation of the general statutory private remedy for violation of section 306(a).
- Proposed Exchange Act rule 104 would set forth the content and delivery requirements for the notice that an issuer must provide in connection with a blackout period.

In order to give effect to section 306(a) in a manner consistent with Congressional intent, we propose to use a number of concepts that have been developed under section 16 of the Exchange Act.[17] This approach provides an appropriately broad scope to the statutory trading prohibition of section 306(a), seeks to prevent evasion of the prohibition, takes advantage of a well-established body of rules and interpretations concerning the trading activities of corporate insiders and facilitates enforcement of the trading prohibition of section 306(a) by generally allowing reference to trading reports filed pursuant to section 16(a) of the Exchange Act.[18] A discussion of each of these proposed rules and related issues follows.

B. Discussion

1. Issuers Subject to Trading Prohibition

Section 306(a) of the Act applies to directors and executive officers of issuers as defined in the Act. Section 2(a)(7) of the Act provides that the term ''issuer'' means an issuer (as defined in section 3(a)(8) of the Exchange Act):[19]

- The securities of which are registered under section 12 of the Exchange Act;[20]
- That is required to file reports under section 15(d) of the Exchange Act;[21] or
- That files, or has filed, a registration statement that has not yet become effective under the Securities Act of 1933 (the ''Securities Act'')[22] and that has not been withdrawn.[23]

Accordingly, section 306(a) applies, and proposed Regulation BTR would apply, to the directors and executive officers of domestic issuers, foreign private issuers, banks and savings associations, small business issuers and, in rare instances, to registered investment companies.[24]

(a) *Foreign Private Issuers*

Section 306(a) of the Act, by its terms, applies to foreign private issuers.[25] Under proposed Regulation BTR, the statutory trading prohibition of section 306(a) would apply to equity security transactions by directors and executive officers of a foreign private issuer when 50% or more of the participants or beneficiaries in pension plans maintained by the issuer who are located in the United States and its territories and possessions[26] are subject to a blackout period, and the affected employees represent a significant portion of the issuer's plan participants.[27] It would not apply if a blackout period affected only plan participants or beneficiaries located outside the United States.

This approach is consistent with the purposes of the statute. We believe that, in enacting section 306(a), Congress was seeking principally to protect pension plan participants and beneficiaries located in the United States, and generally leaving to foreign authorities issues related to the interests of plan participants located outside the United States. It also conforms to our policy of focusing the protections of the federal securities laws on U.S.-based investors.

Request for Comment

- What impact would section 306(a) and proposed Regulation BTR have on

[15] *See* section 306(c) of the Act.

[16] Section 306(b) of the Act directs the Secretary of Labor to issue initial guidance and a model notice pursuant to section 101(i)(6) of ERISA (requiring 30-day advance notice of a pension plan blackout period to the plan's participants and beneficiaries) not later than January 1, 2003. In addition, the Secretary of Labor must promulgate interim final rules not later than October 13, 2002 (75 days after the date of enactment of the Act). These interim final rules were issued by the Department of Labor on October 11, 2002 (67 FR 64766). For purposes of section 306(b), the term ''blackout period'' is defined more expansively than in section 306(a) of the Act and includes any period of more than three consecutive business days in which any ability to change investments in any assets, to obtain distributions or to obtain loans is suspended, limited or restricted. In addition, section 306(b) applies to pension plans regardless of whether the plans invest in an issuer's equity securities.

[17] 15 U.S.C. 78p. Because the purposes of section 306(a) of the Act and section 16 are not identical, however, we do not mean to suggest that section 306(a) and proposed Regulation BTR will always be interpreted the same as section 16 if the purposes diverge or the interests of investors require.

[18] 15 U.S.C. 78p(a).

[19] 15 U.S.C. 78c(a)(8). Section 3(a)(8) defines the term ''issuer'' to mean ''any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term ''issuer'' means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term ''issuer'' means the person by whom the equipment or property is, or is to be, used.''

[20] 15 U.S.C. 78*l*.

[21] 15 U.S.C. 78o(d).

[22] 15 U.S.C. 77a *et seq.*

[23] This definition of ''issuer'' would be set forth in proposed Exchange Act rule 100(k).

[24] Section 306(a) does not, and proposed Regulation BTR would not, apply to entities that do not issue equity securities, such as issuers of asset-backed securities.

[25] For purposes of the Exchange Act, a ''foreign private issuer'' is defined to mean ''any foreign issuer other than a foreign government except an issuer meeting the following conditions: (1) More than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) any of the following: (i) The majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.'' See Exchange Act Rule 3b–4(c) (17 CFR 240.3b–4(c)).

[26] Proposed Regulation BTR would use the term ''state'' to identify the participants or beneficiaries located in the United States and its territories and possessions. Under proposed Exchange Act rule 100(m), the term ''state'' would have the meaning set forth in section 3(a)(16) of the Exchange Act (15 U.S.C. 78c(a)(16)). Section 3(a)(16) defines the term ''state'' to mean ''any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.''

[27] *See* section II.B.5(c) below.

the willingness of foreign private issuers to raise capital in the public U.S. capital markets, to list on U.S. markets and to register their securities under the Securities Act or the Exchange Act?

- Will the application of proposed Regulation BTR to foreign private issuers unduly discourage these issuers from implementing equity-based compensation plans for the benefit of their U.S.-based employees?
- Should section 306(a) and proposed Regulation BTR apply more broadly to foreign private issuers? If so, explain how.

(b) *Banks and Saving Associations*

The statutory trading prohibition of section 306(a) of the Act applies to directors and executive officers of banks and savings associations that satisfy the definition of ''issuer'' under section 2(a)(7) of the Act. The Act amended section 12(i) of the Exchange Act [28] to make it clear that the federal banking agencies have the authority to administer and enforce various provisions of the Act, including the statutory trading prohibition of section 306(a), with respect to banks and savings associations.[29]

(c) *Small Business Issuers*

Section 306(a) of the Act generally does not distinguish between large and small issuers. Accordingly, section 306(a)'s trading prohibition applies to any entity that satisfies the definition of ''issuer'' under section 2(a)(7) of the Act without regard to the entity's size, including small business issuers.[30] We note, however, that because many small companies do not file Exchange Act reports or registration statements under the Securities Act, not all small companies would be subject to section 306(a) and proposed Regulation BTR.

Request for Comment

- Is the compliance burden for small business issuers disproportionate to the benefits to be obtained from compliance with section 306(a) and proposed Regulation BTR? If so, should we exclude them from section 306(a) and proposed Regulation BTR? Would some other threshold for exclusion be more appropriate than the small business issuer definition?
- Is there any basis for treating pension plans sponsored by small business issuers differently than other pension plans? If blackout periods imposed on pension plans sponsored by small business issuers were excluded from proposed Regulation BTR, what would be the impact on plan participants?

(d) *Registered Investment Companies*

The statutory trading prohibition of section 306(a) of the Act applies to directors and executive officers of registered investment companies that register a class of securities under section 12 of the Exchange Act or that are required to file reports under section 15(d) of the Exchange Act or that file, or have filed, a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn. Investment companies, however, typically do not have employees because they are externally managed, with investment advisory and other services provided by affiliated and unaffiliated parties pursuant to contracts with the investment company. Without employees, investment companies typically do not maintain employee pension plans, and, as a practical matter, there would generally be no blackout periods triggering the statutory trading prohibition. Nonetheless, there are some cases, for example, internally managed investment companies, where a registered investment company that compensates its officers and directors with its own shares may have employees of its own and the statutory trading prohibition could apply in practice.[31]

Under proposed Exchange Act rule 104, the required notice to the Commission of a blackout period must be filed on form 8–K. However, Exchange Act rules 13a–11(b) [32] and 15d–11(b) [33] exempt registered management investment companies from form 8–K filing requirements. Accordingly, we are proposing an amendment to those rules that would subject such investment companies to form 8–K filing requirements for the sole purpose of meeting any filing obligation that might arise under proposed Regulation BTR.

Request for Comment

- Should we exclude investment companies from proposed Regulation BTR? If so, what would be the rationale for the exclusion?
- With regard to the proposed form 8–K filing requirement, we request public comment on feasible alternatives that minimize the reporting burdens on registered investment companies. In addition, we request comment on the utility to investors of the reports to the Commission in relation to the costs to registered investment companies and their affiliated persons of providing those reports.

2. Persons Subject to Trading Prohibition

Section 306(a) of the Act applies to directors and executive officers of issuers subject to the Act. Proposed Exchange Act rule 100 would define these terms for purposes of section 306(a).

(a) *Directors*

Under proposed Exchange Act rule 100(c)(1), for purposes of section 306(a) of the Act and proposed Regulation BTR, the term ''director'' would have the meaning set forth in section 3(a)(7) of the Exchange Act.[34] In determining whether an individual would be a director of an issuer for purposes of section 306(a) and proposed Regulation BTR, the individual's title would not be dispositive as to whether he or she is a director.[35] An individual may be a

[28] 15 U.S.C. 78*l*(i).

[29] *See* section 3(b)(4) of the Act.

[30] Under regulation S–B (17 CFR 228.10 *et seq.*), a ''small business issuer'' is defined to mean ''a company that meets all of the following criteria: (i) Has revenues of less than $25,000,000; (ii) is a U.S. or Canadian issuer; (iii) is not an investment company; and (iv) if a majority-owned subsidiary, the parent corporation is also a small business issuer. *Provided however,* that an entity is not a small business issuer if it has a public float (the aggregate market value of the issuer's outstanding securities held by non-affiliates) of $25,000,000 or more.'' *See* item 10(a)(1) of Regulation S–B (17 CFR 228.10).

[31] *See Baker, Fentress & Company, et al.*, Release Nos. 40–23571 (Nov. 24, 1998) (notice) and 40–23619 (Dec. 22, 1998) (order) (permitting internally managed closed-end investment company to provide equity-based compensation, including stock, stock options, and stock appreciation rights to its officers, directors, and employees); *Association of Publicly Traded Investment Funds,* Release Nos. 40–14541 (May 28, 1985) (notice) and 40–14594 (June 21, 1985) (order) (''1985 APTIF Order'') (permitting internally managed closed-end investment companies to offer their employees deferred compensation in the form of stock options and stock appreciation rights); *Association of Publicly Traded Investment Funds,* Release Nos. 40–15439 (Nov. 26, 1986) (notice) and 40–15496 (Dec. 23, 1986) (order) (amending 1985 APTIF Order to permit profit-sharing retirement plans qualified under section 401(a) of the Internal Revenue Code). See also *Interpretive Matters Concerning Independent Directors of Investment Companies,* Release No. 40–24083 (Oct. 14, 1999) (release stating that the staff would not recommend enforcement action against registered open-end investment companies that compensate directors with their shares, provided that a fixed dollar value is assigned to directors' services prior to the time that the compensation in shares is payable).

[32] 17 CFR 240.13a–11(b).

[33] 17 CFR 240.15d–11(b).

[34] 15 U.S.C. 78c(a)(7). Section 3(a)(7) defines the term ''director'' to mean ''any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated.'' As we recently noted, this definition reflects a functional and flexible approach to determining whether a person is a director of an entity. *See* Release No. 34–46685 (Oct. 18, 2002) (67 FR 65325) at n. 7.

[35] As under section 16 of the Exchange Act, in determining whether an advisory, emeritus or honorary director would be a director for purposes of section 306(a) and proposed Regulation BTR, attention would be given to the individual's underlying responsibilities or privileges with

director without holding the title, if he or she functions as a director.[36]

Request for Comment

• Is it appropriate to use the definition in section 3(a)(7) of the Exchange Act to define the term ''director'' for purposes of section 306(a) and proposed Regulation BTR? If not, what definition should we use?

(b) *Executive Officers*

Under proposed Exchange Act rule 100(h)(1), for purposes of section 306(a) of the Act and proposed Regulation BTR, the term ''executive officer'' would be defined in the same manner as the term ''officer'' is defined in Exchange Act rule 16a–1(f).[37] While the Exchange Act rules contain a separate definition of the term ''executive officer,'' [38] we believe that, for purposes of section 306(a) and proposed Regulation BTR, the broader definition in Exchange Act rule 16a–1(f) is more appropriate because of its focus on the policy-making functions of the subject individual.[39] In addition, by using this definition, issuers that are subject to section 16 of the Exchange Act would be better able to coordinate the operation of their insider trading programs and to monitor the individuals subject to the provisions of both section 16 and section 306(a).

Request for Comment

• Is it appropriate to use the definition of the term ''officer'' in Exchange Act Rule 16a–1(f) to define the term ''executive officer'' for purposes of section 306(a) and proposed Regulation BTR?

• If not, should we use the definition in Exchange Act rule 3b–7, or some other definition? Should the scope of the definition be broader or narrower? If so, explain why.

(c) *Foreign Private Issuers*

Under proposed Exchange Act rule 100(c)(2), for purposes of section 306(a) of the Act and proposed Regulation BTR, in the case of a foreign private issuer, the term ''director'' would mean a director who is a management employee of the issuer. Under proposed Exchange Act rule 100(h)(2), for purposes of section 306(a) and proposed Regulation BTR, in the case of a foreign private issuer, the term ''executive officer'' would mean the principal executive officer or officers, the principal financial officer or officers and the principal accounting officer or officers (or, if there is none, the controller) of the issuer. Because foreign private issuers are not subject to section 16 of the Exchange Act,[40] we believe that it is appropriate to specifically enumerate the directors and executive officers of a foreign private issuer who would be subject to section 306(a) and proposed Regulation BTR rather than relying on a section 16 definition. This would assist foreign private issuers in identifying the individuals who would be subject to section 306(a) and proposed Regulation BTR. In addition, many foreign private issuers have lower-level employee representatives on their boards of directors, and we do not believe that section 306(a) and proposed Regulation BTR should be extended to these individuals or to other non-employee directors of foreign companies.

Request for Comment

• Is it appropriate to use a different definition of the terms ''director'' and ''executive officer'' for foreign private issuers than for domestic issuers?

• Is it appropriate to limit the individuals who would be considered the directors and executive officers of a foreign private issuer for purposes of section 306(a) and proposed Regulation BTR? If not, explain why.

• Should the proposed definition cover other executive officers of a foreign private issuer in addition to the three enumerated officers? Should we exclude the principal accounting officer from the definition? In each case, explain why.

• Are there other directors of a foreign private issuer who should be included in the definition other than management directors? If so, explain who and why.

(d) *Termination of Status*

Because of the definitions described above, the statutory trading prohibition of section 306(a) of the Act and the provisions of proposed Regulation BTR would no longer apply to an individual who ceases to be a director or executive officer of an issuer.

3. Securities Subject to Trading Prohibition

Section 306(a) of the Act applies to any equity security of an issuer other than an exempt security.[41] To effectuate the intended purpose of section 306(a) and to prevent evasion of the statutory trading prohibition, proposed Exchange Act rule 100(f) would define ''equity security of the issuer'' to include any equity security or derivative security relating to an issuer, whether or not issued by that issuer.[42] Thus, section 306(a) and proposed Regulation BTR would apply to any equity security that

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respect to the issuer and whether he or she has a significant policy-making role with the issuer. *See* Release No. 34–28869 (Feb. 21, 1991) (56 FR 7242), at section II.A.1. An individual may hold the title ''director'' and yet, because he or she is not acting as such, not be deemed a director. Release No. 34–26333 (Dec. 2, 1988) (53 FR 49997), at section III.A.2. (''In general, honorary directors need not be treated as directors for purposes of Section 16, because they usually do not take part in formulating and deciding policy issues concerning the issuer, and do not have general access to material, non-public information.'')

[36] *See* the Commission's *amicus curiae* brief filed in *Gryl* versus *Shire Pharmaceuticals Group PLC,* 298 F.3d 136 (2d Cir. 2002). Where the individual does not have the title, however, he or she must have more than access to non-public information about the issuer, and must do more than assist the board in formulating policy.

[37] 17 CFR 240.16a–1(f). Exchange Act rule 16a–1(f) defines the term ''officer'' to mean ''an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Officers of the issuer's parent(s) or subsidiaries shall be deemed officers of the issuer if they perform such policy-making functions for the issuer. In addition, when the issuer is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. When the issuer is a trust, officers or employees of the trustee(s) who perform policy-making functions for the trust are deemed officers of the trust.''

[38] *See* Exchange Act rule 3b–7 (17 CFR 240.3b–7). This definition differs from the definition in Exchange Act rule 16a–1(f) in that it does not expressly include a registrant's principal financial officer or principal accounting officer (or controller). It also does not expressly address officers of a parent corporation or how to identify a registrant's executive officers when a registrant is a limited partnership or a trust.

[39] Thus, the standard for determining whether an individual is an ''executive officer'' for purposes of section 306(a) of the Act and proposed Regulation BTR would be the same as those applicable under Exchange Act rule 16a–1(f). For example, the term ''policy-making functions'' would not include policy-making functions that are not significant. Similarly, if pursuant to item 401(b) of Regulation S–K (17 CFR 229.401(b)), an issuer identifies an individual as an ''executive officer,'' it would be presumed that the board of directors of the issuer has made that judgment and that the individuals so identified are executive officers of the issuer for purposes of section 306(a) and proposed Regulation BTR, as are such other persons enumerated in Exchange Act rule 16a–1(f) but not in item 401(b). *See* the note to Exchange Act rule 16a–1(f).

[40] *See* Exchange Act rule 3a12–3 (17 CFR 240.3a12–3).

[41] For purposes of section 306(a) of the Act, proposed Exchange Act rule 100(i) would define the term ''exempt security'' by reference to the definition in section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)).

[42] For example, this would include a security-based swap agreement, a standardized option, a security future on an equity security and a security future on a narrow-based security index. *See*, for example, Release No. 34–28869 (Feb. 8, 1991) (56 FR 7242) and Release No. 33–8107 (Jun. 21, 2002) (67 FR 43234). A ''security-based swap agreement'' is defined in section 206B of the Gramm-Leach-Bliley Financial Modernization Act of 1999, as amended by H.R. 4577, Pub. L. 106–554, 114 Stat. 2763.

relates to an equity security of the director or executive officer's company, even if the security is issued by a third party.[43]

(a) *Equity Security*

Under proposed Exchange Act Rule 100(e), for purposes of section 306(a) of the Act and proposed Regulation BTR, the term ''equity security'' would have the same meaning as in the definition set forth in section 3(a)(11) of the Exchange Act[44] and Exchange Act rule 3a11–1.[45] In the case of foreign issuers, this definition would include depositary shares evidenced by American Depositary Receipts (''ADRs'').[46]

Request for Comment

- Is it appropriate to use the definitions in section 3(a)(11) of the Exchange Act and Exchange Act rule 3a11–1 to define the term ''equity security'' for purposes of section 306(a) and proposed Regulation BTR? If not, what definition should we use?

(b) *Derivative Securities*

Under proposed Exchange Act rule 100(d), for purposes of section 306(a) of the Act and proposed Regulation BTR, the term ''derivative security'' would have the same meaning as the definition of the term ''derivative security'' set forth in Exchange Act rule 16a–1(c).[47] As previously indicated, this definition would be interpreted in a manner consistent with the rules and interpretations that have developed under section 16 of the Exchange Act. For example, an interest that may be settled only in cash, but the value of which is denominated or based on an equity security, such as phantom stock, would be considered a derivative security for purposes of section 306(a) and proposed Regulation BTR. Consequently, an acquisition of a ''cash-only'' derivative security or the exercise, sale or other transfer of the security during a blackout period would be subject to the statutory trading prohibition unless pursuant to an exempt transaction.

Request for Comment

- Is it appropriate to use the Exchange Act Rule 16a–1(c) definition of ''derivative security'' for purposes of section 306(a) and proposed Regulation BTR? If not, what definition should we use?
- Are there instruments included in the definition of ''derivative security'' for purposes of section 16 of the Exchange Act that we should exclude from the definition of ''derivative security'' for purposes of section 306(a) and proposed Regulation BTR?
  —Should we exclude an interest that may be settled solely in cash, the value of which is denominated or based on an equity security, from the definition of ''derivative security'' used for purposes of section 306(a) and proposed Regulation BTR?
- Are there instruments excluded from the definition of ''derivative security'' for purposes of section 16 of the Exchange Act that we should include in the definition of ''derivative security'' for purposes of section 306(a) and proposed Regulation BTR?
  —Should we include derivative securities without a fixed exercise price in the definition of ''derivative security'' used for purposes of section 306(a) and proposed Regulation BTR?

4. Transactions Subject to Trading Prohibition

Section 306(a) of the Act prohibits a director or executive officer from purchasing, selling or otherwise acquiring or transferring any equity security of an issuer during a pension plan blackout period, if the equity security was acquired in connection with the director or executive officer's service or employment as a director or executive officer. Thus, the scope of the statutory trading prohibition is limited to:

- An acquisition of equity securities during a blackout period if the acquisition is in connection with service or employment as a director or executive officer; and
- A disposition of equity securities during a blackout period if the disposition involves equity securities acquired in connection with service or employment as a director or executive officer.[48]

Proposed Regulation BTR would clarify how section 306(a) is intended to apply to each of these two categories of transactions.

(a) *''Acquired in Connection with Service or Employment''*

Section 306(a) of the Act limits the statutory trading prohibition to equity securities that a director or executive officer acquires in connection with his or her service or employment as a director or executive officer.[49] To implement this limitation, proposed

[43] This would follow the approach that the Commission has taken under section 16 of the Exchange Act. *See* Exchange Act rule 16a–1(d) (17 CFR 240.16a–1(d)).

[44] 15 U.S.C. 78c(a)(11). Section 3(a)(11) defines the term ''equity security'' to mean ''any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.''

[45] 17 CFR 240.3a11–1. Exchange Act rule 3a11–1 defines the term ''equity security'' to mean ''any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; any security future on any such security; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.''

[46] An ADR is a negotiable certificate of interest representing American depositary shares that represent an ownership interest in a specified number or fraction of securities that have been deposited with a depositary. Section 306(a) of the Act and proposed Regulation BTR would apply in the same manner whether the transaction or the benefit plan in question involved ADRs or the deposited securities that they represent. Likewise, section 306(a) and proposed Regulation BTR would apply to purchases, sales, acquisitions and transfers that occur in the United States or outside the United States.

[47] 17 CFR 240.16a–1(c). Exchange Act rule 16a–1(c) defines the term ''derivative securities'' to mean ''any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security, but shall not include: (1) Rights of a pledgee of securities to sell the pledged securities; (2) rights of all holders of a class of securities of an issuer to receive securities pro rata, or obligations to dispose of securities, as a result of a merger, exchange offer, or consolidation involving the issuer of the securities; (3) rights or obligations to surrender a security, or have a security withheld, upon the receipt or exercise of a derivative security or the receipt or vesting of equity securities, in order to satisfy the exercise price or the tax withholding consequences of receipt, exercise or vesting; (4) interests in broad-based index options, broad-based index futures, and broad-based publicly traded market baskets of stocks approved for trading by the appropriate federal governmental authority; (5) interests or rights to participate in employee benefit plans of the issuer; or (6) rights with an exercise or conversion privilege at a price that is not fixed; or (7) options granted to an underwriter in a registered public offering for the purpose of satisfying over-allotments in such offering.''

[48] While section 306(a) of the Act uses the word ''acquires'' to describe the equity securities that are subject to the statutory trading prohibition, we believe that Congress intended to cover equity securities whenever acquired, whether before or during a pension plan blackout period. The nature of the transactions that are subject to the trading prohibition confirm this conclusion. The language in proposed Exchange Act rule 101(a) reflects this interpretation.

[49] Section 306(a)(1) of the Act expressly limits the scope of the statutory trading prohibition to equity securities that a director or executive officer acquires ''in connection with his or her service or employment as a director or executive officer.'' Accordingly, equity securities of an issuer that are not acquired in connection with service or employment as a director or executive officer would not be subject to section 306(a) or proposed Regulation BTR.

Exchange Act rule 100(a) defines this term to include equity securities acquired by a director or executive officer:

- At a time when he or she was a director or executive officer of the issuer, under a compensatory plan, contract, authorization or arrangement, including, but not limited to, plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit-sharing (whether or not set forth in any formal plan document), including a compensatory plan, contract, authorization or arrangement with a parent, subsidiary or affiliate of the issuer;
- At a time when he or she was a director or executive officer of the issuer, as a result of any transaction or business relationship that is described in paragraph (a) or (b) of item 404 of Regulation S–K [50] or, in the case of foreign private issuers, item 7.B of form 20–F [51] (but without application of the disclosure thresholds of such provisions), to the extent that he or she has a pecuniary interest [52] in the equity securities;
- As ''director's qualifying shares'' or other securities that he or she must hold to meet an issuer's minimum ownership requirements for directors or executive officers; or
- Prior to becoming, or while, a director or executive officer of the issuer if the equity security was acquired as an inducement to service or employment with the issuer or a parent, subsidiary or affiliate of the issuer or as a result of a merger, consolidation or other acquisition transaction involving the issuer.

While it is clear that Congress intended section 306(a) to cover transactions involving equity securities that are acquired through grants and awards under employee stock option, restricted stock and other common equity compensation plans, we believe that the broad language of the statute encompasses any plan, contract, authorization or arrangement that results in the acquisition of issuer equity securities in exchange for the performance of services for, or employment with, an issuer. The definition in proposed Exchange Act rule 100(a)(1) is intended to reach these types of plans and arrangements. This would ensure that issuers do not shift the form of their compensation programs to enable directors and executive officers to evade the application of section 306(a).

The definition in proposed Exchange Act rule 100(a)(2) would include equity securities that have been acquired solely or primarily as a result of an individual's status as a director or executive officer. While this definition may reach equity securities that were, in fact, acquired in arms-length commercial transactions, we believe that inclusion of these transactions is necessary to prevent evasion of the statutory trading prohibition.

The definition in proposed Exchange Act rule 100(a)(3) would include securities that an individual has acquired to satisfy requirements that the individual be a security holder of the issuer in order to serve on the issuer's board of directors (so-called ''directors' qualifying shares'') and securities that a director or executive officer has acquired to satisfy an issuer's minimum ownership guidelines or requirements for directors or executive officers, including equity securities acquired on the open market for such purposes. Finally, the definition in proposed Exchange Act rule 100(a)(4) would include equity securities acquired at a time when an individual has not yet become a director or executive officer of the issuer, but which are clearly related to his or her service or employment, such as a grant or award made to induce an individual to join an issuer's board of directors or to become an employee of the issuer or as a result of a merger, consolidation or other acquisition transaction involving the issuer.

Request for Comment

- Are the transactions involving the acquisition of equity securities described in proposed Exchange Act rule 100(a) consistent with purposes of section 306(a) and proposed Regulation BTR? Should any of the described transactions be excluded from the definition of ''acquired in connection with service or employment''? If so, what would be the rationale for the exclusion?
- Are there any other situations where equity securities acquired by a director or executive officer should be considered ''acquired in connection with service or employment'' as a director or executive officer?
- For purposes of determining whether equity securities received under a compensatory plan, contract or arrangement were ''acquired in connection with service or employment,'' would it be helpful to reference the existing definition of an ''employee benefit plan'' under the federal securities laws?
- In the case of equity securities acquired by an individual as result of a merger, consolidation or other acquisition transaction involving the issuer, should such equity securities be considered ''acquired in connection with service or employment as a director or executive officer'' only where they replace equity securities that otherwise would satisfy the requirements of the definition? For example, where an employee of a target company becomes an executive officer of an acquiring company and, in connection with the merger, consolidation or other acquisition transaction of the two entities, is issued equity securities of the acquiring company to replace equity securities of the target company, should these equity securities received be considered ''acquired in connection with service or employment as a director of executive officer'' only to the extent that they were otherwise acquired in connection with service or employment as a director or executive officer of the target company?
- Should proposed Regulation BTR contain a ''safe harbor'' provision specifying acquisitions of an issuer's equity securities by directors and executive officers of the issuer that are not ''acquired in connection with service or employment'' as a director or executive officer? If so, what acquisitions of an issuer's equity securities should fall within the ''safe harbor'?

(b) *Indirect Interests*

The statutory trading prohibition of section 306(a) of the Act applies to both indirect, as well as direct, purchases, sales or other acquisitions or transfers of equity securities of the issuer by a director or executive officer.[53] Similarly, to prevent evasion of the statutory trading prohibition, the definition of ''acquired in connection with service or employment'' in proposed Exchange Act rule 100(a) would apply to indirect, as well as direct, acquisitions of equity securities for the benefit of a director or executive officer. For purposes of section 306(a), an acquisition or disposition of equity securities would be considered an acquisition or disposition by a director or executive officer if the director or

[50] 17 CFR 229.404(a) and (b).

[51] 17 CFR 249.220f.

[52] For purposes of section 306(a) of the Act, proposed Exchange Act rule 100(l) would define the terms ''pecuniary interest'' and ''indirect pecuniary interest'' by reference to the definitions in Exchange Act rule 16a–1(a)(2) (17 CFR 240.16a–1(a)(2)). Exchange Act rule 16a–1(a)(2)(i) (17 CFR 240.16a–1(a)(2)(i)) defines the term ''pecuniary interest'' to mean ''the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the subject securities.'' The definition in proposed Exchange Act rule 100(l) also would encompass the portfolio exclusion of Exchange Act rule 16a–1(a)(2)(iii) (17 CFR 240.16a–1(a)(2)(iii)).

[53] *See* proposed Exchange Act rule 101(a).

executive officer has a pecuniary interest[54] in the transaction.

To promote consistency and to simplify compliance, the term ''pecuniary interest'' would be interpreted in a manner consistent with the rules and interpretations that have developed under section 16 of the Exchange Act. Accordingly, a purchase, sale or other acquisition or transfer of equity securities by immediate family members[55] sharing the same household, a partnership, corporation, limited liability company or trust would be attributable to a director or executive officer for purposes of the statutory trading prohibition of section 306(a)(1) and proposed Exchange Act rule 101(a) if he or she is deemed to have an indirect pecuniary interest[56] in the equity securities in question. An acquisition of equity securities by an immediate family member sharing the same household, a partnership, corporation, limited liability company or trust would be attributable to a director or executive officer for purposes of determining whether the acquisition is ''in connection with service or employment'' if the acquisition otherwise satisfies the definition in proposed Exchange Act rule 100(a) and he or she is deemed to have an indirect pecuniary interest in the equity securities in question.

Request for Comment

• Is it appropriate to use the definition in Exchange Act rule 16a-1(a)(2) to define the term ''pecuniary interest'' for purposes of section 306(a) and proposed Regulation BTR? If not, what definition should we use?

—Are the definitions that determine the operation of the definition of the term ''pecuniary interest'' for purposes of section 16 of the Exchange Act appropriate for determining the application of section 306(a) and proposed Regulation BTR to indirect acquisitions of equity securities?

—Instead, should the application of section 306(a) and proposed Regulation BTR to indirect acquisitions of equity securities use a different standard, such as the beneficial ownership rules under section 13(d) of the Exchange Act,[57] for purposes of determining whether equity securities were acquired ''in connection with service or employment'' as a director or executive officer? If so, explain why.

—Should the application of section 306(a) and proposed Regulation BTR to indirect acquisitions and dispositions of equity securities use a different standard, such as the beneficial ownership rules under section 13(d) of the Exchange Act, for purposes of determining whether an acquisition or disposition of equity securities during a blackout period is subject to the statutory trading prohibition? If so, explain why.

(c) *Service or Employment Presumption*

Since the statutory trading prohibition of section 306(a) of the Act applies only to equity securities acquired in connection with service or employment as a director or executive officer, the statute, by its terms, does not completely preclude a director or executive officer from engaging in an acquisition or disposition of the equity securities of the issuer during a blackout period. This possibility may present difficulties in determining whether a particular transaction during a blackout period, such as a sale on the open market, involves equity securities that are subject to section 306(a) or other equity securities.

To simplify identification and eliminate tracing the source of equity securities involved in a disposition transaction and to prevent possible evasion of the statute, proposed Exchange Act rule 101(b) establishes an irrebuttable presumption that any equity securities sold or otherwise transferred during a blackout period were acquired in connection with service or employment as a director or executive officer to the extent that the director or executive officer holds such securities, without regard to the actual source of the securities disposed. To avoid an overly-broad application of the presumption, however, in a given blackout period, equity securities held by a director or executive officer that were acquired in connection with service or employment could only count against a single disposition transaction during that blackout period.

For example, if an executive officer owned 1,000 shares of the issuer's common stock, 250 of which were acquired as the result of the exercise of an employee stock option, a sale of 250 shares of common stock during a blackout period would be presumed to be a sale of the option shares and therefore subject to the statutory trading prohibition of section 306(a) and proposed Exchange Act rule 101(a), without regard to the actual source of the shares sold. A subsequent sale of 250 shares of common stock during the same blackout period, however, would not trigger the statutory trading prohibition since the option shares would have been deemed sold in the first transaction.

Request for Comment

• Is it appropriate to presume that any equity securities acquired or disposed of during a blackout period were acquired in connection with service or employment as a director or executive officer? If not, is there an alternative way to determine the source of equity securities acquired or disposed of during a blackout period that effectively prevents evasion of the statutory trading prohibition of section 306(a) and proposed Regulation BTR?

• Where the presumption is applied, should the equity securities acquired in connection with service or employment as a director or executive officer that were deemed sold or otherwise disposed of be excluded for purposes of applying the presumption to a sale or other disposition of equity securities in a subsequent blackout period? If so, explain why.

• Should the presumption that equity securities acquired or disposed of during a blackout period were acquired in connection with service of employment as a director or executive officer be rebuttable? If so, under what circumstances?

(d) *Transitional Matters*

Except as provided in proposed Exchange Act rule 100(a), equity securities acquired by an individual before he or she became a director or executive officer of an issuer would not be subject to section 306(a) of the Act or proposed Regulation BTR.[58] This would exclude from the statutory trading prohibition any equity securities acquired under a plan, contract, authorization or arrangement while the individual was an employee, but not a director or executive officer, of the issuer.

On the other hand, equity securities acquired by an individual in connection with service or employment as a director or executive officer before a company constituted an ''issuer'' under the definition contained in section 2(a)(7) of the Act would be subject to the statutory trading prohibition of section 306(a) and proposed Regulation BTR. Similarly, equity securities acquired in connection with an individual's service or employment as a director or executive officer before the effective date of the Act would be subject to

[54] *See* n. 52 above.

[55] As defined in Exchange Act rule 16a-1(e) (17 CFR 240.16a-1(e)) to include ''any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, and shall include adoptive relationships.''

[56] *See* proposed Exchange Act rule 100(l).

[57] 15 U.S.C. 78m(d).

[58] *See* section II.B.4(a) above.

section 306(a) and proposed Regulation BTR.

Request for Comment

• Should we exclude equity securities acquired by an individual before he or she became a director or executive officer of an issuer from section 306(a) of the Act and proposed Regulation BTR?

• Is it necessary or appropriate to treat equity securities acquired by a director or executive officer before a company became an ''issuer'' as defined in section 2(a)(7) of the Act as equity securities subject to section 306(a) and proposed Regulation BTR to prevent evasion of the statutory trading prohibition?

(e) *Exempt Transactions*

Section 306(a)(3) of the Act permits us to provide appropriate exemptions from the statutory trading prohibition of section 306(a), including purchases pursuant to an automatic dividend reinvestment program or purchases or sales made pursuant to an advance election. Because we believe that there are a number of transactions involving the acquisition or disposition of an equity security of an issuer that do not appear to present the concerns that section 306(a) is intended to remedy, we propose to exempt several types of transactions from the statutory trading prohibition if adequate safeguards exist. Proposed Exchange Act rule 101(c) would exempt:

• Acquisitions of equity securities under dividend or interest reinvestment plans;

• Purchases or sales of equity securities pursuant to a contract, instruction or written plan that satisfies the affirmative defense conditions of Exchange Act rule 10b5–1(c); [59]

• Purchases or sales of equity securities pursuant to certain ''tax-conditioned'' plans,[60] other than discretionary transactions; [61] and

• Increases or decreases in the number of equity securities held as a result of a stock split or stock dividend applying equally to all equity securities of that class, including a stock dividend in which equity securities of a different issuer are distributed, and acquisitions of rights, such as shareholder or pre-emptive rights, pursuant to a pro rata grant to all holders of the same class of equity securities registered under section 12 of the Exchange Act.

In the case of the acquisition of an equity security pursuant to a dividend or interest reinvestment plan, under proposed Exchange Act rule 101(c)(1) the acquisition would be exempt from the statutory trading prohibition of section 306(a) and proposed Regulation BTR if made under a broad-based plan providing for the regular reinvestment of dividends or interest that does not discriminate in favor of employees of the issuer and operates on substantially the same terms for all plan participants.[62] Similarly, under proposed Exchange Act rule 101(c)(4), an increase or decrease in the number of equity securities held by a director or executive officer resulting from a stock split or stock dividend would be exempt where the transaction applies equally to all equity securities of that class, including a stock dividend in which equity securities of a different issuer are distributed, as would an acquisition of rights, such as shareholder or pre-emptive rights, pursuant to a pro rata grant to all holders of the same class of equity securities registered under section 12 of the Exchange Act.[63]

Because a purchase or sale of equity securities pursuant to a contract, instruction or written plan for the purchase or sale of equity securities of the issuer that satisfies the affirmative defense conditions of Exchange Act rule 10b5–1(c) is made pursuant to an advance election, such a transaction does not necessarily give rise to the problem that section 306(a) is intended to address as long as the individual was not aware of the impending blackout.[64] Under proposed Exchange Act rule 101(c)(2), transactions that satisfy the affirmative defense conditions of Exchange Act rule 10b5–1(c) would be exempt from the statutory trading prohibition of section 306(a) and proposed Regulation BTR as long as the advance election was not made or modified during the blackout period or at the time the director or executive officer was aware of the impending blackout. To be eligible for the exemption, the binding contract must have been executed, the instruction must have been given or the written plan must have been adopted, before the director or executive officer received notice of the imposition of the blackout period. In addition, a director or executive officer must not be aware of the impending blackout at the time the contract is executed, the instruction is given or the plan is adopted, including any modifications to the contract, instruction or plan.

Under proposed Exchange Act rule 101(c)(3), a purchase or sale of equity securities pursuant to a Qualified Plan,[65] Excess Benefit Plan [66] or Stock Purchase Plan [67] would be exempt from the statutory trading prohibition of section 306(a) and proposed Regulation BTR.[68] These plans must satisfy specified provisions of the Internal Revenue Code that are designed to ensure non-discriminatory treatment of plan participants and generally involve automatic, periodic acquisitions of equity securities made pursuant to advance elections. Foreign private issuers may have employee benefit plans that are not required to satisfy the Internal Revenue Code, but instead satisfy foreign tax and other laws. As proposed, these plans would not come within the exemption under proposed Exchange Act rule 101(c)(3).

Generally, the exemption would not extend to ''discretionary transactions,'' [69] such as an intra-plan transfer involving an issuer equity securities fund or a cash distribution funded by a volitional disposition of an issuer equity security, that occurred during a blackout period. Except as described in the following sentence, these transactions would be considered

[59] 17 CFR 240.10b5–1(c).

[60] *See* Exchange Act rule 16b–3(c) (17 CFR 240.16b–3(c)). These include Qualified Plans, Excess Benefit Plans and Stock Purchase Plans as defined in Exchange Act rule 16b–3(b) (17 CFR 240.16b–3(b)). *See* nn. 65, 66 and 67 below.

[61] As defined in Exchange Act rule 16b–3(b)(1) (17 CFR 240.16b–3(b)(1)).

[62] This exemption would be similar to the exemption for dividend and interest reinvestment plans under Exchange Act rule 16a–11 (17 CFR 240.16a–11).

[63] This exemption would be similar to the exemption for stock splits, stock dividends and pro rata rights under Exchange Act rule 16a–9 (17 CFR 240.16a–9).

[64] Awareness of an impending blackout period would be considered awareness of material, nonpublic information that would render the affirmative defense unavailable. *See* Exchange Act rule 10b5–1(c)(1)(i)(A) (17 CFR 240. 10b5–1(c)(1)(i)(A)).

[65] As defined in Exchange Act rule 16b–3(b)(4) (17 CFR 240.16b–3(b)(4)).

[66] As defined in Exchange Act rule 16b–3(b)(2) (17 CFR 240.16b–3(b)(2)).

[67] As defined in Exchange Act rule 16b–3(b)(5) (17 CFR 240.16b–3(b)(5)).

[68] Accordingly, as proposed an acquisition or disposition of equity securities made in connection with death, disability, retirement or termination of employment or a transaction involving a diversification or distribution required by the Internal Revenue Code to be made available to plan participants would be exempt from the statutory trading prohibition of section 306(a) of the Act because these transactions are not discretionary transactions.

[69] 17 CFR 240.16b–3(b)(1). Exchange Act rule 16b–3(b)(1) defines the term ''discretionary transaction'' to mean ''a transaction pursuant to an employee benefit plan that: (i) Is at the volition of a plan participant; (ii) is not made in connection with the participant's death, disability, retirement or termination of employment; (iii) is not required to be made available to a plan participant pursuant to a provision of the Internal Revenue Code; and (iv) results in either an intra-plan transfer involving an issuer equity securities fund, or a cash distribution funded by a volitional disposition of an issuer equity security.''

a purchase or sale of equity securities of the issuer subject to the statutory trading prohibition of section 306(a) and proposed Regulation BTR. Notwithstanding the foregoing, a discretionary transaction that occurred during a blackout period pursuant to an advance election that satisfies the affirmative defense conditions of Exchange Act rule 10b5–1(c) as described above would be eligible for exemption from the statutory trading prohibition of section 306(a) and proposed Regulation BTR.

Request for Comment

• Is it appropriate to exempt the described transactions from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If not, explain why.

• Should we consider other transactions for exemption from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, what would be the rationale for the exemption?

—Should we exempt a transfer of equity securities without the receipt of consideration, such as a bona fide gift, from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, what would be the rationale for the exemption?

—Should we exempt an acquisition or disposition of equity securities resulting from an involuntary event, such as the death of a director or executive officer or pursuant to an order of a court or other judicial or administrative authority, from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, what would be the rationale for the exemption?

—Should we exempt the closing of a derivative security position as a result of its exercise or conversion, and the acquisition of underlying securities at a fixed exercise price due to the exercise or conversion of a call equivalent position, such as an employee stock option, from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, what would be the rationale for the exemption? Commenters are requested to justify their views in light of the express statutory prohibition against acquiring equity securities of an issuer in connection with service or employment as a director or executive officer during a blackout period. Should such an exemption be limited to situations where the position was established without awareness of an impending blackout period? Should such an exemption be limited to situations where the position would expire, mature or otherwise terminate during the blackout period?

—Should we exempt the closing of a derivative security position as a result of its exercise or conversion, and the disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position, from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, what would be the rationale for the exemption? Should such an exemption be limited to situations where the position was established without awareness of an impending blackout period?

• Should we provide an express exemption for the exercise of a put equivalent position during a blackout period written by a director or executive officer before a blackout period that is exercised by a counterparty during the blackout period? Should such an exemption be limited to circumstances where the director or executive officer does not exercise any influence over the timing of the exercise?

• Should we provide an express exemption for a sale or other transfer of the equity security by a director or executive officer that is compelled by the laws or other requirements of an applicable jurisdiction? If so, what should be the scope of the exemption?

• Is it appropriate to exempt a discretionary transaction from the statutory trading prohibition of section 306(a) and proposed Regulation BTR where the transaction occurs pursuant to an advance election that satisfies the affirmative defense conditions of Exchange Act rule 10b5–1(c)? If not, should a discretionary transaction that otherwise would occur during a blackout period be deferred until the end of the blackout period rather than prohibited?

• Should an acquisition or disposition of equity securities made in connection with death, disability, retirement or termination of employment or transactions involving a diversification or distribution required by the Internal Revenue Code to be made available to plan participants be subject to the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, explain why.

• Do foreign private issuers have employee benefit plans that are substantially similar to Qualified Plans, Excess Benefit Plans and Stock Purchase Plans that should be exempt from the statutory trading prohibition of section 306(a) and proposed Regulation BTR? If so, what would be the rationale for the exemption?

• Because there may be a variety of employee benefit plans and other compensatory arrangements under foreign law that may not be eligible for the exemption under proposed Exchange Act rule 100(c)(3) because they do not satisfy the requirements of the Internal Revenue Code, should we exempt purchases and sales of equity securities pursuant to compensatory plans and arrangements of a foreign private issuer that are substantially similar to Qualified Plans, Excess Benefit Plans and Stock Purchase Plans? Alternatively, because of the potential number of variations in plans and arrangements, should we address exemptions in this area on a case-by-case basis?

5. Blackout Period

Section 306(a)(4)(A) of the Act defines the term ''blackout period'' to mean any period of more than three consecutive business days during which the ability of not fewer than 50% of the participants or beneficiaries under all individual account plans maintained by the issuer to purchase, sell or otherwise acquire or transfer an interest in any equity security of such issuer held in such an individual account plan is temporarily suspended by the issuer or by a fiduciary of the plan. Proposed Exchange Act rule 100(b) would clarify the scope of this provision and address the application of this definition to both domestic and foreign private issuers.

Request for Comment

• Should we define the term ''blackout period'' to be shorter than the three consecutive business days specified in the statute? If so, how long should the period be and why? Are there particular types of abuses that we should consider in determining the appropriate length of the period?

—In view of the fact that the statutory definition will automatically become effective on January 26, 2003, would there be any adverse consequences from having a more restrictive definition in our rules than the definition that will become effective under the statute?

—If we were to define the term ''blackout period'' to be shorter than three consecutive business days, how should we harmonize the definition with the definition of ''blackout period'' contained in the interim final rule recently issued by the Department of Labor under section 306(b) of the Act?

(a) *Individual Account Plans*

Section 306(a)(5) of the Act defines the term ''individual account plan'' by

reference to section 3(34) of the Employee Retirement Income Security Act of 1974 (''ERISA'').[70] Section 3(34) defines the term ''individual account plan'' to mean ''a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.'' [71] This definition encompasses a variety of pension plans, including section 401(k) plans, profit-sharing and savings plans, stock bonus plans and money purchase pension plans. Proposed Exchange Act rule 100(j) would clarify that, for purposes of section 306(a) of the Act, this definition also includes non-qualified deferred compensation arrangements that reflect the elements described in the definition. As provided under section 306(a)(5), proposed Exchange Act rule 100(j) would exclude a one-participant retirement plan from the definition.[72]

Request for Comment

• Does the general statement about non-qualified deferred arrangements provide sufficient guidance as to when these arrangements would be considered ''individual account plans'' for purposes of section 306(a)(5) and proposed Exchange Act rule 100(j)? If not, what additional guidance should we give in this area?

(b) *50% Test*

Under section 306(a)(4)(A) of the Act, a blackout period occurs only where at least 50% of the participants or beneficiaries under all individual account plans maintained by the issuer are subject to a temporary suspension by the issuer or by a fiduciary of the plan of more than three consecutive business days that prevents the participants or beneficiaries from purchasing, selling or otherwise acquiring or transferring an interest in any equity security of the issuer held in the individual account plans. Proposed Exchange Act rule 100(b) would clarify that, for purposes of making this calculation, the individual account plans ''maintained by the issuer'' would include only individual account plans in which participants or beneficiaries held or could hold equity securities of the issuer, whether or not the account plan actually contained equity securities of the issuer at the time of the calculation. This would include individual account plans that:

• Permit participants or beneficiaries to invest their plan contributions in the equity securities of the issuer;

• Include an ''open brokerage window'' that permit participants or beneficiaries to invest in the equity securities of any publicly-traded company, including the issuer;

• Match employee contributions with equity securities of the issuer; or

• Reallocate forfeitures that included equity securities of the issuer to the remaining plan participants.

The proposed rule also would provide that, for purposes of determining the individual account plans ''maintained by the issuer,'' the rules under section 414(b), (c), (m) and (o) of the Internal Revenue Code [73] with respect to entities treated as a single employer with respect to an issuer would apply.[74] The ''single employer'' rules of section 414 are designed to aggregate the employees of an affiliated group of businesses to ensure compliance with the limitations on the absolute and relative amounts of benefits that can be provided to individual employees or groups of employees under tax-qualified employee benefit programs.[75] While each business within a controlled group [76] may have its own employee benefit plan or plans, and each plan can provide different benefit structures, profiles of the covered employee groups, including the compensation and benefit levels for each participant, must be maintained and monitored to enable the single employer, deemed to exist for the controlled group, to determine that the plans are in compliance with the applicable requirements. We believe that these rules reflect the appropriate principles for determining the individual account plans of an issuer and its parent, subsidiary and affiliated entities that should be aggregated for purposes of determining whether a blackout period affects 50% or more of the individual account plans maintained by an issuer.

Request for Comment

• Is it necessary or appropriate to apply the ''single employer'' rule of section 414(b), (c), (m) and (o) of the Internal Revenue Code for purposes of determining the individual account plans ''maintained by the issuer'' for purposes of the 50% test? If not, why not? Should some of the provisions be applied, but not others? If so, which ones? For example, is it necessary or appropriate to apply the rules under section 414(m), which address whether separate service organizations constitute an affiliated group, for purposes of identifying individual account plans maintained by the issuer?

• Is there an alternative ''control group'' concept that we should use to determine the individual account plans that are to be considered ''maintained by the issuer'' for purposes of the 50% test? For example, would it be appropriate to use the definition of an ''affiliate'' set forth in section 407(d)(7) of the Employee Retirement Income Security Act of 1974 to determine which individual account plans are ''maintained by the issuer'' for purposes of section 306(a)(4)(A)?

• Is it necessary or appropriate to include individual account plans that merely provide for an ''open brokerage window'' that permit participants or beneficiaries to invest in the equity securities of any publicly-traded company in the description of individual account plans that should be considered in the 50% test? If not, explain why.

(c) *Application of 50% Test*

For purposes of section 306(a) of the Act, once an issuer identified the relevant individual account plans for purposes of the 50% test, it would apply the test by comparing the number of participants or beneficiaries located in the United States and its territories and possessions under all individual account plans maintained by the issuer that will be subject to a temporary

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[70] 29 U.S.C. 1002(34).

[71] *Id.*

[72] A ''one-participant retirement plan'' is defined under section 101(i)(8)(B) of ERISA (29 U.S.C. 1021(i)(8)(B)) to mean ''a retirement plan that: (i) On the first day of the plan year: (I) covered only the employer (and the employer's spouse) and the employer owned the entire business (whether or not incorporated), or (II) covered only one or more partners (and their spouses) in a business partnership (including partners in an S or C corporation (as defined in section 1361(a) of the Internal Revenue Code of 1986)), (ii) meets the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this paragraph) without being combined with any other plan of the business that covers the employees of the business, (iii) does not provide benefits to anyone except the employer (and the employer's spouse) or the partners (and their spouses), (iv) does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control, and (v) does not cover a business that leases employees.''

[73] 26 U.S.C. 414(b), (c), (m) and (o). Section 414(b) provides that, for purposes of various provisions of the Internal Revenue Code, all employees of all corporations that are members of a ''controlled group'' of corporations are to be treated as employed by a single employer. Section 414(c) provides ''single-employer'' treatment for certain groups of partnerships and proprietorships under common control, while section 414(m) provides ''single-employer'' treatment for organizations that provide services for one another.

[74] See proposed Exchange Act rule 100(b)(3).

[75] These include prohibitions against discriminating in favor of highly compensated employees, vesting requirements and benefit limits.

[76] A ''controlled group'' of corporations is defined in section 1563(a) of the Internal Revenue Code (26 U.S.C. 1563(a)).

suspension of trading in such equity securities to the overall number of participants or beneficiaries located in the United States and its territories and possessions under all individual account plans maintained by the issuer.[77] If this percentage is at least 50%, the statutory trading prohibition would apply to the directors and executive officers of a domestic issuer.

In the case of a foreign private issuer, however, a concurrent second calculation would be applied to determine if the statutory trading prohibition was triggered. This calculation would compare the number of participants or beneficiaries located in the United States and its territories and possessions under all individual account plans maintained by the issuer subject to the temporary suspension of trading in such equity securities to the overall number of participants or beneficiaries under all individual account plans maintained by the issuer worldwide.[78] If this percentage is greater than 15% and the concurrent 50% test also is met, the statutory trading prohibition would apply to the directors and executive officers of the foreign private issuer. As previously discussed, although this second calculation is not reflected in section 306(a), we believe that such a test should be applied to ensure that the statutory trading prohibition is limited to the directors and executive officers of foreign private issuers where a significant portion of their overall plan participants or beneficiaries are located in the United States.

The application of these principles is illustrated by the following examples:

- *Example 1.* Company X is a foreign private issuer with 100,000 employees worldwide who participate in pension plans maintained by the issuer. 30,000 participants are located in the United States. A fiduciary of the issuer's U.S. pension plan initiates a blackout that will affect 16,000 of the U.S. participants. Since plan participants located in the United States who are subject to the blackout comprise 50% or more of the total number of participants located in the United States (16,000/30,000), and plan participants located in the United States who are subject to the blackout represent more than 15% of the total number of plan participants worldwide (16,000/100,000), the statutory trading prohibition of section 306(a) would apply to the foreign private issuer's directors and executive officers.
- *Example 2.* Company X is a foreign private issuer with 100,000 employees worldwide who participate in pension plans maintained by the issuer. 10,000 participants are located in the United States. A fiduciary of the issuer's U.S. pension plan initiates a blackout that will affect 7,000 of the U.S. participants. Although plan participants located in the United States who are subject to the blackout comprise 50% or more of the total number of participants located in the United States (7,000/10,000), because plan participants located in the United States who are subject to the blackout represent less than 15% of the total number of plan participants worldwide (7,000/100,000), the statutory trading prohibition of Section 306(a) would not apply to the directors and executive officers of the foreign private issuer.

Request for Comment

- Is it appropriate to limit the scope of the definition of the term ''blackout period'' to situations where the participants or beneficiaries under individual account plans that are affected by the temporary trading suspension represent 50% or more of the participants or beneficiaries under individual account plans located in the United States and its territories and possessions?
- Is it appropriate to limit the scope of the definition of the term ''blackout period'' in the case of a foreign private issuer to situations where the participants or beneficiaries located in the United States under all individual account plans maintained by the issuer subject to the temporary trading suspension also represent a significant portion of the overall number of the participants or beneficiaries under all individual account plans maintained by the issuer worldwide? If so, should the threshold for applying section 306(a) be higher or lower (such as 20% or 10%) than 15% of worldwide individual account plan participants or beneficiaries? If not, what would be the rationale for applying section 306(a) to a broader group of foreign private issuers?
- What would be an appropriate measurement date for determining the number of participants or beneficiaries in an individual account plan for purposes of conducting the 50% test? Should this number be determined as of the end of the most recent plan fiscal year, the end of the most recent fiscal quarter or some other date? What are the relevant considerations in selecting an appropriate measurement date?
- Is it necessary or appropriate for the proposed rules to ensure that the 50% test considers plan participants or beneficiaries who are United States citizens or residents who are on temporary assignment abroad?
- Would it be helpful for us to provide additional examples of the application of the 50% test? If so, are there specific fact patterns that we should address in the examples?

(d) *Exceptions to Definition of Blackout Period*

Section 306(a)(4)(B) of the Act expressly excludes two categories of transactions from the definition of ''blackout period.'' These exceptions include:

- A regularly scheduled period in which the participants and beneficiaries may not purchase, sell or otherwise acquire or transfer an interest in any equity security of an issuer, if such period is:

—Incorporated into the individual account plan; and

—Timely disclosed to employees before they become participants under the individual account plan or as a subsequent amendment to the plan; and

—Any suspension described in the general definition of ''blackout period'' that is imposed solely in connection with persons becoming participants or beneficiaries, or ceasing to be participants or beneficiaries, in an individual account plan by reason of a corporate merger, acquisition, divestiture or similar transaction involving the plan or plan sponsor.[79]

Section 306(a)(4)(B) further directs us to prescribe regulations to implement these exceptions. Accordingly, proposed Exchange Act rule 102 clarifies the application of the exceptions.[80] Proposed Exchange Act rule 102(a) would address the exception for regularly scheduled blackout periods by providing that the requirement that the blackout period be incorporated in the individual account plan could be satisfied by including a description of the regularly scheduled blackout period, including the plan transactions to be suspended during, or otherwise affected by, the blackout and its frequency and duration, in the documents or instruments under which the plan operates. The proposed rule also would provide that disclosure of the blackout period to an employee would be timely if the employee was provided notice of the blackout period at any time prior to when, or within 30 calendar days after, he or she formally enrolled in the plan, or, in the case of a subsequent amendment to the plan, within 30 calendar days after the adoption of the amendment. The notice could be in any

[77] *See* proposed Exchange Act rule 100(b)(1).

[78] *See* proposed Exchange Act rule 100(b)(2).

[79] *See* section 306(a)(4)(B)(i) and (ii) of the Act.

[80] These clarifications are necessary to resolve ambiguities that might otherwise require literal compliance with the conditions of the exceptions in order to avoid having the temporary trading suspension constitute a blackout period for purposes of section 306(a)(1).

graphic form that is reasonably accessible to the intended recipient.

In the case of a blackout imposed to consolidate plans following a merger acquisition, divestiture or similar transaction, proposed Exchange Act rule 102(b) would clarify that the blackout period would not trigger the statutory trading prohibition of section 306(a) if its principal purpose is to enable individuals to become participants or beneficiaries in the plan, or to terminate participation in the plan, even though the blackout also is used to effect other administrative actions that are incidental to the admission or withdrawal of plan participants or beneficiaries. In addition, the proposed rule would provide that the exception would be available only with respect to the participants or beneficiaries of the acquired or divested entity.

Request for Comment

• Is it necessary or appropriate to clarify in proposed Exchange Act rule 102(a) that a regularly scheduled blackout period will be considered ''incorporated'' into an individual account plan if it is included in any of the documents or instruments, such as the summary plan description, under which the account plan operates? If so, explain why.

• Is it necessary or appropriate to clarify in proposed Exchange Act rule 102(a) that disclosure of a regularly scheduled blackout period to an employee would be timely if the employee was provided notice of the blackout period at any time prior to when, or within 30 calendar days after, he or she formally enrolls in the plan? If not, explain why. Should the timeliness of disclosure be measured with respect to an event other than formal enrollment in an individual account plan?

• Is it necessary or appropriate to clarify in proposed Exchange Act rule 102(a) that disclosure of a regularly scheduled blackout period to an employee would be timely in the event of a subsequent amendment to an individual account plan if the employee was provided notice of the blackout period within 30 calendar days after the adoption of the amendment? If not, explain why. Should the timeliness of disclosure be measured with respect to an event other than formal enrollment in an individual account plan?

• Is it necessary or appropriate to clarify in proposed Exchange Act rule 102(a) the method by or form in which an issuer may timely disclose to employees the existence of a regularly scheduled blackout period? If so, explain why.

• Should the exception in proposed Exchange Act rule 102(a) contain a *de minimis* threshold that would not cause the loss of the exception in the event that some plan participants or beneficiaries failed to receive timely notice of the regularly scheduled blackout period? If so, should the *de minimis* threshold be a number (such as fewer than 5 or 10) or a percentage (such as fewer than 1% or 2%) of participants or beneficiaries that have individual account plans? What should the threshold be?

• Is it necessary or appropriate to clarify in proposed Exchange Act rule 102(b) that a blackout period following a merger, acquisition, divestiture or similar transaction would be excepted if it principally involves the enrollment of individuals in an individual account plan? If not, why not? Should we identify the type of administrative activities that would be considered incidental to the principal purpose of the blackout period?

• Is it necessary or appropriate to limit the exception in proposed Exchange Act rule 102(b) to the participants or beneficiaries of the acquired or divested entity? If not, why not?

6. Remedies

Section 306(a) of the Act contains two distinct remedies. First, a violation of the statutory trading prohibition of section 306(a) is subject to a possible Commission enforcement action.[81] In addition, where a director or executive officer realizes a profit from a prohibited transaction during a blackout period, an issuer, or a security holder of the issuer on its behalf, may bring an action to recover the profit.[82] Accordingly, liability under section 306(a) of the Act is not limited solely to recovery of the profit realized by a director or executive officer from a prohibited transaction.[83] Proposed Regulation BTR embodies both of these contemplated remedies.

(a) *Commission Enforcement*

Section 306(a)(1) of the Act provides that it is unlawful for a director or executive officer of an issuer of any equity security, directly or indirectly, to purchase, sell or otherwise acquire or transfer any equity security of the issuer during a blackout period with respect to the equity security if the director or executive officer acquired the equity security in connection with his or her service or employment as a director or executive officer. This express prohibition against the trading of equity securities during a blackout period, as contemplated by section 306(a)(1) of the Act, provides the necessary predicate for enforcement actions and sanctions under the Exchange Act.[84]

Consequently, a director or executive officer who violates the statutory trading prohibition of section 306(a) would be subject to possible civil injunctive actions, cease-and-desist proceedings, civil penalties and all other remedies available to the Commission to redress violations of the Exchange Act.[85] Under appropriate circumstances, a director or executive officer also could be subject to possible criminal liability.[86]

(b) *Private Right of Action*

Section 306(a)(2) of the Act provides that any profit realized by a director or executive officer subject to the statutory trading prohibition of section 306(a)(1) of the Act inures to, and is recoverable by, the issuer, irrespective of the director or executive officer's motive or intention upon entering into the transaction. This remedy reflects a strict standard of liability for prohibited transactions that is similar to the standard that forms the basis for a private right of action under section 16(b) of the Exchange Act.[87]

Under section 306(a)(2)(B) of the Act, the issuer may institute an action to recover a director or executive officer's realized profits from a prohibited transaction at law or in equity in any court of competent jurisdiction. If the issuer fails or refuses to bring an action within 60 days after the date of request, or fails diligently to prosecute the action

[81] *See* sections 3(b)(1) and 306(a)(1) of the Act.

[82] *See* section 306(a)(2)(A) and (B) of the Act.

[83] In this respect, section 306(a) of the Act differs from section 16(b) of the Exchange Act, where the statute provides solely a private right of action (and profit disgorgement can be the only consequence). In addition, a transaction that is subject to the statutory trading prohibition of section 306(a) may, under some circumstances, also result in the operation of the ''short-swing profits'' recovery provision of section 16(b) of the Exchange Act and form the basis for an action under Exchange Act rule 10b–5 (17 CFR 240.10b–5).

[84] Section 3(b)(1) of the Act provides that ''[a] violation of any provision of the Act, any rule or regulation of the Commission issued under this Act, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 * * * or the rules and regulations issued thereunder, consistent with the provisions of this Act, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules and regulations.'' Thus, a violation of section 306(a) of the Act, although not codified in the Exchange Act, would be subject to the same penalties as an Exchange Act violation.

[85] *See* sections 21 and 21C of the Exchange Act (15 U.S.C. 78u and 78u–3).

[86] *See* section 32 of the Exchange Act (15 U.S.C. 78ff).

[87] As under section 16(b) of the Exchange Act, issues of scienter and materiality, which are necessary elements of an anti-fraud action under the Exchange Act, would not be relevant to a private action under section 306(a) and proposed Regulation BTR.

thereafter, the owner of any equity security of the issuer may bring such an action in the name, and on behalf of, the issuer.

Because section 306(a) protects pension plan participants or beneficiaries, we believe that Congress intended to provide standing to bring an action to all holders of the equity securities of the issuer, including plan participants and beneficiaries who hold equity securities of the issuer in their individual account plans, as of the date of the subject transaction. Proposed Exchange Act rule 103 would reflect this approach. As set forth in section 306(a)(2)(B), no suit may be brought more than two years after the date on which the recoverable profits were realized.

Request for Comment

- Where a transaction involving the equity securities of an issuer gives rise to both private right of action under section 306(a) and section 16(b) of the Exchange Act, should a recovery under one provision be offset against a recovery under the other provision? If so, explain why.
- Similarly, where a transaction involving the equity securities of an issuer gives rise to both private right of action under section 306(a) and an action under Exchange Act rule 10b–5, should a recovery under one provision be offset against a recovery under the other provision? If so, explain why.

As noted above, the private right of action under section 306(a)(2) serves a remedial purpose that is similar to the purpose of section 16(b). While foreign private issuers would be subject to section 306(a)(2), they are not subject to the profit recovery and other provisions of section 16. This treatment reflects foreign private issuers' concerns relating to the strict liability nature of section 16(b), as well as jurisdictional issues that would likely arise in connection with applying section 16(b) to offshore transactions involving the equity securities of foreign private issuers by non-U.S. resident directors and officers.

Request for Comment

- Should foreign private issuers be exempt from the private right of action under section 306(a)(2)? If so, what are the jurisdictional and policy reasons that would support such an exemption? Are there other ways to address the jurisdictional issues and other matters relating to foreign private issuers in this area? Is the potential for Commission enforcement action under section 306(a) a sufficient remedy with respect to foreign private issuers?

(c) *Realized Profits*

For purposes of section 306(a) of the Act, a security holder could initiate a private action only if a director or executive officer realized a profit as a result of a purchase, sale or other acquisition or transfer of an equity security during a blackout period. As under section 16(b) of the Exchange Act, this concept of realized profit would mean that the director or executive officer received a direct or indirect pecuniary benefit from the transaction.[88] The question of whether a transaction has resulted in the realization of recoverable profits is complex. It is further complicated where the prohibited transaction is a purchase or other acquisition of equity securities during a blackout period.

There are several possible ways to calculate realized profits. In the case of a sale or other disposition of equity security during a blackout period, this includes:

- The difference between the purchase or acquisition price, if any, of the equity security and (a) the actual amount received in the case of a sale or (b) the market value of the equity security at the time of transfer in the case of a transfer without receipt of consideration;
- The difference between the most recent purchase or acquisition price, if any, of an equity security acquired in connection with service or employment as a director or executive officer before the commencement of the blackout period and (a) the actual amount received in the case of a sale or (b) the market value of the equity security at the time of transfer in the case of a transfer without receipt of consideration;
- The difference between the lowest purchase or acquisition price, if any, of an equity security acquired in connection with service or employment as a director or executive officer during a specified period before the commencement of the blackout period and (a) the actual amount received in the case of a sale or (b) the market value of the equity security in the case of a transfer without receipt of consideration;
- The difference between the average market value of the equity securities of the issuer during a specified period before the commencement of the blackout period and (a) the actual amount received in the case of a sale or (b) the market value of the equity security at the time of transfer in the case of a transfer without receipt of consideration; and
- The difference between the actual amount received as a result of the sale or other transfer of the equity security and the market value of the equity securities of the issuer on the first date after the end of the blackout period.[89]

In the case of a purchase or other acquisition of an equity security during a blackout period, this includes:

- The difference between the purchase or acquisition price, if any, of the equity security and (a) the actual amount received in the case of a sale of the equity security or (b) the market value of the equity security at the time of transfer in the case of a transfer without receipt of consideration;
- The difference between the purchase or acquisition price, if any, of the equity security and the market value of the equity securities of the issuer on the first date after the end of the blackout period;
- The difference between the purchase or acquisition price, if any, of the equity security and (a) the actual amount received or (b) the market value of the equity security at the time of transfer without receipt of consideration in the case of a sale or other transfer of any equity security (whether or not the security purchased or acquired) after the end of the blackout period; and
- The difference between the purchase or acquisition price, if any, of the equity security and the earlier of (a) the actual amount received upon the sale or other disposition of the equity security or (b) the market value of the equity security on the first anniversary of the last day of the blackout period.

In view of the complexity associated with this issue, we are not proposing a specific approach for calculating realized profits at this time. Instead, we solicit comment on the various approaches described above, as well as any other approaches that would be consistent with the purposes of section 306(a).

Request for Comment

- Should we propose a specific formula for the calculation of ''realized profits'' that are recoverable under the private right of action provided in section 306(a)?
  —If so, what would be an appropriate calculation for a transaction involving a sale or other transfer of equity securities during a blackout period?

[88] *See* Exchange Act rule 16a–1(a)(2)(i) (17 CFR 240.16a–1(a)(2)(i)). *See* also *Feder* v. *Frost,* 220 F.3d 29, 34 (2d Cir. 2000).

[89] In addition, where the prohibited transaction involves the disposition of a derivative security, the profit recovery guidelines of Exchange Act rule 16b–6(c) and (d) (17 CFR 240–16b–6(c) and (d)) could possibly apply.

—Similarly, what would be an appropriate calculation for a transaction involving a purchase or other acquisition of equity securities during a blackout period? In either case, explain how the suggested calculation specifically relates to the ability to profit by trading during the blackout period.

• Should we refrain from providing guidance, and instead leave profit calculations to the courts based on the facts and circumstances of the particular case?

7. Notice

Section 306(a)(3) of the Act requires an issuer to provide timely notice to its directors and executive officers and to the Commission of the imposition of a blackout period that would trigger the statutory trading prohibition of section 306(a)(1). Proposed Exchange Act rule 104 would clarify how issuers would satisfy this statutory directive.

(a) *Notice Requirement*

Proposed Exchange Act rule 104(a) would reflect the general requirement of section 306(a)(3) of the Act that, in any case in which a director or executive officer of an issuer of any equity security is subject to the statutory trading prohibition of section 306(a) and proposed Regulation BTR, the issuer of the equity securities must provide notice of the blackout period to the director or executive officer, as well as to the Commission.[90]

(b) *Content of Notice*

The required content of the notice would be set forth in proposed Exchange Act rule 104(b)(1).[91] As proposed, the notice would include the following information:

• The reason or reasons for the blackout period;

• A description of the plan transactions to be suspended during, or otherwise affected by, the blackout period;

• The description of the class of equity securities subject to the blackout period;

• The actual or expected beginning and ending dates of the blackout period; and

• The name, address and telephone number of the person designated by the issuer to respond to inquiries about the blackout period, or, in the absence of such a designation, the issuer's human resources director or person performing equivalent functions.

An indication of the beginning and ending dates of the blackout period is intended to enable directors and executive officers to factor the anticipated duration of the blackout into their pre-blackout period investment activities and decisions and to apprise them as to when they would be able to recommence their trading activities. Given the potential impact of a blackout period on a director or executive officer's ability to engage in transactions involving equity securities of the issuer, it is likely that they may have questions about a blackout period. For this reason, the proposed notice would have to contain the name, address and telephone number of the person designated by the issuer to answer questions concerning the blackout period.

Request for Comment

• Is the information proposed to be included in the required notice useful? Should the required notice include additional or different information?

(c) *Notice to Directors and Executive Officers*

Proposed Exchange Act rule 104(b)(2) would require notice to directors and executive officers to be provided at least 15 calendar days in advance of commencement of the blackout period. The notice could be in any graphic form that is reasonably accessible to the intended recipient. For purposes of the proposed rule, notice would be considered provided as of the date of mailing, if mailed by first class mail, or as of the date of electronic transmission, if transmitted electronically.

In some instances, it may not be practicable for an issuer to provide the required notice to its directors and executive officers within the time period specified in the proposed rule. For example, where commencement of the blackout period was due to events that were unforeseeable, or to circumstances that were beyond the reasonable control of, the issuer, such as a major computer or other technical failure, a 15-day advance notice requirement may be impracticable.[92] The proposed rule would excuse an issuer from the 15-day notice requirement where the issuer makes a written determination that the circumstances preclude compliance with the requirement and notifies the affected directors and executive officers as soon as reasonably practicable. We anticipate that issuers would need to rely on this exception only in rare circumstances.

If there was a subsequent change in the beginning or ending dates of the blackout period, an issuer would be required to provide directors and executive officers with an updated notice explaining the reasons for the change in the date or dates and identifying all material changes in the information contained in the prior notice. The updated notice would be required to be provided as soon as reasonably practicable, unless such notice in advance of the termination of a blackout period is impracticable.

Request for Comment

• Is 15 days advance notice sufficient? Should the advance notice period be longer or shorter (such as 30 days or 10 days)? Should the reference to days be ''business,'' rather than ''calendar,'' days? Should we adopt a more flexible ''reasonable time'' standard?

• For purposes of the notice requirement as it applies to directors and executive officers, should we establish an outside maximum period (such as 30 days) in which to provide the notice to ensure that notice is not provided so far in advance of the blackout period commencement date as to undermine its importance to directors and executive officers?

• Is the proposed exception to the 15-day notice requirement of proposed Exchange Act rule 104 appropriate? Is the proposed exception too broad? If so, how should it be revised to ensure that issuers provide timely notice while still providing flexibility for unforeseeable events?

• Does a general exception for ''unforeseeable circumstances'' and ''circumstances that are beyond the control of the issuer'' provide issuers with sufficient guidance as to the types of situations that would not be subject

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[90] Although notice is required by section 306(a)(6) of the Act, an issuer's failure to provide notice would not be an affirmative defense to an enforcement action for a violation of section 306(a)(1) or proposed Exchange Act rule 101(a) or to a private action to recover profits under section 306(a)(2) or proposed Exchange Act rule 103(a). In addition, an issuer's failure to provide notice where a director or executive subsequently violated the statutory trading prohibition of section 306(a)(1) may result in an enforcement action against the issuer for causing the director or executive officer's violation.

[91] While section 306(a)(3) of the Act does not require a notice to contain any specific information, we believe that it is essential to fulfilling the purpose of the provision to ensure that the notice contain certain minimum information about the blackout that would be of value to affected directors and executive officers and the public.

[92] We note that, for purposes of section 306(b) of the Act, the 30-day advance notice requirement does not apply if deferral of the blackout period would result in a violation of the exclusive purpose and prudence requirements of section 404(1)(A) and (B) of ERISA or where commencement of the blackout period is due to events that were unforeseeable or circumstances that were beyond the control of the issuer or the plan administrator. *See* section 306(b)(1)(i)(2)(C) of the Act.

to the 15-day notice requirement? If not, what additional guidance should we give in this area?

• Is there a better means of ensuring that directors and executive officers receive timely notification of an impending blackout period? Does the required notice need to be in graphic form or would directors and executive officers find oral notice sufficient?

(d) *Notice to the Commission*

While section 306(a)(6) of the Act merely requires that an issuer provide notice of an impending blackout period to the Commission, we believe that the principal purpose of this requirement is to ensure that an issuer's security holders have notice of the blackout period so that they can monitor compliance with the statutory trading prohibition. This objective is best achieved by requiring that the notice to the Commission be provided in a publicly-available document. Accordingly, proposed Exchange Act rule 104(b)(3) would require that notice to the Commission be provided on form 8–K. The content of the required report on form 8–K would be the same as the content of the required notice to directors and executive officers.

The proposed new disclosure item under form 8–K would require an issuer to disclose the imposition of a blackout period (as defined in proposed Exchange Act rule 100(b)) upon the earlier of receipt of notice of the blackout from the plan administrator [93] or actual knowledge of the blackout period by the person designated by the issuer to oversee the issuer's pension plans, or, in the absence of such a designation, the issuer's human resources director or person performing equivalent functions.[94]

Foreign private issuers are not required to file current reports on form 8–K.[95] We are not proposing to change this reporting requirement at this time. Instead, we are proposing changes to forms 20–F and 40–F that would require a foreign private issuer to file as an exhibit to the report copies of all notices provided to directors and executive officers pursuant to section 306(a)(3) of the Act and proposed Exchange Act rule 104 during the previous fiscal year, unless the notices previously have been provided to the Commission in a report on form 6–K. Of course, a foreign private issuer may make the required disclosure under cover of form 6–K, and we encourage foreign private issuers to do so.

Request for Comment

• Should the required notice to the Commission have to be filed on form 8–K? Is another approach for filing the required notice with the Commission, such as a posting on an issuer's Internet web site, more appropriate? If so, how would the imposition of the blackout period be communicated to investors?

• Is the information in the proposed form 8–K item useful? Should the proposed form 8–K item include additional or different information?

• Is the proposed triggering event for the form 8–K filing appropriate? Is the person designated by the issuer to oversee the issuer's pension plans the proper person to whom the issuer should look for determining when a form 8–K is required? Would another person, such as the agent for service of legal process for the issuer, be more appropriate?

• Should we require foreign private issuers to file the notice required under section 306(a)(3) and proposed Exchange Act rule 104 under cover of form 6–K? Should we otherwise require a foreign private issuer to make such notices public before the filing of an annual report on form 20–F or 40–F? If so, how?

• Where the pension plan of a foreign private issuer is subject to section 15(d) of the Exchange Act and files reports on form 11–K,[96] should the plan be required to file a form 8–K disclosing the blackout period? If so, should such a requirement be in addition to, or replace, the requirement that the foreign private issuer provide notice to the Commission?

(e) *Transition Period*

Section 306(c) of the Act provides that section 306 will take effect on January 26, 2003. Consequently, for purposes of proposed Regulation BTR, the notice requirement would apply to blackout periods commencing on or after January 26, 2003. For blackout periods occurring between January 26, 2003 and February 10, 2003 (the date 15 days after the effectiveness of the statute), issuers should furnish notice as soon as reasonably possible. This approach is intended to ensure that the statutorily-required notice is provided with respect to blackout periods that commence before February 11, 2003.

III. General Request for Comment

We are proposing Regulation BTR to implement section 306(a) of the Sarbanes-Oxley Act. We solicit comment, both specific and general, upon each aspect of the proposed rules. If you would like to submit written comments on the proposed rules, to suggest changes or to submit comments on other matters that might affect the proposed rules, we encourage you to do so.

We also solicit comment on the following general aspects of the proposed rules:

• Are there aspects of the proposed rules that we should eliminate? Are there aspects that we should supplement?

• Are there aspects of the proposed rules where the concepts developed under section 16 of the Exchange Act should not be used as a guide to clarify the scope and application of section 306(a)?

• Are the proposed transition provisions with respect to the required notice to directors and executive officers and the Commission appropriate? Should different transition provisions be considered?

In addition, we request comment on whether any further changes to our rules and forms are necessary or appropriate to implement the objectives of section 306(a) of the Act and proposed Regulation BTR.

IV. Paperwork Reduction Act

The proposed rules and form amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[97] We are submitting the proposed rules and form amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[98] The title for the proposed collection of information with respect to the proposed rules will be ''Regulation BTR.'' The title for the collections of information with respect to the

[93] Such notice is required to be provided to the issuer under section 306(b)(1)(i)(2)(E) of the Act.

[94] *See* proposed item 5.04 of form 8–K. This proposed amendment to form 8–K would supersede the proposal adding an item requiring disclosure of any known event that would have the effect of materially limiting, restricting or prohibiting participants in an employee benefit, retirement or stock ownership plan from acquiring, disposing or converting their holdings, other than a periodic or other limitation, restriction or prohibition based on presumed or actual knowledge of or access to material non-public information, if that plan is broadly available to the issuer's employees. *See* proposed item 5.04 to form 8–K, Release No. 33–8106 (June 17, 2002) (67 FR 42914). While today's proposal is narrower than the June proposal, it is consistent with section 306(a) of the Act.

[95] Foreign private issuers are required to file under the cover of form 6–K (17 CFR 249.306) copies of all material information that the foreign private issuer makes, or is required to make, public under the laws of its jurisdiction of incorporation, files, or is required to file, under the rules of any stock exchange or otherwise distributes to its security holders.

[96] 17 CFR 249.311.

[97] 44 U.S.C. 3501 *et seq.*

[98] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

proposed form amendments are ''Form 20–F,'' ''Form 40–F'' and ''Form 8–K.''

Form 20–F (OMB Control No. 3235–0288) is used by foreign private issuers to either register a class of securities under the Exchange Act or provide an annual report required under the Exchange Act. Form 40–F (OMB Control Number 3235–0381) is used by foreign private issuers to file reports under the Exchange Act after having registered securities under the Securities Act and by certain Canadian registrants.

Form 8–K (OMB Control No. 3235–0060) prescribes information, such as material events or corporate changes, that an issuer that is subject to the reporting requirements of sections 13(a) or 15(d) of the Exchange Act must disclose on a current basis. Form 8–K also may be used, at an issuer's option, to report any events that the issuer deems to be of importance to security holders. Issuers also may use the form to satisfy the public disclosure requirements of Regulation FD.[99] An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid OMB control number.

A. Summary of Proposed Rules

The proposed rules would clarify the application and prevent evasion of section 306(a) of the Sarbanes-Oxley Act. Section 306(a) prohibits the directors and executive officers of an issuer from, directly or indirectly, purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity securities transactions, if the equity security was acquired in connection with the director's or executive officer's service or employment as a director or executive officer. Section 306(a) also requires an issuer to provide timely notice to its directors and executive officers and to the Commission of the commencement of a blackout period. The proposed rules would specify the content and timing of this notice. The required notice is a ''collection of information'' requirement.

Compliance with the proposed rules would be mandatory. The information required by the proposed rules would not be kept confidential.

B. Reporting and Cost Burden Estimates

In order to estimate the potential compliance burden for the proposed collection of information, we have made the following assumptions. The notice requirements of section 306(a) of the Act apply to issuers that have a class of securities registered under section 12 of the Exchange Act. These requirements also apply, via section 15(d) of the Exchange Act, to issuers with an effective registration statement under the Securities Act that are not otherwise subject to the registration requirements of section 12 of the Exchange Act, and to issuers that have filed a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn. We estimate that there are approximately 18,200 entities that fit these descriptions.[100]

We then calculated the number of issuers that are likely to maintain participant-directed individual account plans and the likely number of plans maintained by these issuers. Based on statistics tabulated by the Department of Labor with respect to the number of individual account plans currently in existence, we estimate that 30% of issuers maintain individual account plans and that, on average, these issuers maintain 1.5 plans each.[101]

We then developed an assumption to account for the fact that not all potentially affected plans will impose blackout periods that would trigger the notice requirement, and not all of those imposing blackout periods would do so in a given year. Based on research conducted by the Department of Labor to estimate the frequency of the imposition of blackout periods that would trigger the notice requirement,[102] as adjusted to reflect the narrower definition of the term ''blackout period'' for purposes of section 306(a),[103] we estimate that potentially affected plans will impose blackout periods on average once every five years. Among these, some plans will not impose blackout periods, some will impose blackout periods that do not trigger the notice requirement (that is, a temporary suspension for a period of three or fewer consecutive business days) and some may have blackout periods more frequently.

We therefore assume that 20% of potentially affected plans will impose a blackout period in any given year. We request comment and any additional information that would confirm or otherwise inform this assumption. The resulting number of plans assumed to be affected by the notice requirement is approximately 1,230 plans per year.[104]

In developing burden estimates, we estimated that it will take an issuer, on average, two hours to draft the notice to directors and executive officers and three hours to draft a current report on form 8–K which must be filed to provide the required notice to the

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[99] 17 CFR 243.100–103.

[100] This estimate is based, in part, on the total number of issuers that are operating companies that filed annual reports on form 10–K (8,484), form 10–KSB (3,820), form 20–F (1,194) or form 40–F (134) during the 2001 fiscal year, which are required of all operating company issuers with a class of securities registered under section 12 of the Exchange Act and all such companies subject to section 15(d) of the Exchange Act, and an estimate of the average number of issuers that may have a registration statement filed under the Securities Act pending with the Commission at any time (100). In addition, we estimate that approximately 4,500 investment companies currently file periodic reports on Form N–SAR, and these entities are included in our estimate of the number of entities that would be subject to the requirements of proposed Regulation BTR. With regard to investment companies, because these entities generally do not have employees, and therefore typically do not maintain pension plans, there generally would be no blackout periods that would trigger the statutory trading prohibition of section 306(a) and proposed Regulation BTR. Therefore, while there may be instances in which the proposed regulation would apply, we would expect the burden on investment companies as a group to be negligible. We request comment or additional information that might confirm or otherwise inform this assumption.

[101] Although the entities subject to the requirements of proposed Regulation BTR include registered investment companies, because it is unlikely that an investment company would maintain a pension plan and, as a practical matter, there would generally be no blackout periods triggering the statutory trading prohibition of section 306(a) of the Act, we excluded these entities from our subsequent calculations. (18,200 entities—4,500 investment companies × 30% × 1.5 plans = 6,165 plans.) This number is consistent with the Department of Labor's estimate of the number of participant-directed individual account plans that filed form 5500 for fiscal year 1998 (6,145 plans).

[102] In conducting its research, the Department of Labor reviewed available literature in an effort to establish a reasonable estimate of the frequency of the imposition of blackout periods that would trigger notice requirements. One small survey of administrators of very large plans indicated that their largest plans had undergone a blackout period at a rate of once each three to four years. A different survey indicated a lower frequency of blackout periods, at a rate in the area of about 7% of plans per year. No comprehensive statistics on this frequency are available. *See* Department of Labor Release (Oct. 11, 2002) (67 FR 64766), at section D, Paperwork Reduction Act Analysis.

[103] While the Department of Labor estimated that, on average, a pension plan would experience a blackout period once every four years, we have adjusted this estimate to reflect the fact that, for purposes of section 306(a) of the Act, the definition of a ''blackout period'' is limited to a temporary trading suspension involving issuer equity securities, while, for purposes of section 306(b), the definition of a ''blackout period'' includes a temporary suspension, limitation or restriction affecting the direction or diversification of account assets, plan loans or plan distributions.

[104] 6,165 plans × 20% = 1,233 plans. Based on the number of annual reports filed on forms 10–K, 10–KSB, 20–F and 40–F, we estimate that 90% of these plans are maintained by operating issuers (12,304/13632), 9% by foreign private issuers that file on form 20–F (1,194/13,632) and 1% by foreign private issuers that file on form 40–F (134/13,632).

Commission.[105] We then estimated that 75% of the burden associated with the preparation of the required notices will be borne by the issuer and that 25% of the burden will be borne by outside counsel retained by the issuer to assist in preparing the notices to directors and executive officers and to the Commission.[106] Preparation of the required notice for directors and executive officers is estimated to require approximately 1,845 hours [107] and cost approximately $250,000 annually,[108] and preparation of current reports on form 8–K to provide the required notice to the Commission is estimated to require approximately 2,490 hours [109] and cost approximately $336,000 annually.[110] The inclusion of the required information in annual reports on form 20–F is estimated to require approximately 249 hours [111] and cost approximately $33,625 annually,[112] and the inclusion of the required information in annual reports on form 40–F is estimated to require approximately 28 hours [113] and cost approximately $3,735 annually.[114]

The estimated burden for distribution of the notices takes several factors into account, including an assumed number of blackout periods triggering required notices, an assumed number of directors and executive officers affected annually, the number of notices that will be provided electronically and on paper and the differential costs of electronic and paper distribution methods.[115] Notices provided to the Commission on a current report on form 8–K and in the annual reports on form 20–F and 40–F would be transmitted electronically via the Commission's Electronic Data Gathering, Analysis and Retrieval (''EDGAR'') system. Those directors and executive officers not estimated to receive notice electronically are assumed to receive the notice on paper. No time or direct cost is attributed to electronic distribution methods other than the time required to prepare the notice or form, as the case may be, because it is assumed that notices are drafted in electronic form, issuers use existing infrastructure to communicate electronically and the cost of electronic transmission is negligible. Paper notice distribution to directors and executive officers is estimated to require approximately 512 hours [116] and cost approximately $3,075 annually.[117]

The total burden of providing the required notice to an issuer's directors and executive officers are estimated to be approximately 2,357 hours [118] and approximately $253,075 annually.[119] The total burden hours of complying with form 8–K, revised to include the burden hours expected from providing the required notice to the Commission, are estimated to be 733,990 hours, an increase of 2,490 hours [120] from the current annual burden of 731,500 hours. The total burden hours of complying with form 20–F, revised to include the burden hours expected from providing the required notice to the Commission, are estimated to be 652,472 hours, an increase of 249 hours [121] from the current annual burden of 652,223 hours. The total burden hours of complying with form 40–F, revised to include the burden hours expected from providing the required notice to the Commission, are estimated to be 1,134 hours, an increase of 28 hours [122] from the current annual burden of 1,106 hours.

The total dollar cost of complying with form 8–K, revised to include outside counsel costs expected from providing the required notice to the Commission, is estimated to be $73,492,000, an increase of $336,000 [123] from the current annual burden of $73,156,000. The total dollar cost of complying with form 20–F, revised to include outside counsel costs expected from providing the required notice to the Commission, is estimated to be $587,033,625, an increase of $33,625 [124] from the current annual burden of $587,000,000. The total dollar cost of complying with form 40–F, revised to include outside counsel costs expected from providing the required notice to the Commission, is estimated to be $998,736, an increase of $3,736 [125] from the current annual burden of $995,000. Comments concerning the accuracy of these burden estimates, and any suggestions for reducing the burden, should be directed to the Commission as described below.

C. Request for Comment

We request comment in order to: (a) Evaluate whether the proposed information collection is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) evaluate the accuracy of our estimate of the burden of the proposed rules; (c) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (d) evaluate whether there are ways to minimize the burden of the proposed rules on those who respond, including through the use of automated collection techniques or other forms of information technology.[126]

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the proposed collection of information requirement should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange

[105] These estimates are based on consultations with several issuers, law firms and other persons who regularly assist issuers in preparing and disseminating communications to directors and executive officers and filing Exchange Act reports with the Commission.

[106] These percentages are based on consultations with several issuers, law firms and other persons who regularly assist issuers in preparing and filing Exchange Act reports with the Commission. We have used an estimated hourly rate of $300.00 to determine the estimated cost to issuers of having the required notice reviewed by outside counsel. We arrived at this hourly rate estimate after consulting with several private law firms. We then have multiplied this hourly rate by a factor of 1.35 to reflect appropriate overhead charges.

[107] 1,230 plans × 2 hours × .75 = 1,845 hours.

[108] 1,230 plans × 2 hours × .25 x $405 = $249,075.

[109] 1,230 plans × 3 hours × .75 × .90 = 2,491 hours.

[110] 1,230 plans × 3 hours × .25 × $405 × .90 = $336,251.

[111] 1,230 plans × 3 hours × .75 x .09 = 249 hours. We note that, because under proposed Regulation BTR the statutory trading prohibition of Section 306(a) of the Act would be triggered, in the case of a foreign private issuer, only where number of plan participants or beneficiaries affected by a temporary trading suspension exceeds 15% of all participants or beneficiaries under plans maintained by the issuer, these estimates may overstate the actual compliance burden.

[112] 1,230 plans × 3 hours × .25 × $405 × .09 = $33,625.

[113] 1,230 plans × 3 hours × .75 × .01 = 28 hours.

[114] 1,230 plans × 3 hours × .25 × $405 × .01 = $3,736.

[115] For purposes of this estimate, we have assumed that the number of blackout periods triggering the notice requirement is 1,230 each year, the average number of directors and executive officers of an issuer is 10, 50% of the notices would be provided electronically and that paper distribution would require five minutes per notice for copying and mailing, plus $0.50 for paper and postage. These estimates are based on consultations with several issuers, law firms and other persons who regularly assist issuers in preparing and disseminating communications to directors and executive officers.

[116] 1,230 blackout periods × five notices × five minutes per notice = 512.5 hours.

[117] 1,230 blackout periods × five notices x $0.50 per notice = $3,075.

[118] 1,845 hours + 512 hours = 2,357 hours.

[119] $250,000 + $3,075 = $253,075.

[120] *See* n. 109 above.

[121] *See* n. 111 above.

[122] *See* n. 113 above.

[123] *See* n. 110 above.

[124] *See* n. 112 above.

[125] *See* n. 114 above.

[126] Comments are requested pursuant to 44 U.S.C. 3506(c)(2)(B).

Commission, 450 Fifth Street NW., Washington, DC 20549–0609, with reference to File No. S7–44–02. Requests for materials submitted to the OMB by us with regard to this collection of information should be in writing, refer to File No. S7–44–02 and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street NW., Washington, DC 20549. Because the OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

V. Cost-Benefit Analysis

Section 306(a) of the Act prohibits directors and executive officers of an issuer from purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity security transactions, if the equity security was acquired by the director or executive officer in connection with his or her service or employment as a director or executive officer. In addition, section 306(a) requires an issuer to provide timely notice to its directors and executive officers, and the Commission, of the imposition of a pension plan blackout period. The statute is intended to restrict the ability of corporate insiders to trade in the equity securities of an issuer at a time when a substantial number of the issuer's employees are unable to engage in transactions involving equity securities of the issuer through their individual pension plan accounts.

The proposed rules would, upon adoption, clarify the application of section 306(a) and prevent evasion of its statutory trading prohibition. We recognize that any implementation of the Sarbanes-Oxley Act likely will result in costs as well as benefits and have an effect on the economy. We are sensitive to the costs and benefits of proposed rules that would specify the content and timing of the notice that issuers are required to provide to their directors and executive officers and that would mandate the required notice to the Commission to be provided on a form 8–K or, in the case of foreign private issuers, in their annual reports on form 20–F or 40–F. We discuss these costs and benefits below.

A. Benefits

Section 306(a) will, and the proposed rules would, have several important benefits. By restricting the ability of directors and executive officers to trade in an issuer's equity securities when plan participants are unable to do so, the proposed rules would mitigate the differential treatment between plan participants and beneficiaries and the directors and executive officers of the issuer with respect to such securities. This should tie the interests of directors and executive officers more closely to that of other security holders.

The content and timing requirements for the notice contemplated by section 306(a) would help ensure that directors and executive officers of an issuer have all relevant information about an impending blackout period. This will enable these individuals to conform their activities to the statutory trading prohibition and to avoid any appearance of a conflict of interest between their corporate responsibilities and their personal trading activities. In addition, requiring that notice to the Commission be provided on form 8–K or, in the case of a foreign private issuer, on form 20–F or 40–F, will help ensure that an issuer's security holders have notice of an impending blackout period. In turn, this will enable security holder to monitor compliance with the statutory trading prohibition of section 306(a). These benefits are difficult to quantify.

B. Costs

The costs associated with the proposed rules are primarily attributable to the statutory requirement to prepare and distribute advance notice of the imposition of a blackout period to directors and executive officers and to the Commission. For purposes of the Paperwork Reduction Act, we estimated the aggregate costs for issuers required to provide this notice to be approximately $625,000 per year and the related burden to be approximately 5,125 hours.[127]

While compliance with the statute and the proposed rules is the individual obligation of an issuer's directors and executive officers, it is likely that issuers will incur costs in assisting these individuals in observing the proposed trading restriction. Accordingly, issuers may incur costs associated with assisting their directors and executive officers in determining whether transactions in equity securities of the issuer are exempt from the insider trading prohibition of the proposed rules and in identifying and tracking the equity securities that are subject to the insider trading prohibition. These costs are difficult to quantify, but all are imposed by the statute.

We believe that many U.S. issuers already maintain internal procedures for assisting their directors' and officers' compliance with the provisions of section 16 of the Exchange Act and preventing violations of section 10(b) of the Exchange Act and Exchange Act rule 10b–5. It is likely that these issuers will enhance these internal procedures to address the trading restrictions of section 306(a) of the Act and proposed Regulation BTR. Some issuers may need to institute appropriate internal procedures. Other issuers may need to modify existing procedures. Because the scope and sophistication of these internal procedures are likely to vary among issuers, it is difficult to provide an accurate estimate of the incremental cost of enhancing existing systems. Because we do not have data to quantify the cost of implementing, or upgrading and strengthening existing, internal insider trading procedures, we seek comments and supporting data on these costs.

Section 306(a) also imposes costs on directors and executive officers of an issuer that is subject to section 306(a)'s trading prohibition. Restrictions on trading activities increase the financial exposure to directors and executive officers during blackout periods and reduce their financial flexibility. This may result in losses in their portfolios. In addition, because the directors and executive officers of issuers that are subject to the reporting requirements of the Exchange Act are already subject to restrictions on their trading activities, such as restrictions that confine their trading to designated ''window'' periods, the introduction of an additional trading restriction to this existing framework may, in some instances, limit the ability of a director or executive officer to trade for significant periods. This also may result in losses in their portfolios. These costs are difficult to quantify, but are mitigated somewhat by the timely notice required by the statute.

C. Request for Comments

We request comment on all aspects of this cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the proposed rules. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

[127] *See* the discussion in section IV.B above.

VI. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis, or IRFA, has been prepared in accordance with the Regulatory Flexibility Act.[128] The IRFA pertains to new rules that we are proposing to clarify the application of section 306(a) of the Act and to prevent evasion of its statutory trading prohibition. The proposed rules also would specify the content and timing of notice that issuers are required to provide to their directors and executive officers and the Commission about the imposition of a pension plan blackout period.

A. Reasons for, and Objectives of, New Rules

Section 306(a) of the Act prohibits directors and executive officers of an issuer from purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity security transactions, if the equity security was acquired in connection with the director or executive officer's service or employment as a director or executive officer. In addition, section 306(a) requires issuers to provide timely notice to their directors and executive officers and the Commission of the imposition of a blackout period. The proposed rules, which would clarify the application of section 306(a) and prevent evasion of its statutory trading prohibition, are intended to further the statute's purpose of mitigating the differential treatment between an issuer's directors and executive officers and its employees who participate in pension plans maintained by the issuer at a time when a substantial number of those participants are unable to engage in transactions involving issuer equity securities through their individual pension plan accounts.

B. Legal Basis

We are proposing the new rules under the authority set forth in sections 3, 13, 23(a) and 36 of the Exchange Act, sections 30 and 38 of the Investment Company Act and sections 3(a) and 306(a) of the Act.

C. Small Entities Subject to the Proposed Rules

Section 306(a) of the Act affects, and the proposed rules would affect, small entities the securities of which are registered under section 12 of the Exchange Act, that are required to file reports under section 15(d) of the Exchange Act or that file, or have filed, a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn. For purposes of the Regulatory Flexibility Act, the Exchange Act[129] defines the term ''small business,'' other than an investment company, to be an issuer that, on the last day of its most recent fiscal year, has total assets of $5 million or less.[130] The statute and proposed rules apply only to issuers with pension plans; we do not have data to indicate the number of small issuers that maintain pension plans, but according to available data, only 30% of all issuers maintain such plans. Furthermore, our data indicates that temporary trading suspensions that would be subject to section 306(a) occur to a plan once every five years. If these percentages are accurate regardless of an issuer's size, the proposed rules should only affect approximately 150 small entities per year. We estimate that there are approximately 2,500 issuers that are subject to the Act that are not investment companies and that have assets of $5 million or less.[131] There are approximately 225 registered investment companies that may be considered small entities. However, as noted above,[132] we anticipate that the burden imposed on investment companies by section 306(a) and the proposed rules would be negligible.

D. Reporting, Record Keeping and Other Compliance Requirements

Section 306(a) of the Act requires issuers, including ''small businesses,'' to provide timely notice to directors and executive officers and the Commission of a blackout period. The proposed rules would specify the content and timing of this notice. The statute's basic prohibition against trading during blackout periods is largely self-executing and does not afford us with substantial discretion to exercise regulatory flexibility with respect to small businesses.

While a cost will be incurred in complying with the notice requirement, we believe that these costs will be minimal for small businesses. A required notice is likely to be prepared once for each blackout period and distributed to affected directors and executive officers. In addition, a current report on form 8–K would be prepared and filed with the Commission. The cost of preparing and distributing the required notice to directors and executive officers is estimated to be approximately $590 annually for both large and small businesses.[133] The notice requirement involves a design standard in that the content of the proposed notice to directors and executive officers and the form and content of the notice to the Commission is dictated by the proposed rules and would be comparable for all issuers, including small, as well as large, entities. We do not believe that excepting small businesses from making the notice would be in the interests of their directors and executive officers, or consistent with the statute.

While we are proposing the specific content of the required notice to directors and executive officers, we do not dictate the specific form of the notice. In addition, we are proposing that the notice to the Commission be provided electronically through the filing of a current report on form 8–K. Nonetheless, we wish to address in our final rulemaking any special issues facing small businesses with respect to blackout period notices, and any alternatives consistent with the objectives of section 306(a) of the Act that may serve to facilitate compliance.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that duplicate, overlap or conflict with the proposed rules.

F. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In that regard, we are considering the following alternatives: (a) Establishing different compliance or reporting requirements that take into account the resources of small entities, (b) clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities and (c) exempting small entities from all or part of the proposed rules. The proposed rules are intended to ensure that corporate insiders do not trade in an issuer's equity securities during periods when the ability of participants or beneficiaries in the issuer's pension plans to purchase, sell or otherwise acquire or transfer equity securities of the issuer has been temporarily suspended. We do not currently believe that an exemption is

[128] 5 U.S.C. 603.

[129] 17 CFR 240.0–10(a).

[130] A similar definition is provided under Securities Act rule 157 (17 CFR 230.157).

[131] This estimate is based on filings with the Commission.

[132] *See* the discussion in section IV.B above.

[133] ($253,073 + (2,357 × $200 per hour)/1,230 blackouts = $589. *See also* section IV.B above.

necessary (since the cost of compliance is low) or appropriate (since Congress did not indicate that there should be different treatment for small businesses). Nevertheless, we solicit comment as to whether small business issuers should be excluded from the proposed rules. We also seek comment on the scope of the proposed disclosure, the cost of preparing it and whether the obligation can be simplified or clarified. If the cost is disproportionately large for small businesses, we will consider appropriate modifications to the proposed rules.

G. Request for Comments

We encourage the submission of comments with respect to any aspect of the IRFA. In particular, we request comment on the number of small businesses that would be affected by the proposed rules, the nature of the impact, how to quantify the number of small businesses that would be affected and how to quantify the impact of the proposed rules. Commenters are requested to describe the nature of any effect and provide empirical data and other factual support for their views to the extent possible. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rules are adopted, and will be placed in the same public file as comments on the proposed rules.

VII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,'' [134] we must advise the Office of Management and Budget as to whether the proposed rules constitute a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

Where a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review. We request comment on the potential impact of the proposed rules on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

[134] Pub. L. 104–121, title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

VIII. Consideration of Burden on Competition

Section 23(a)(2) of the Exchange Act [135] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The proposed rules would clarify the application and prevent evasion of section 306(a) of the Act. Section 306(a) prohibits the directors and executive officers of an issuer from purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity security transactions, if the equity security was acquired by the director or executive officer in connection with his or her service or employment as a director or executive officer. In addition, under section 306(a) an issuer is required to provide timely notice to its directors and executive officers and the Commission of the imposition of a pension plan blackout period.

The proposed rules, which would clarify the application of section 306(a), are intended to further the statute's purpose of mitigating the differential treatment between an issuer's directors and executive officers and its employees who participate in pension plans maintained by the issuer at a time when a substantial number of these participants are unable to engage in transactions involving issuer equity securities through their individual pension plan accounts. While the statute may have an impact on competition by placing restrictions on the ability of directors and executive officers of issuers with pension plans to trade that are not placed on issuers without such plans, we do not believe that the proposed rules would impose any burden on competition. Issuers would incur some costs in complying with the proposed rules. These costs would include preparing the required notice to include the information specified in the proposed rules and providing notice to the Commission on a current report on form 8–K or, in the case of a foreign private issuer, on form 20–F or 40–F. We request comment on whether the proposed rules, if adopted, would impose a burden on competition. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

[135] 15 U.S.C. 78w(a)(2).

IX. Promotion of Efficiency, Competition and Capital Formation

Section 3(f) of the Exchange Act [136] requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. The proposed rules would clarify the application and prevent evasion of section 306(a) of the Act. Section 306(a) prohibits directors and executive officers of an issuer from purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity security transactions, if the equity security was acquired in connection with the director or executive officer's service or employment as a director or executive officer. In addition, section 306(a) requires issuers to provide timely notice to their directors and executive officers and the Commission of the imposition of a pension plan blackout period.

The proposed rules, which would clarify the application of section 306(a), are intended to further the statute's purpose of mitigating the differential treatment between an issuer's directors and executive officers and its employees who participate in pension plans maintained by the issuer at a time when a substantial number of these participants are unable to engage in transactions involving issuer equity securities through their individual pension plan accounts. While the statute may have an impact on competition, we do not believe that the proposed rules would impose any burden on competition, other than some burden on the efficiency of the market on an issuer's equity securities during a pension plan blackout period. This burden is imposed by the statute. We are not aware of any impact on capital formation that would result from the proposed rules. Issuers would incur some costs in complying with the proposed rules. These costs would include preparing the required notice to include the information specified in the proposed rules and providing notice to the Commission on a current report on form 8–K or, in the case of a foreign private issuer, on form 20–F or 40–F. We request comment on whether the

[136] 15 U.S.C. 78c(f).

proposed rules, if adopted, would impose a burden on competition. Commenters are requested to provide empirical data and other factual support or their views to the extent possible.

X. Statutory Authority

The rules contained in this release are being proposed under the authority set forth in sections 3, 13, 23(a) and 36 of the Exchange Act, sections 30 and 38 of the Investment Company Act and sections 3(a) and 306(a) of the Sarbanes-Oxley Act of 2002.

List of Subjects in 17 CFR Parts 240, 245 and 249

Reporting and record keeping requirements, Securities.

Text of Proposed Rules and Forms

In accordance with the foregoing, title 17, chapter II, of the Code of Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 is amended by adding the following citations in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

Section 240.13a–11 is also issued under secs. 3(a) and 306(a), Pub. L. 107–204, 116 Stat. 745.

* * * * *

Section 240.15d–11 is also issued under secs. 3(a) and 306(a), Pub. L. 107–204, 116 Stat. 745.

* * * * *

2. Section 240.13a–11 is amended by:

a. Removing the sectional authority following § 240.13a–11; and

b. Revising paragraph (b).

The revision reads as follows:

§ 240.13a–11 Current reports on Form 8– (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on form 6–K (17 CFR 249.306) pursuant to § 240.13a–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such investment companies are required to file notice of a blackout period pursuant to § 245.104 of this chapter.

3. Section § 240.15d–11 is amended by:

a. Removing the sectional authority following § 240.15d–11; and

b. Revising paragraph (b).

The revision reads as follows:

§ 240.15d–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on form 6–K (17 CFR 249.306) pursuant to § 240.15d–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file periodic reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such investment companies are required to file notice of a blackout period pursuant to § 245.104 of this chapter.

4. Part 245 is added to read as follows:

PART 245—REGULATION BLACKOUT TRADING RESTRICTION

[Regulation BTR—Blackout Trading Restriction]

Sec.
245.100 Definitions.
245.101 Prohibition of insider trading during pension fund blackout periods.
245.102 Exceptions to definition of blackout period.
245.103 Remedy.
245.104 Notice.

Authority: 15 U.S.C. 78w(a), unless otherwise noted.

Sections 245.100—245.104 are also issued under secs. 3(a) and 306(a), Pub. L. 107–204, 116 Stat. 745.

§ 245.100 Definitions.

As used in Regulation BTR (§§ 245.100 through 245.104), unless the context otherwise requires:

(a) The term *acquired such equity security in connection with service or employment as a director or executive officer,* when applied to a director or executive officer, means that he or she acquired, directly or indirectly, an equity security of the issuer:

(1) At a time when he or she was a director or executive officer of the issuer, under a compensatory plan, contract, authorization or arrangement, including, but not limited to, plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit-sharing (whether or not set forth in any formal plan document), including a compensatory plan, contract, authorization or arrangement with a parent, subsidiary or affiliate of the issuer;

(2) At a time when he or she was a director or executive officer of the issuer, as a result of any transaction or business relationship that is described in paragraph (a) or (b) of item 404 of Regulation S–K (§ 229.404 of this chapter) or, in the case of a foreign private issuer, item 7.B of form 20–F (§ 249.220f of this chapter) (but without application of the disclosure thresholds of such provisions), to the extent that he or she has a pecuniary interest (as defined in paragraph (l) of this section) in the equity securities;

(3) As directors' qualifying shares or other securities that he or she must hold to meet an issuer's minimum ownership requirements for directors or executive officers; or

(4) Prior to becoming, or while, a director or executive officer of the issuer if the equity security was acquired as an inducement to service or employment with the issuer or a parent, subsidiary or affiliate of the issuer or as a result of a merger, consolidation or other acquisition transaction involving the issuer.

(b) Except as provided in § 245.102, the term *blackout period*:

(1) With respect to the equity securities of any issuer (other than a foreign private issuer), means any period of more than three consecutive business days during which the ability to purchase, sell or otherwise acquire or transfer an interest in any equity security of such issuer held in an individual account plan is temporarily suspended by the issuer or by a fiduciary of the plan with respect to not fewer than 50% of the participants or beneficiaries under all individual account plans (as defined in paragraph (j) of this section) maintained by the issuer that permit participants or beneficiaries located in any State (as defined in paragraph (m) of this section) to acquire or hold equity securities of the issuer;

(2) With respect to the equity securities of any foreign private issuer (as defined in § 240.3b–4(c) of this chapter), means any period of more than three consecutive business days during which both:

(i) The conditions the paragraph (b)(1) of this section are met; and

(ii) The participants or beneficiaries so restricted comprise more than 15% of the participants or beneficiaries under all individual account plans maintained by the issuer that permit participants or beneficiaries to acquire or hold equity securities of the issuer.

(3) In determining the individual account plans (as defined in paragraph (j) of this section) maintained by the issuer for purposes of this paragraph (b), the rules under Section 414(b), (c), (m) and (o) of the Internal Revenue Code (26 U.S.C. 414(b), (c), (m) and (o)) are to be applied.

(c) (1) The term *director* has, except as provided in paragraph (c)(2) of this section, the meaning set forth in section 3(a)(7) of the Exchange Act (15 U.S.C. 78c(a)(7)).

(2) In the case of a foreign private issuer (as defined in § 240.3b–4(c) of this chapter), the term *director* means those individuals within the definition set forth in section 3(a)(7) of the Exchange Act who are management employees of the issuer.

(d) The term *derivative security* has the meaning set forth in § 240.16a–1(c) of this chapter.

(e) The term *equity security* has the meaning set forth in section 3(a)(11) of the Exchange Act (15 U.S.C. 78c(a)(11)) and § 240.3a11–1 of this chapter.

(f) The term *equity security of the issuer* means any equity security or derivative security relating to an issuer, whether or not issued by that issuer.

(g) The term *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(h) (1) The term *executive officer* has, except as provided in paragraph (h)(2) of this section, the meaning set forth in § 240.16a–1(f) of this chapter.

(2) In the case of a foreign private issuer (as defined in § 240.3b–4(c) of this chapter), the term *executive officer* means the principal executive officer or officers, the principal financial officer or officers and the principal accounting officer or officers (or, if there is none, the controller) of the issuer.

(i) The term *exempt security* has the meaning set forth in section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)).

(j) The term *individual account plan* means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account, including a deferred compensation arrangement that contains the aforementioned features, except that such term does not include a one-participant retirement plan (within the meaning of section 101(i)(8)(B) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1021(i)(8)(B))).

(k) The term *issuer* means an issuer (as defined in section 3(a)(8) of the Exchange Act (15 U.S.C. 78c(a)(8))), the securities of which are registered under section 12 of the Exchange Act (15 U.S.C. 78*l*) or that is required to file reports under section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and that it has not withdrawn.

(l) The term *pecuniary interest* has the meaning set forth in § 240.16a–1(a)(2)(i) of this chapter and the term *indirect pecuniary interest* has the meaning set forth in § 240.16a–1(a)(2)(ii) of this chapter. § 240.16a–1(a)(2)(iii) of this chapter also shall apply to determine pecuniary interest for purposes of this regulation.

(m) The term *State* has the meaning set forth in section 3(a)(16) of the Exchange Act (15 U.S.C. 78c(a)(16)).

§ 245.101 Prohibition of insider trading during pension fund blackout periods.

(a) Except to the extent otherwise provided in paragraph (c) of this section, it is unlawful under section 306(a)(1) of the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745) for any director or executive officer of an issuer of any equity security (other than an exempt security), directly or indirectly, to purchase, sell or otherwise acquire or transfer any equity security of the issuer (other than an exempt security) during any blackout period with respect to such equity security, if such director or executive officer acquires or previously acquired such equity security in connection with his or her service or employment as a director or executive officer.

(b) For purposes of section 306(a)(1) of the Sarbanes-Oxley Act of 2002, any purchase, sale or other acquisition or transfer of an equity security of the issuer during a blackout period will be deemed to be a transaction involving an equity security ''acquired in connection with service or employment as a director or executive officer'' (as defined in § 245.100(a)) to the extent that the director or executive officer has a pecuniary interest (as defined in § 245.100(l)) in such an equity security and the equity security has not previously been subject to the operation of section 306(a)(1) during the same blackout period.

(c) The following transactions are exempt from section 306(a)(1) of the Sarbanes-Oxley Act of 2002:

(1) Any acquisition of equity securities resulting from the reinvestment of dividends in, or interest on, equity securities of the same issuer if the acquisition is made pursuant to a plan providing for the regular reinvestment of dividends or interest and the plan provides for broad-based participation, does not discriminate in favor of employees of the issuer and operates on substantially the same terms for all plan participants;

(2) Any purchase or sale of equity securities of the issuer pursuant to a contract, instruction or written plan that satisfies the affirmative defense conditions of § 240.10b5–1(c) of this chapter; provided that, for purposes of this section, awareness of an impending blackout period (as defined in § 245.100(b)) will constitute awareness of material, non-public information;

(3) Any purchase or sale of equity securities pursuant to a Qualified Plan (as defined in § 240.16b–3(b)(4) of this chapter), an Excess Benefit Plan (as defined in § 240.16b–3(b)(2) of this chapter) or a Stock Purchase Plan (as defined in § 240.16b–3(b)(5) of this chapter) other than a Discretionary Transaction (as defined in § 240.16b–3(b)(1) of this chapter) unless such Discretionary Transaction meets the conditions of paragraph (c)(2) of this section; and

(4) The increase or decrease in the number of securities held as a result of a stock split or stock dividend applying equally to all securities of that class, including a stock dividend in which equity securities of a different issuer are distributed; and the acquisition of rights, such as shareholder or pre-emptive rights, pursuant to a pro rata grant to all holders of the same class of equity securities registered under section 12 of the Exchange Act.

§ 245.102 Exceptions to definition of blackout period.

The term ''blackout period,'' as defined in § 245.100(b), does not include:

(a) A regularly scheduled period in which the participants and beneficiaries may not purchase, sell or otherwise acquire or transfer an interest in any equity security of an issuer, if a description of the blackout period, including the plan transactions to be suspended during, or otherwise affected by the blackout and its frequency and duration, is:

(1) Included in the documents or instruments under which the individual account plan operates; and

(2) Disclosed to an employee before he or she formally enrolls, or within 30 days following formal enrollment, as a participant under the individual account plan or within 30 days after the adoption of an amendment to the plan. For purposes of this paragraph (a)(2), the disclosure may be provided in any

graphic form that is reasonably accessible to the employee; or

(b) Any suspension described in § 245.100(b) the principal purpose of which is to permit persons affiliated with the acquired or divested entity to become participants or beneficiaries, or to cease to be participants or beneficiaries, in an individual account plan following a corporate merger, acquisition, divestiture or similar transaction involving the plan or plan sponsor.

§ 245.103 Remedy.

(a) *Recovery of Profits.* Section 306(a)(1) of the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745) provides that any profit realized by a director or executive officer from any purchase, sale or other acquisition or transfer of any equity security of an issuer in violation of section 306(a)(1) will inure to and be recoverable by the issuer, regardless of any intention on the part of the director or executive officer in entering into the transaction.

(b) *Actions to recover profit.* Section 306(a)(2) of the Sarbanes-Oxley Act of 2002 provides that an action to recover profit in accordance with may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any equity security of the issuer in the name and on behalf of the issuer if the issuer fails or refuses to bring such action within 60 days after the date of request, or fails diligently to prosecute the action thereafter, except that no such suit may be brought more than two years after the date on which such profit was realized.

§ 245.104 Notice.

(a) In any case in which a director or executive officer is subject to section 306(a)(1) of the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745) in connection with a blackout period (as defined in § 245.100(b)) with respect to any equity security, the issuer of the equity security must timely notify each director or officer and the Commission of the blackout period.

(b) For purposes of this section:

(1) The notice must include:

(i) The reason or reasons for the blackout period;

(ii) A description of the plan transactions to be suspended during, or otherwise affected by, the blackout period;

(iii) A description of the class of equity securities subject to the blackout period;

(iv) The actual or expected beginning and ending dates of the blackout period; and

(v) The name, address and telephone number of the person designated by the issuer to respond to inquiries about the blackout period, or, in the absence of such a designation, the issuer's human resources director or person performing equivalent functions; and

(2) (i) Notice to an affected director or executive officer will be considered timely if the notice described in paragraph (b)(1) of this section is provided (in graphic form that is reasonably accessible to the recipient) at least 15 calendar days in advance of the commencement of the blackout period;

(ii) Notwithstanding paragraph (b)(2)(i) of this section, the requirement to give at least 15 days advance notice will not apply in any case in which the inability to provide advance notice of the blackout period is due to events that were unforeseeable to or circumstances that were beyond the reasonable control of the issuer, and the issuer reasonably so determines in writing. Determinations described in the preceding sentence must be dated and signed by an authorized representative of the issuer. In any case in which this exception to the 15-day advance notice requirement applies, the issuer must provide the notice described in paragraph (b)(1) of this section, as well as a copy of the written determination, to all affected directors and executive officers as soon as reasonably practicable before the blackout period commences; and

(3) Notice to the Commission will be considered timely if:

(i) The issuer, except as provided in paragraph (b)(3)(ii) of this section, files a current report on form 8–K (§ 249.308 of this chapter) within the time prescribed for filing the report under the instructions for the form; or

(ii) In the case of a foreign private issuer (as defined in § 240.3b–4(c) of this chapter), the issuer includes the information set forth in paragraph (b)(1) of this section in the first annual report on form 20–F (§ 249.220f of this chapter) or 40–F (§ 249.240f of this chapter) required to be filed after the receipt of the notice of a blackout period required by 29 CFR 2520.101–3(c) within the time prescribed for filing the report under the instructions for the form.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

5. The authority citation for part 249 is amended by revising the sectional authority for § 249.308 to read as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted.

* * * * *

Section 249.308 is also issued under 15 U.S.C. 80a–29, 15 U.S.C. 80a–37 and secs. 3(a), 302 and 306(a), Pub. L. 107–204, 116 Stat. 745.

* * * * *

6. Form 20–F (referenced in § 249.220f) is amended by:

a. Renumbering paragraph (10) as paragraph (11) under ''Instructions as to Exhibits''; and

b. Adding paragraph (10) under ''Instructions as to Exhibits.''

The addition reads as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 20–F

* * * * *

Instructions As To Exhibits

* * * * *

10. Any notice required by rule 104 of Regulation BTR (17 CFR 245.104 of this chapter) that you sent during the past fiscal year to a director or executive officer (as defined in 17 CFR 245.100(d) and (h) of this chapter) concerning any equity security subject to a blackout period (as defined in 17 CFR 245.100(c) of this chapter) under rule 101 of Regulation BTR (17 CFR 245.101 of this chapter) if the director or executive officer acquired the equity security in connection with his or her service or employment as a director or executive officer (as defined in 17 CFR 245.100(a)). Each notice must have included the information specified in 17 CFR 245.104(b) of this chapter.

Note: The exhibit requirement in paragraph (10) applies only to an annual report, and not to a registration statement, on form 20–F. The Commission will consider the attachment of any rule 104 notice as an exhibit to a timely filed Form 20–F annual report to satisfy an issuer's duty to notify the Commission of a blackout period in a timely manner. Although an issuer need not submit a rule 104 notice under cover of a form 6–K, if an issuer has already submitted this notice under cover of form 6–K, it need not attach the notice as an exhibit to a form 20–F annual report.

* * * * *

7. Form 40–F (referenced in § 249.240f) is amended by adding new paragraph (7) to general instruction B to read as follows:

Note: The text of form 40–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 40–F

* * * * *

General Instructions

* * * * *

B. Information To Be Filed On This Form

* * * * *

(7) An issuer must attach as an exhibit to an annual report filed on form 40–F a copy of any notice required by rule 104 of Regulation BTR (17 CFR 245.104 of this

chapter) that it sent during the past fiscal year to a director or executive officer (as defined in 17 CFR 245.100(d) and (h) of this chapter) concerning any equity security subject to a blackout period (as defined in 17 CFR 245.100(c) of this chapter) under rule 101 of Regulation BTR (17 CFR 245.101 of this chapter) if the director or executive officer acquired the equity security in connection with his or her service or employment as a director or executive officer (as defined in 17 CFR 245.100(a)). Each notice must have included the information specified in 17 CFR 245.104(b) of this chapter.

Note: The Commission will consider the attachment of any rule 104 notice as an exhibit to a timely filed form 40–F annual report to satisfy an issuer's duty to notify the Commission of a blackout period in a timely manner. Although an issuer need not submit a rule 104 notice under cover of a form 6–K, if an issuer has already submitted this notice under cover of form 6–K, it need not attach the notice as an exhibit to a form 40–F annual report.

* * * * *

8. Form 8–K (referenced in § 249.308) is amended by:

a. Revising General Instruction 1; and

b. Adding item 5.04 under ''Information to be Included in the Report.''

The revision and addition read as follows:

Note: The text of form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

General Instructions

* * * * *

B. Events to be Reported and Time for Filing of Reports

1. * * * A report on this form pursuant to item 5.04 is required to be filed within two business days after the earlier of receipt of notice of the blackout period (as defined in § 245.100(b)) from the plan administrator or actual knowledge of the blackout period by the person designated by the issuer to oversee the issuer's pension plans, or, in the absence of such a designation, the issuer's human resources director or person performing equivalent functions.

* * * * *

Information To Be Included in the Report

* * * * *

Item 5.04. Temporary Suspension of Trading Under Registrant's Employee Benefit Plans

Upon the earlier of receipt of notice of a blackout period (as defined in § 245.100(b)) from the plan administrator or actual knowledge of the blackout period by the person designated by the issuer to oversee the issuer's pension plans, or, in the absence of such a designation, the issuer's human resources director or person performing equivalent functions, provide the information specified in § 245.104(b) of this chapter.

* * * * *

Dated: November 6, 2002.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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