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[Release Nos. 34-28869; 35-25254; IC-17991; File No. S7-3-91]

RIN 3235-AB14

Ownership Reports and Trading By Officers, Directors and Principal Security Holders

AGENCY: Securities and Exchange Commission.

ACTION: Final rules and solicitation of comments.

SUMMARY: The Commission today is adopting amendments to its rules and forms, as well as related disclosure requirements for issuers, regarding the filing of ownership reports by officers, directors, and principal security holders, and the exemption of certain transactions by those persons from the short-swing profit recovery provisions of section 16 of the Securities Exchange Act of 1934 and related provisions of the Investment Company Act of 1940 and the Public Utility Holding Company Act of 1935. The amendments are intended to achieve greater clarity, enhance consistency with the statutory purpose, and improve compliance with the reporting provisions of the rules. The Commission also is soliciting further public comments on the addition of an exit box to Forms 4 and 5.

EFFECTIVE DATE: These amendments are effective May 1, 1991; however, special phase-in provisions are contained in Section VII of this release.

Comment date: Comment letters on the exit box on Forms 4 and 5 should be received on or before March 31, 1991.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth St., NW., Washington, DC 20549. Comments should refer to File No. S7-3-91. All comments received will be available for public inspection and copying in the Commission's Public Reference Room at the same address.

FOR FURTHER INFORMATION CONTACT: Brian J. Lane, Richard P. Konrath, Mark W. Green, or Emanuel D. Strauss, (202) 272-2573, Division of Corporation Finance; Dorothy Donohue (202) 272-2030, Division of Investment Management; or Joanne Rutkowski (202) 504-2267 with respect to the Public Utility Holding Company Act.

SUPPLEMENTARY INFORMATION: The Commission today announced the adoption of revisions to its rules promulgated under section 16 [1] of the Securities Exchange Act of 1934 ("Exchange Act").[2] Every rule under section 16 has been amended, deleted, or reorganized except for Rule 16e-1,[3] and several new Section 16 rules have been added. Further, Exchange Act Rule 12h-2 [4] has been deleted as obsolete and Rule 30f-1 [5] under the Investment Company Act of 1940 ("Investment Company Act") [6] has been amended.

In addition, new Item 405 of Regulation S-K [7] and new Form 5 have been adopted, as have changes to Schedule 14A [8] and Forms 10-K,[9] 3,[10] 4 [11] and N-SAR.[12]

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I. Executive Summary

The beneficial ownership reporting and short-swing profit recovery provisions of section 16 of the Exchange Act apply to every person who is directly or indirectly the beneficial owner of more than ten percent of any class of equity securities that is registered pursuant to section 12 of the Exchange Act ("ten percent holders"),[13]

[1] 15 U.S.C. 78p (1988).
[2] 15 U.S.C. 78a *et seq.* (1988).
[3] 17 CFR 240.16e-1.
[4] 17 CFR 240.12h-2.
[5] 17 CFR 270.30f-1.
[6] 15 U.S.C. 80a-1 *et seq.* (1988).
[7] 17 CFR 229.10—229.802.
[8] 17 CFR 240.14a-101.
[9] 17 CFR 249.310.
[10] 17 CFR 249.103.
[11] 17 CFR 249.104.
[12] 17 CFR 274.101.

[13] 15 U.S.C. 78l (1988). When referring to an issuer with securities registered under section 12, this release includes securities of closed-end investment companies subject to section 30(f) of the Investment Company Act (15 U.S.C. 80a-29(f) (1988)) and public utility holding companies subject to Section 17 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79q (1988)). The insiders of a closed-end investment company also include the adviser and any affiliated person of the adviser. Section 2(a)(3) of the Investment Company Act (15 U.S.C. 80a-2(a)(3) (1988)).

and to every director and officer of an issuer with a class of equity securities so registered.[14] Section 16 of the Exchange Act was designed to provide the public with information on securities transactions and holdings of corporate insiders and to deter insiders from speculative short-swing trading in their corporations' securities and from engaging in transactions in their corporations' securities while in possession of material, non-public information. Section 16 is but one weapon against insider trading. Unlike other provisions applicable to insider trading, such as sections 10(b),[15] 14(e) [16] and 21A [17] of the Exchange Act, section 16 is a strict liability provision under which an insider's short-swing profits can be recovered regardless of whether the insider actually was in possession of material, non-public information.

In response to developments in the trading of derivative securities, the growth of complex and diverse employee benefit plans, and substantial filing delinquencies, the Commission undertook a comprehensive review of the rules and forms under section 16. Noting that the regulatory framework had resulted in interpretive uncertainty, substantial litigation, and, in some instances, unnecessary regulatory burdens, the Commission proposed to revise the rules to achieve greater clarity, rescind unnecessary requirements, streamline mandated procedures, increase compliance with the reporting provisions of the rules, and enhance consistency with the statutory purposes of section 16.

The Commission initially proposed comprehensive revisions to the rules promulgated pursuant to section 16 in December 1988; 271 comment letters were received.[18] In response to comments, the Commission revised the proposed amendments and republished the rules for comment in August 1989; 211 comment letters were submitted in response to the reproposal.[19] For the reasons provided in the Proposing and Reproposing Releases, and as further explained in this release, the Commission today is adopting the proposed regulatory scheme, with a number of modifications in response to comments made on the reproposal.

Rule 16b–3, the employee benefit plan rule, has been modified in several respects from that reproposed. The shareholder approval condition to the exemption, applicable to issuer grant plans and other plans unable to satisfy the conditions of former Rule 16a–8,[20] has been retained. The reproposed extension of the required period of disinterested status for plan administrators to one year following the administration of a plan has not been adopted. In response to comments, Rule 16b–3 has been reorganized to clarify the application of the regulatory framework to transactions under broad-based, non-discriminatory plans and the availability of the intra-plan transaction exemption for elections and transactions within a participant-directed plan. The revisions are intended to facilitate compliance with Rule 16b–3 by section 401(k) plans [21] and other similar broad-based participant-directed plans.

In addition to the revisions addressing employee benefit plans, revisions have been made to modify the reproposed conditions under which a trust becomes subject to section 16 where it has an insider trustee; specify the extent of insiders' obligations to disclose on the first Form 5 unreported transactions and holdings that should have been reported prior to the effective date of the rules; delete the former exemption for surrenders of options in a merger as unnecessary; provide a reporting as well as a short-swing profit exemption for non-events such as pro rata stock splits, stock dividends, and similar grants; add an exit box to Forms 4 and 5; add a provision deeming a Form 3, 4 or 5 timely filed if delivered to a third party business that guarantees delivery to the Commission no later than the due date; and clarify the application of the rules to specific situations.[22] Comment is solicited on the exit box, as discussed in section II.C.2 below.

II. Section 16(a) Reporting

A. Who Must Report

1. Officers and Directors

The definition of "officer" has been adopted without substantive change from the reproposal. It is modeled after the definition of "executive officer" used elsewhere in the Exchange Act rules,[23] but also specifically includes principal financial officers and principal accounting officers (or controllers where there is no principal accounting officer), as well as officers of a parent having policy-making functions with respect to the issuer.[24] Thus, persons having policy-making duties, as specified under Rule 3b–7, will be deemed officers for purposes of section 16.[25] A person's title alone should not determine whether that person is subject to section 16; the proper focus should be on whether a person is "a corporate employee performing important executive duties of such character that he would be likely, in discharging these duties, to obtain confidential information about the company's affairs that would aid him if he engaged in personal market transactions." [26] If title were determinative, persons with executive functions could avoid responsibility by forgoing title; moreover, persons with officer titles but no significant managerial or policy-making duties would be subject to the draconian

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[14] Officers, directors, and ten percent holders are referred to throughout this release as "insiders." The term also includes an officer or director who has terminated officer or director status but continues to be subject to reporting under section 16 for six months following his or her last transaction as an officer or director, including the Form 5 filing requirement.

[15] 15 U.S.C. 78j(b) (1988).

[16] 15 U.S.C. 78n(e) (1988).

[17] 15 U.S.C. 78u(a)(1) (1988).

[18] Release No. 34–26333 (December 2, 1988) (53 FR 49997) ("Proposing Release"). The comment letters and a staff summary of the letters may be inspected and copied at the Commission's Public Reference Room (File No. S7–26–88).

[19] Release No. 34–27149 (August 18, 1989) (54 FR 35667) ("Reproposing Release"). The comment letters and a staff summary of the letters may be inspected and copied at the Commission's Public Reference Room (File No. S7–23–89).

[20] 17 CFR 240.16a–8.

[21] I.R.C. 401(k) (26 U.S.C. 401(k) (1988)).

[22] Section VIII, *infra*, contains charts summarizing the changes from the former rules, as well as a chart summarizing changes in staff interpretations enumerated in the section 16 question-and-answer interpretive release, Exchange Act Release No. 18114 (September 24, 1981) (46 FR 48147) ("Release No. 34–18114").

[23] Rule 3b–7 (17 CFR 240.3b–7). The term includes presidents, vice-presidents in charge of a principal business unit, division or function, other persons who perform similar policy-making functions, and executive officers of subsidiaries who perform policy-making functions for the registrant. A technical change is being made to this rule to correct a typographical error.

[24] Rule 16a–1(f). A note has been added to the rule that makes it clear that those persons identified by an issuer as meeting the policy-making definition pursuant to Item 401(b) of Regulation S–K (17 CFR 229.401) (based on the Rule 3b–7 definition) will be presumed to be those persons who, together with the other persons specified in Rule 16a–1(f), are subject to section 16, and the note makes it clear that the term "policy-making function" does not include functions that are not significant. The rule as adopted also clarifies that when an issuer with equity securities registered under section 12 is structured as a trust, employees of the trustee performing policy-making functions with respect to the trust are deemed officers of the trust.

[25] *See C.R.A. Realty Corp.* v. *Crotty*, 878 F.2d 562 (2d Cir. 1989); *Colby* v. *Klune*, 178 F.2d 872 (2d Cir. 1949); *see also Merrill Lynch, Pierce Fenner & Smith, Inc.* v. *Livingston*, 566 F.2d 1119 (9th Cir. 1978); *Pier I Imports of Georgia, Inc.* v. *Wilson*, 529 F. Supp. 239 (N.D. Tex. 1981); *but see National Medical Enterprises, Inc.* v. *Small*, 680 F.2d 83 (9th Cir. 1982).

[26] *Colby* v. *Klune*, *supra* 178 F.2d at 873, *as quoted in C.R.A. Realty Corp.* v. *Crotty*, *supra*, 878 F.2d at 566.

liability of section 16(b). Similarly, in determining whether an advisory, emeritus or honorary director is a director for section 16 purposes, the person's title is not determinative and no change in current staff interpretation is being made.[27]

2. Transactions While not an Officer or Director

Rule 16a–2(a) is adopted substantially as reproposed. Thus, a person will not be required to disclose transactions or be subject to section 16(b) short-swing profit liability for transactions that occurred within six months prior to the date the individual first became an officer or director, except that an officer or director who becomes subject to section 16 as a result of the issuer's registration of a class of equity securities pursuant to section 12 of the Exchange Act will be subject to section 16 with respect to transactions conducted during the six months prior to the first transaction requiring a Form 4 filing.[28]

In contrast, consistent with the prior rules,[29] transactions by officers and directors after termination of employment with an issuer are not necessarily exempt from section 16. In response to commenters' concerns, the rule makes it clear that, as is currently the case, an insider continues to be subject to section 16 for up to six months following termination. However, a transaction occurring after a person has terminated insider status must be reported only if it occurs within six months of a transaction that took place while the person was an officer or director.[30] As a result, a person is required to file on Form 4 to report non-exempt transactions within six months of the last transaction while the person was an officer or director subject to Section 16. In addition, the person is required to file on Form 5 to report transactions on a deferred basis for that portion of the issuer's fiscal year during which the person was an officer or director subject to section 16, and also is required to report exempt transactions occurring within six months of the last transaction while the person was an officer or director subject to section 16.

For example, if an insider executes a transaction on April 28 and terminates officer or director status on April 30, any transaction executed on or before October 28 must be reported, since it occurred within six months following the last transaction prior to termination of officer or director status. If, in this example, the insider filed a Form 5 in June to report exempt acquisitions and dispositions in an employee benefit plan, and in September exercised an option previously granted and reported on a Form 5, the insider must file another Form 5 (or an optional Form 4) to report the exercise, since it occurred within six months following the last transaction prior to termination of officer or director status. In addition, the insider should indicate on the Form 4 or 5 reporting the exercise that insider status has terminated.[31] Where all prior transactions, including transactions otherwise reportable on Form 5, have been reported, and the insider has not had any transactions, including transactions exempt from Section 16(b), in the six months prior to termination, there is no Form 5 filing obligation or other post-termination reporting obligation. In this case, the insider may wish to furnish the issuer with a written representation that no further report on Form 5 is required.

3. Ten Percent Holder

Section 16, as applied to ten percent holders, is intended to reach those persons who can be presumed to have access to inside information because they can influence or control the issuer as a result of their equity ownership. Section 13(d) of the Exchange Act [32] specifically addresses such relationships. As proposed, the rules adopted today [33] define ten percent holders under section 16 as persons deemed ten percent holders under section 13(d) of the Exchange Act and the rules thereunder. The section 13(d) analysis, such as the exclusion of non-voting securities [34] and counting only those derivative securities exercisable or convertible within 60 days,[35] are imported into the ten percent holder determination for section 16 purposes.[36] The section 13(d) definition of beneficial ownership is used only to determine status as a ten percent holder; once status is determined, the reporting and short-swing profit provisions of section 16 apply only to those securities in which the insider has a pecuniary interest.[37]

Under the rule, adopted as reproposed, shares held by institutions eligible to file beneficial ownership reports on Schedule 13G [38] that are held for clients in a fiduciary capacity in the ordinary course of business are not counted for purposes of determining ten percent holder status ("13G exemption").[39] This is a limited

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[27] As stated in the Proposing Release, the legal doctrine concerning "deputized" directors is not affected by the rules adopted today and will be left to case law. *See, e.g., Blau* v. *Lehman*, 368 U.S. 403 (1962); *Feder* v. *Martin Marietta*, 406 F.2d 260 (2d Cir. 1969).

[28] For example, a director of a private company purchases common stock in the company on January 1 and March 1. The company registers a class of equity securities under section 12 effective May 1. The director then sells the stock on August 1. The sale is required to be reported on Form 4, triggering the requirement to report any transactions conducted within six months of the first transaction requiring a filing. The purchase made on March 1 would be disclosed because it was conducted within six months of the sale, but the purchase made on January 1 need not be disclosed because it occurred more than six months prior to the sale. In addition, the March 1 purchase could be matched with the August 1 sale for short-swing profit recovery purposes, absent an exemption from section 16(b).

[29] Former Rule 16a–1(e) (17 CFR 240.16a–1(e)); Release 34–18114 Q.35.

[30] Rule 16a–2(b). Transactions occurring after a reduction in beneficial ownership of an issuer's securities to ten percent or less would not be a reportable event, if the person is not also an officer or director, since section 16(b) explicitly provides that short-swing transactions can occur only if there is both a sale and purchase within six months while the person beneficially owned more than ten percent of the issuer. *Foremost-McKesson, Inc.* v. *Provident Securities Co.*, 423 U.S. 232 (1976); *see also* Rule 16a–2(c).

[31] Both Form 4 and Form 5 have an exit box on the face of the Form that should be checked. *See* II.C.2, *Infra*. If the exit box is checked to reflect termination of insider status and a subsequent transaction necessitates another filing, the exit box should also be checked on the subsequent filing.

[32] 15 U.S.C. 78m(d) (1988).

[33] Rule 16a–1(a)(1). For a discussion of the application of Section 16 to section 13(d) groups, *see* Section II.B.3, *infra*.

[34] Rule 13d–1(d) (17 CFR 240.13d–1(d)).

[35] Rule 13d–3(d)(1) (17 CFR 240.13d–3(d)(1)).

[36] With respect to derivative securities, Rule 16a–4(a) states that derivative securities are deemed to be the same class of equity securities as the underlying securities. This essentially codifies the holding in *Chemical Fund* v. *Xerox Corp.*, 377 F.2d 107 (2d Cir. 1967). Accordingly, a holder of section 12 debt convertible into Section 12 common stock would not consider the debt itself in the ten percent owner calculation, but rather would consider only the common stock into which the debt was convertible within 60 days.

In contrast to convertible debt, a security that is an equity security in its own right, as well as on account of a conversion feature, would require a double calculation. For example, if a class of voting preferred stock registered under section 12 is convertible into section 12 common stock, the beneficial owner of the preferred stock is deemed the owner of both the preferred stock and the underlying common stock. Accordingly, the ten percent holder calculation must be performed with respect to the preferred stock and the common stock separately. If the convertible preferred stock is non-voting, the preferred stock is not considered a separate class of equity for purposes of the ten percent holder calculation, because Rule 13d–3(d)(1) excludes non-voting securities; therefore, the beneficial owner of the non-voting preferred stock, like a holder of convertible debt, performs the ten percent holder calculation only with respect to the underlying common stock.

[37] Rule 16a–1(a)(2).

[38] 17 CFR 240.13d–102. In order to qualify to use Schedule 13G, the institution must acquire or hold securities of the issuer in the ordinary course of business without the purpose or effect of influencing or changing control. Rule 13d–1(b)(1)(i) (17 CFR 240.13d–1(b)(1)(i)).

[39] Rule 16a–1(a)(1). The rule is modeled after Rule 13d–1(b)(1)(ii) (17 CFR 240.13d–1(b)(1)(ii)).

Continued

departure from the approach under section 13(d). Securities not held in a fiduciary capacity, however, must be counted in determining whether the 13G institution is a ten percent holder. Questions have been raised as to the applicability of the 13G exemption to employee benefit plans and pension funds subject to the Employee Retirement Income Security Act of 1974 ("ERISA").[40] Consistent with current staff interpretation of Section 13(d),[41] a plan will not be deemed the beneficial owner of shares allocated to plan participants over which participants have voting power.[42]

B. What Is Reported—Transactions in Securities in Which Insider has Pecuniary Interest

1. Pecuniary Interest

Section 16(a) reporting obligations and section 16(b) short-swing profit recovery cover only those securities in which insiders have or share a direct or indirect pecuniary interest.[43] The definition of pecuniary interest is adopted as reproposed, with the following modifications to the application of the indirect pecuniary interest standard.

a. *Partnership Holdings.* Under the partnership attribution rule, adopted as reproposed, the beneficial ownership of portfolio securities[44] owned by a general or limited partnership is attributed to the general partners in proportion to the greater of their capital account or interest in the profit of the partnership at the time of the transaction.[45] In the event of a short-swing transaction, a general partner's share of the partnership's capital account or profits is determined by the partnership agreement in effect at the time of the transaction and the partnership's most recent financial statements.

b. *Fee Arrangements.* In the Reproposing Release, the Commission proposed that investment adviser or trustee fee arrangements based on the performance of the portfolio would create a pecuniary interest in the portfolio, except where the fee was calculated on an annual or longer basis and the securities of the issuer did not comprise more than ten percent of the portfolio.[46] Commenters expressed concern that the rule inadvertently implied that fees based upon the amount of assets managed would create a pecuniary interest and that advisers and trustees could not be paid until the end of the year. The rules adopted today clarify that asset-based fees do not create a pecuniary interest in the securities managed and that advisers or trustees may be paid more than once during the year, as long as the fee is related to performance for a year or more.

c. *Corporate Holdings.* A non-exclusive safe harbor governing beneficial ownership of portfolio securities held by a corporation or similar entity[47] has been adopted. The rule adopted today[48] provides a safe harbor from attribution of corporate holdings for shareholders who are not controlling shareholders[49] of the corporation and do not have or share investment control over the corporation's portfolio securities. Unlike the reproposal, the safe harbor does not extend to controlling shareholders and, therefore, the rule does not distinguish between public and nonpublic corporations.

2. Broad-based Stock Indices and Baskets

A new provision has been added to make it clear that beneficial ownership of a broad-based, publicly traded market basket or index security or future does not create a beneficial ownership interest in the component stocks.[50] This provision clarifies that in such a case, the pecuniary interest in one component stock is too remote for the stock to be considered beneficially owned.[51]

3. Section 13(d) Groups

Questions have been raised concerning the application of the reporting and short-swing profit recovery provisions of section 16 to section 13(d) groups.[52] In applying the rules adopted today, only those securities in which a member of a group has a direct or indirect pecuniary interest would be reported and subject to short-swing profit recovery.[53] Thus, while securities holdings of group members may subject the group members to section 16, if the group member does not have or share a pecuniary interest in securities held by other group members, the transactions of the other group members do not create section 16 obligations for that member.[54]

Institutions eligible to use the 13G exemption include specified broker-dealers, banks, insurance companies, investment companies, investment advisers, employee benefit plans, holding companies, and groups consisting of these exempt institutions. Whereas the reproposed rule made reference to Rule 13d-1 (17 CFR 240.13d-1), the rule as adopted enumerates the eligible institutions. It is noted that although securities in life insurance company separate accounts are deemed assets of the insurance company under state law, these assets are held for the exclusive benefit of customer annuitants in a manner comparable to other fiduciary institutions referenced in the rule. Thus, for purposes of section 16, insurance accounts held for the exclusive benefit of customers may be treated, where appropriate, as fiduciary accounts and excluded from the determination as to whether the insurance company is a ten percent holder for purposes of section 16.

[40] Public Law No. 93-406, 88 Stat. 829 (29 U.S.C. 1001 *et seq.* (1988)).

[41] *See Rio Grande Industries, Inc.* (April 5, 1989).

[42] Rule 16a-1(a)(1). A plan trustee's residual or overriding voting or investment control, pursuant to its legally imposed fiduciary duty to act in the best interests of the plan trust beneficiaries under Title I of ERISA, does not create a beneficial ownership interest under Rule 16a-1(a)(1) in securities that are allocated to plan participants having voting power. In addition, a plan trustee does not become a beneficial owner under Rule 16a-1(a)(1) where the trustee gains limited voting authority, such as in circumstances where a plan participant does not give the trustee voting instructions and the trustee must exercise voting power on behalf of the participant. *Compare Rio Grande Industries, Inc., supra* n. 41. Note that while the plan itself has beneficial ownership of unallocated shares over which the trustee has voting or investment power, employee benefit plan trustees that are institutions enumerated in the rule typically would not have beneficial ownership of those shares because they are held in a fiduciary account in the ordinary course of business. For a discussion of trusts, *see* Section II.B.4, *infra*.

[43] Rule 16a-1(a)(2). Rule 16a-8 addresses trust beneficial ownership. Rule 16a-1(a)(4) permits a disclaimer of beneficial ownership to accompany any reported transaction or holding, even where beneficial ownership is deemed to exist under the rules.

[44] The definition of "portfolio securities" has been moved to Rule 16a-1(g).

[45] Rule 16a-1(a)(2)(ii)(B).

[46] Rule 16a-1(a)(2)(ii)(C).

[47] For example, business trusts are treated as corporations for purposes of section 16.

[48] Rule 16a-1(a)(2)(iii).

[49] The reference to "controlling shareholder" applies to shareholders that have the power to exercise control over the corporation by virtue of their securities holdings.

[50] Rule 16a-1(a)(5)(iii).

[51] Broad-based stock indices and baskets also are excluded from the definition of "derivative security." *See* Rule 16a-1(c)(4) and section III.B, *infra*. In essence, broad-based indices and baskets are outside the purview of section 16, both with respect to the indices or baskets and their component securities.

[52] *See* Exchange Act section 13(d)(3) (15 U.S.C. 78m(d)(3) (1988)); Rule 13d-5 (17 CFR 240.13d-5).

[53] Where a member of the group has the ability, through any contract, arrangement, understanding or relationship, to receive a portion of the profits from transactions in any other group member's securities, the member has a pecuniary interest in the securities. In this event, the group member is required to report all holdings and transactions in equity securities to which the arrangement or understanding relates, as well as any other equity securities in which the member has a pecuniary interest, and is subject to short-swing recovery from resulting transactions.

[54] In contrast to section 13(d), which requires a group filing, the group itself would not be a separate person for section 16 purposes. However, for purposes of determining status as a ten percent holder under Section 16, the securities beneficially owned by the group must be included in the calculation by each individual member of the group.

4. Trusts and Trustees

The trust rule adopted today addresses the application of section 16 to trust holdings and transactions substantially as reproposed.[55] There are two changes from the reproposal, discussed below, which limit the circumstances under which a trust becomes subject to section 16 as a result of having an insider trustee.

In addition, the rule has been reorganized for clarity.[56] The first part of the rule addresses circumstances under which a trust, trustee, beneficiary or settlor becomes subject to section 16,[57] while the second part addresses the reporting and short-swing profit obligations of such parties once they are subject to section 16.[58] The first part of the rule is based on the section 13(d) concepts used for determining ten percent holder status generally,[59] while the second part is based on the pecuniary interest concepts used for determining reporting and short-swing profit obligations generally.[60]

a. *Status Under Section 16.* As in the reproposed rules and under current law, the Rule provides that a trust is subject to section 16 if it holds more than ten percent of a class of equity securities of an issuer registered pursuant to section 12. Under the new rule, ten percent ownership by a trust is determined in accordance with the general beneficial ownership rule, Rule 16a-1(a)(1).[61] Employee benefit plan trusts subject to ERISA thus will exclude from the ten percent calculation securities that are allocated to participants with voting control, a result that carries out the purposes of section 16 without unduly interfering with the day-to-day operation of pension and employee benefit plans.[62]

As proposed, a trust also would have become subject to section 16 if the trustee was an insider and had investment control over the trust's portfolio securities. The rule, as adopted, subjects the trust to section 16 only if an insider trustee has or shares investment control and the trustee, or a member of the trustee's immediate family, has a pecuniary interest in the issuer's securities held by the trust.[63] This modification recognizes that the potential for abuse is remote where the trustee has little incentive to abuse inside information. Further, the rule has been modified to state that if a trustee is an institution eligible to file a Schedule 13G, the trustee's insider status does not subject that trust to section 16.[64] Additionally, the service of an officer or director as a trustee of the issuer's employee benefit plan does not in itself subject the plan to section 16, even if the officer or director is a plan participant.[65]

The former rule provided that where the trust was a ten percent holder, each trustee also became subject to section 16. The result is similar under the rule as adopted;[66] whether a trustee is deemed to be the beneficial owner of securities held by the trust for status purposes is governed by the general beneficial ownership rule, Rule 16a-1(a)(1), which focuses on a section 13(d) analysis.[67] Thus, a trustee having or sharing voting or investment control over securities held by a trust would include these securities in the trustee's own ten percent holder calculation.[68] Professional institutional trustees, however, are likely to be able to avail themselves of the 13G exemption provided by Rule 16a-1(a)(1).

The Rule 16a-1(a)(1) analysis also is applicable to beneficiaries or settlors. Under most circumstances such parties are not expected to have either the requisite voting or investment control over the securities, and thus could exclude the securities from the ten percent holder calculation. Where, however, a settlor has the power to revoke the trust without the consent of another person, the settlor will be deemed a beneficial owner of securities held by the trust for determining status as a ten percent holder.[69]

b. *Reporting and Short-Swing Profit Obligations.* The rule separately addresses reporting obligations, and the corollary application of short-swing profit recovery provisions, of trusts, trustees, beneficiaries and settlors.[70] Trust holdings and transactions normally are reported only by the trustee on behalf of the trust,[71] and generally would not be matched for section 16(b) purposes with non-trust transactions of the trustee, beneficiaries and settlors. Four exceptions to this provision are specified in the rule.

First, just as employee benefit plan securities allocated to employees with voting control are excluded from the trust's ten percent holder calculation, securities held by or transactions conducted in an employee benefit plan are excluded from the trust's reporting obligations if the trustee does not exercise investment control with respect to such holdings or transactions.[72] These transactions instead must be reported by employee participants who are subject to section 16. The allocation of securities owned by a trust to a participant account is not a trust transaction subject to section 16, and need not be reported by the trust, but is an acquisition reportable by the insider-participant.

Second, an insider trustee with a pecuniary interest in any holding or transaction of the trust[73] must report such holding or transaction on the trustee's individual form, as well as on the separate form filed on behalf of the trust.[74] Trust transactions in which the insider trustee has a pecuniary interest can be matched with personal transactions of the trustee, as well as other trust transactions. The rule sets forth two non-exclusive situations where the trustee is deemed to have a pecuniary interest: The trustee or an immediate family member is a beneficiary of the trust,[75] or a

[55] Rule 16a-8.

[56] For ease of reference, reproposed Rule 16a-1(a)(5)(i), addressing trust remainder interests, has been redesignated Rule 16a-8(c).

[57] Rule 16a-8(a).

[58] Rule 16a-8(b).

[59] Rule 16a-1(a)(1).

[60] Rule 16a-1(a)(2).

[61] Rule 16a-8(a)(1)(i).

[62] *See* section II.A.3, *supra*.

[63] Rule 16a-8(a)(1)(ii).

[64] Rule 16a-8(a)(1)(ii)(A).

[65] Rule 16a-8(a)(1)(ii)(B). This was added in response to commenter concern that officers acting as trustees for plans of the issuer would subject the plan trust to section 16. For an explanation of the rules concerning employee benefit plans, including plans structured in trust form, *see* section IV, *infra*.

[66] Where a trust is subject to section 16 because an insider trustee has a pecuniary interest in a portion of the trust corpus, other trustees of the trust who are not insiders will not thereby become subject to section 16.

[67] Rule 16a-8(a)(2)(i).

[68] Generally, in determining whether a trustee in his or her individual capacity is a ten percent holder, equity securities individually held over which the trustee has or shares voting or investment control and equity securities of the same class held in one or more trusts (and deemed beneficially owned by the trustee under a section 13(d) analysis) would be aggregated.

[69] Rule 16a-8(a)(2)(ii).

[70] The person required to report a transaction under section 16(a) also is subject to the provisions of sections 16(b) and 16(c). Rule 16a-8(d).

[71] Rule 16a-8(b).

[72] Rule 16a-8(b)(1). Thus, transactions in a typical participant-directed plan would be reported by the employee-participants, not the trust. When a trust does have to file reports with respect to an employee benefit plan, the reporting ordinarily will be on an annual basis since transactions exempt pursuant to Rule 16b-3 are reportable on Form 5. *See* Rule 16a-3(g)(3) and the discussion of employee benefit plans in Part IV, *infra*.

[73] Pecuniary interest includes an interest in the income or the corpus of the trust.

[74] Rule 16a-8(b)(2). In such circumstances, both the trustee and the trust are deemed beneficial owners; however, any short-swing profits would be recoverable only once, as specified in Rule 16a-1(a)(3).

[75] Rule 16a-8(b)(2)(ii). As adopted, the rule clarifies that the trustee has a pecuniary interest in

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performance fee is received that does not satisfy the proviso of Rule 16a-1(a)(2)(ii)(C).[76]

Third, the rule addresses insider beneficiaries specifically, recognizing, as did the former rule, that it is inappropriate to require beneficiaries to incur reporting and short-swing profit obligations for transactions beyond their control. Accordingly, although beneficiaries have a pecuniary interest in trust securities to the extent of their pro rata interest in the trust,[77] they ordinarily would not report trust holdings or transactions. In the usual situation where the trustee makes the investment decisions without the prior approval of or consultation with the beneficiary, only the trust reports the transaction, and the transaction is matchable only with other trust transactions.[78] Where the insider beneficiary has investment control over the transaction and the trustee executes the transaction as directed, the beneficiary rather than the trust reports the transaction, which is matchable with other transactions of the beneficiary.[79] Where investment control is shared, including consultation between the trustee and beneficiary, both the trust and the beneficiary must report the transaction and are responsible for any resulting short-swing profits.[80]

Finally, the rule addresses reporting by insider settlors.[81] Just as a settlor who reserves the right to revoke the trust without the consent of another person is deemed to beneficially own the issuer's securities held by the trust for purposes of determining ten percent ownership status, such a settlor also is viewed as having a pecuniary interest in the securities, and is responsible for reporting and short-swing profit recovery. However, if such a settlor neither has nor shares investment control, it would be inappropriate to require reporting or profit recovery. In this event, the trust rather than the settlor is responsible for reporting and the trust transactions are not matchable against the settlor's transactions, just as for a beneficiary having no investment control.

C. How and When to Report

1. Timing of Reports

As reproposed, option exercises and conversions of derivative securities must be reported on the earlier of the next Form 4 otherwise required or on Form 5.[82] In addition, commenters suggested that reporting earlier on a voluntary basis would facilitate report preparation and section 16(a) compliance. At their suggestion, the rules, as adopted, have been amended to state explicitly that insiders may report exercises and conversions, as well as any other transactions, on a date earlier than that which is required by the rules.[83]

The rules adopted today provide that for purposes of section 16 a form will be deemed timely filed if it is delivered to a third party business, including the postal service, in sufficient time for it to guarantee delivery of the filing to the Commission no later than the specified due date.[84] Accordingly, the insider will not be deemed delinquent on account of the third party's breach of its guarantee. For example, many mail services currently guarantee overnight delivery or delivery within a specified time. An insider required to file a Form 4 with the Commission by the tenth of the month will be deemed to have timely filed the Form 4 if the insider delivers the Form to a mail service guaranteeing delivery to the Commission by the due date. This provision recognizes the large number of individuals that are subject to the reporting requirements of section 16(a), as well as the expectation that forms mailed or delivered by guaranteed delivery services will be filed with the Commission by the specified due date.[85] Insiders must retain a receipt or other writing from the third party evidencing timely receipt by the third party for filing with the Commission by the required date in order to rely on this provision.

2. Revisions to Forms 3, 4, and 5

The annual Form 5 filing requirements have been adopted substantially as proposed, with revisions to facilitate the reporting of securities held in employee benefit plans. A Form 5 must be filed within 45 days of the issuer's fiscal year end by every person who was an insider at any time during the fiscal year to report any securities transactions during that period that have not been reported previously on a Form 4, either because of deferred reporting or failure to file required reports.[86] A Form 5 is not required from an insider with no reportable transactions.

In response to comments that information concerning transactions in employee benefit plans and dividend reinvestment plans ("DRIPs") may not be available from plan administrators to permit timely reporting on Form 5, as well as concern that the information required would be voluminous and not meaningful, two changes to the reporting requirements have been made.[87] First, insiders are permitted to report exempt acquisitions in thrift and stock purchase plans [88] and DRIPs [89] on an aggregate basis, rather than transaction by transaction. Reportable dispositions may not be aggregated. Second, insiders must report plan transactions on the Form 5 as of the most recent date for which such data is reasonably available to the reporting person.[90] Plan information for the fiscal year not reported on the Form 5 filed for that year would be reportable on the Form 5 for the next fiscal year (or may be filed on a Form 4 or an amended Form 5 promptly after becoming available).

Commenters were concerned that the Form 5 requirement to report any unreported transactions, including those made prior to the adoption of Form 5, would place insiders at risk of committing reporting violations by failing to report earlier transactions that they in good faith did not recollect. In response to these concerns, the rule adopted today requires an insider, in completing the first Form 5 or making the first written representation that no Form 5 is required, to report transactions not previously reported for each of the issuer's two past fiscal years, rather than for an indefinite period. For calendar year companies this will mean that the Form 5 will

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the proportionate holdings of the family member, rather than all holdings of the trust.

[76] Rule 16a-8(b)(2)(i). For a discussion of performance fees, *see* Section II.B.1.b, *supra*.

[77] Rule 16a-8(b)(3)(iii).

[78] This is consistent with former Rule 16a-8(b) (17 CFR 240.16a-8(b)).

[79] Rule 16a-8(b)(3)(ii).

[80] Rule 16a-8(b)(3)(i). Under former Rule 16a-8(d) (17 CFR 240.16a-8(d)), the trustee was permitted to file a single report on behalf of all beneficiaries. However, as proposed, this provision has been deleted; under the new regulatory framework the person who has the pecuniary interest must report. *See* Rule 16a-1(a)(3).

[81] Rule 16a-8(b)(4).

[82] Rule 16a-4. *See* Section III.D, *infra*, for a discussion of exercises and conversions.

[83] Rules 16a-3(a) and 16a-3(g)(3) permit the early reporting of transactions on Form 4.

[84] Rule 16a-3(h).

[85] The Commission's position regarding the timely filing of forms required by section 16 and the rules thereunder does not apply to filings required under other provisions of the federal securities laws. *See, e.g.*, Exchange Act Rule 0-3 (17 CFR 240.0-3).

[86] Rule 16a-3(f)(1).

[87] Instruction 4(a)(ii) of Form 5.

[88] For a discussion of the exemption from liability for transactions in ongoing stock acquisition plans, *see* section IV.D, *infra*.

[89] Consistent with current interpretation, only the reinvestment of dividends or interest is exempt, not additional securities acquired through voluntary cash contributions under such plans. *See* Release No. 34-18114, Q. 78. Any such additional purchases thus must be reported on Form 4 and may not be aggregated.

[90] The Form must specify the period for which plan information is disclosed.

include transactions in 1990 and 1991. As another example, an insider of a company with a June 30 fiscal year end would include transactions for the year ending June 30, 1990, and 1991. The rule also provides that the insider need only have a reasonable good faith belief that all transactions in the period prior to the effective date of the rules have been reported or are reported on the Form 5.[91] The limitation of insider review to the prior two fiscal years is not an amnesty for earlier violations of section 16(a). Likewise, late disclosure of any transactions, on any form, does not cure the original violation.

In subsequent years, Form 5 will relate only to transactions during the most recent fiscal year and DRIP and employee benefit plan transactions from the prior fiscal year for which information was not available at the time of the prior report and not previously reported. Insiders will be responsible for determining whether all required reports and transactions during such periods have been reported.[92]

In response to commenters' concerns, Forms 3, 4, and 5 and related instructions have been revised to simplify the forms and facilitate completion and reporting.[93] General revisions include reformatting the forms (*i.e.*, combining columns and eliminating others as unnecessary) to create additional space for reporting transactions, and changing transaction codes to specify in greater detail the types of transactions reported. Minor changes also have been made to form instructions to clarify reporting obligations.

At the suggestion of commenters, boxes have been added to Forms 4 and 5 that insiders must check to indicate termination of insider status. Completing these boxes will facilitate Commission and investor monitoring of insider reports. Comment is solicited on the usefulness of this approach.

Forms 4 and 5 also have been amended to contain, next to the exit box, a reminder that subsequent reports may be required to be filed by persons who were insiders at any time during the issuer's fiscal year. Of course, as discussed above,[94] even after a person ceases to be an officer or director, the person may have subsequent filing obligations (*i.e.*, a Form 4 for post-termination transactions or a Form 5 at the end of the year to reflect option exercises, employee benefit plan transactions, other transactions exempt from section 16(b), small acquisitions or other previously unreported transactions).[95] Insiders who wish to file reports of exempt transactions early, at the time of their ceasing to be officers or directors subject to Section 16, may do so on either a Form 4 or Form 5.

III. Derivative Securities

A. Conceptual Framework

Given the uncertainty surrounding the application of section 16 to derivative securities under the former rules and existing case law, the Commission is adopting a comprehensive regulatory framework, in order to effect the purposes of section 16 and to address the proliferation of derivative securities and the popularity of exchange-traded options. This framework recognizes that holding derivative securities is functionally equivalent to holding the underlying equity securities for purposes of section 16, since the value of the derivative securities is a function of or related to the value of the underlying equity security. Consequently, both types of securities can be used to engage in the kind of short-swing profit taking that Congress sought to prevent.[96]

Section 16 was enacted by Congress to provide a prophylactic measure against insider trading by allowing the corporation to recapture the profit derived by one of its insiders who engages in two transactions in the company's equity securities within a six-month period of time. Just as an insider's opportunity to profit commences when he purchases or sells the issuer's common stock, so too the opportunity to profit commences when the insider engages in transactions in options or other derivative securities that provide an opportunity to obtain or dispose of the stock at a fixed price.[97] The holder of a call option not only knows that he will be able to obtain the stock, but also knows the price at which it will be obtained. Thus, whether or not the holder chooses to exercise his right to obtain the stock, the extent of his profit is determinable, when compared with a transaction in the underlying equity security or a derivative security related to that underlying equity security.[98]

The functional equivalence of derivative securities and their underlying equity securities for section 16 purposes requires that the acquisition of the derivative security be deemed the significant event, not the exercise. Failure to recognize that derivative securities are functional equivalents of the underlying securities for Section 16 purposes would permit insiders to evade disgorgement of short-swing profits simply by buying call options and selling the underlying stock, or buying underlying stock and buying put options. Potential abuse with derivative securities is demonstrated by the many enforcement actions involving the purchase of derivative securities, rather than common stock, to misuse inside information.[99]

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[91] Rule 16a-3(f)(1). A review of records available without undue burden or expense would be an adequate basis for such belief.

[92] The good faith belief standard is not applicable for transactions subsequent to the effective date. If an insider does not report a Form 4 transaction until a subsequent fiscal year, there would be two violations, a failure to file a timely Form 4 and a failure to report the transaction on Form 5; there would not be an additional violation each subsequent year.

[93] As a matter of policy, the Commission will accept computer generated Forms 3, 4, or 5 if the computer generated facsimile is identical in format and is limited to 8½" x 11" paper. These forms must be signed manually.

[94] *See* section II.A.2, *supra*.

[95] In addition, ten percent holders while not subject to section 16 after termination of status, may have a Form 5 filing obligation as to unreported transactions that occurred during the period the person was a ten percent holder.

[96] For a discussion of option pricing and the relationship between an option's price and the price of the underlying security, *see generally* J. Cox and M. Rubenstein, "Options Markets" (Prentice-Hall Inc. 1985); J. Cox, S. Ross, & M. Rubinstein, "Option Pricing: A Simplified Approach," "Journal of Financial Economics," 229-263 (Sept. 1979); M. Brennan & E. Schwartz, "The Valuation of American Put Options," "Journal of Finance," 449-462 (May 1977); F. Black and M. Scholes, "The Valuation of Option Contracts and a Test of Market Efficiency," "Journal of Financial Economics," 399-418 (May 1972).

[97] The definition of "derivative security" in Rule 16a-1(c) excludes those securities without a fixed exercise price. *See* sections III.B and III.D, *infra*.

[98] For example, if an insider who owns 1000 shares of stock acquires call options giving him the right to obtain 1000 shares of the company's stock at $100 a share, and the stock price rises to $120, the insider knows that he can sell his stock and replace that holding for $20,000 less than the sale price. The insider is at no risk that subsequent events will place that profit in danger, if he sells the stock but chooses not to exercise the call options immediately.

[99] *See, e.g., SEC* v. *Tome*, 833 F.2d 1086 (2d Cir. 1987); *SEC* v. *Foundation Hal*, 736 F. Supp. 465 (S.D.N.Y. 1990); *SEC* v. *Raab*, Litigation Release No. 12709 (Nov. 20, 1990); *SEC* v. *Finacor Anstalt and Certain Purchasers of Call Option Contracts for the Common Stock of Combustion Engineering, Inc.*, Litigation Release No. 12603 (Sept. 6, 1990); *SEC* v. *Bushman*, Litigation Release No. 12594 (Aug. 27, 1990); *SEC* v. *Certain Purchasers*, Litigation Release No. 12542 (July 13, 1990); *SEC* v. *Godfrey*, Litigation Release No. 12420 (March 22, 1990); *SEC* v. *O'Hagan*, Litigation Release No. 12344 (Jan. 10, 1990); *SEC* v. *Musella*, 748 F. Supp. 1028 (S.D.N.Y. 1989); *SEC* v. *Shiffman*, Litigation Release No. 12175 (July 24, 1989); *SEC* v. *Iseppi*, Litigation Release No. 11964 (Jan. 17, 1989), *SEC* v. *Levine*, Litigation Release No. 11095 (May 12, 1986); and *SEC* v. *Reed*, Litigation Release No. 9537 (December 23, 1981). Congressional concern about this problem is further evidenced by the enactment of the Insider Trading Sanctions Act of 1984 amendment to section 20(d) of the Exchange Act. *See* Public Law No. 98-376, 98 Stat. 1264 (1984); 15 U.S.C. 78t(d) (1988).

By equating ownership of the derivative security to ownership of the underlying equity security, opportunities for evasion of Section 16 are minimized. Unlike the results under prior Commission rules and case law, under the rules adopted today, transactions in the derivative securities are matchable against transactions in the underlying securities and against each other; short-swing profits obtained through use of derivative securities are recoverable.[100] The rules correspondingly recognize that, for purposes of the abuse addressed by section 16, the exercise of a derivative security, much like the conversion of a convertible security, essentially changes the form of beneficial ownership from indirect to direct.[101] Since the exercise represents neither the acquisition nor the disposition of a right affording the opportunity to profit, it should not be an event that is matched against another transaction in the equity securities for purposes of section 16(b) short-swing profit recovery.

The profit that can be realized on short-swing transactions, whether accomplished through derivative securities, the underlying equity security or a combination of both, depends upon the price of the underlying security. While the amount of the profit may vary given factors such as the time value of money and volatility of the underlying stock evidenced in the option premium, the exercise does not change the opportunity to realize a profit. As the price of the underlying common stock increases, so does the value of a call option [102] or similar derivative security with a fixed exercise or conversion price related to the common stock.[103]

When an insider acquires a typical call option, the insider acquires the right to receive the underlying equity security at a fixed price for a fixed duration.[104] When the price of the underlying equity security exceeds sufficiently the price at which the derivative security can be exercised, the profit can be locked in as there is no uncertainty about the insider's ability to realize the profit, whether by selling the derivative security, selling the underlying securities received upon exercise, or selling other holdings of the underlying securities or other derivative securities related to the underlying security.[105] In each case the insider locks in the ability to profit by transactions in derivative securities, but under the former rules the insider could evade disgorgement of the short-swing profit earned by timing the exercise of the call option to occur more than six months after the sale of the underlying security. Some courts have recognized a potential for abuse and have matched a transaction in a derivative security with an offsetting transaction in the underlying security,[106] but many courts have not.[107]

The following scenarios, while not exhaustive of all possible combinations of transactions involving derivative securities and the underlying equity security, use actual prices on the specified dates and illustrate an insider's profit potential from short-swing transactions involving derivative securities and the underlying equity securities. The amount of profit differs primarily due to the diminishing value of an option as it approaches expiration and the fact that some of the value of the option premium (or market price) is lost upon exercise.[108]

(1) *Purchase Stock—Sell Stock.* If an insider of IBM purchased 1,000 shares of IBM common stock on February 23, 1990 ($102⅝ per share NYSE), he would have paid $102,625. If the insider sold the 1,000 shares on April 16, 1990, for $110,750 ($110¾ per share NYSE), a profit of $8,125 would have been made.[109]

(2) *Purchase Option—Exercise Option—Sell Stock.* Similarly, the same insider could have bought ten IBM call option contracts (covering 1,000 IBM common shares) on February 23, 1990, for $9,875 ($9⅞ per share), exercisable on or before October 19, 1990, at $100 per share. If on April 16, 1990, the insider exercised the option and purchased the stock for $100,000 and sold the stock for $110,750 ($110¾ per share), the profit would be $875.[110]

(3) *Purchase Option—Sell Stock.* If the insider purchased the same ten IBM call option contracts (covering 1,000 IBM common shares) on February 23, 1990, for $9,875 ($9⅞ per share), exercisable on or before October 19, 1990, but, instead of exercising the option and selling the underlying stock, he sold 1,000 shares of IBM common stock otherwise held on April 16, 1990, for $110,750 ($110¾ per share), the insider would lock in the ability to earn a profit of $875.[111]

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[100] Rule 16a–4(a) and Rule 16b–6(a).

[101] *See, e.g., Petteys* v. *Butler*, 367 F.2d 528 (9th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967); *Blau* v. *Lamb*, 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967); *Blau* v. *Max Factor & Co.*, 342 F.2d 304 (9th Cir.), *cert. denied*, 382 U.S. 892 (1965).

[102] A long call option position or a short put option position can benefit as the value of the underlying stock increases, although the profit potential varies between the two. These positions are termed "call equivalent positions." Likewise, a short call or a long put position are termed "put equivalent positions."

[103] For example, on April 2, 1990, Global Marine common stock closed on the New York Stock Exchange ("NYSE") at $4 ⅝ while its warrants (a right to purchase one common share at $3 expiring in 1996) closed at $2 ¾. On October 1, 1990, the stock closed at $5⅜[3/8] and the warrants closed at $3⅛. Both the stock and the warrant had increased in value by 75 cents.

[104] Although the timing of the exercise of European style options is fixed in advance, the opportunity to profit from acquiring stock at a fixed price is the same.

[105] Likewise, an insider can lock in profit from the appreciation in value of an equity security by purchasing a put option.

[106] *See Gund* v. *First Florida Banks, Inc.*, 726 F.2d 682 (11th Cir. 1984); *Bershad* v. *McDonough*, 428 F.2d 693 (7th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971); *T-Bar Inc.* v. *Chatterjee*, 693 F. Supp. 1 (S.D.N.Y. 1988).

[107] *See, e.g., Colan* v. *Monumental Corp.*, 713 F.2d 330 (7th Cir. 1983); *Morales* v. *Mapco*, 541 F.2d 233 (10th Cir. 1976); *Silverman* v. *Landa*, 306 F.2d 422 (2d Cir. 1962); *Blau* v. *Ogsbury*, 210 F.2d 426 (2d Cir. 1954).

[108] For example, assume that at the close of trading on March 20, 1990, a person purchased a May IBM call option covering 100 shares of IBM stock with an exercise price of $100, at $1000 ($10 per share) when the underlying IBM stock's price was $108. On May 1, 1990, IBM's stock price was again $108 per share, yet the May IBM call option's closing price was $8⅛ per share. The decrease in value resulted primarily from the fact that the option was closer to its expiration on May 18. In both examples the "intrinsic value" (inherent profit on the underlying stock as of that date) of the option was $8, since the option could be exercised at $100 and the stock was trading at $108. The remainder of the option price ($2 extra on March 20, but only ⅛ on May 1st) reflects the time value remaining until expiration, the volatility of the underlying stock and other factors, such as interest rates, that affect the market value of an option. *See generally* R.A. Brealey & S.C. Meyers, "Principles of Corporation Finance" 484, Table 20–2 (3d ed. 1988).

If the holder of the call option immediately exercised the option on March 20 or exercised on May 1, he would have received the underlying stock priced at $108 for $100 per share, providing a possible $8 per share profit (the "intrinsic value" of the option). It should be noted that by exercising the option the holder would have lost any option premium above the intrinsic value ($2 on March 20 or ⅛ on May 1). Thus, it is less likely that option holders will exercise the option and lose the option premium since it is more profitable to sell the option. *See generally* "Characteristics and Risks of Standardized Options" 28–31 (Options Clearing Corp. 1987). Where employee stock options are non-transferable, there is no premium to lose through exercise.

[109] The examples do not take into account transaction costs such as brokerage commissions and other costs.

[110] The profit was $7,250 less than the first example and $2,875 less than the fourth example where the insider simply sold his options rather than exercise them. This differential results from the loss of the option time value premium when exercised. The intrinsic value of the option when exercised was $10¾ ($110¾ minus $100 exercise price), and the remaining 2⅞ of the $13⅝ premium received in example 4 represented time value, which is lost when an option is exercised.

[111] This assumes the insider later replaces the 1,000 shares sold through the exercise of the call options. The profit was $7,250 less than the profit in the first example and the same as the second example. By selling the option rather than exercising it, the insider would retain the full value of the option premium. (See Example 4.)

(4) *Purchase Option—Sell Option.* Suppose the same insider purchased ten IBM call option contracts (covering 1,000 IBM shares) on February 23, 1990 for $9,875 ($9⅞ per share) exercisable at $100 before October 19. On April 16, 1990, the insider sold the call options for $13,625 ($13⅝ per share). The profit would have been $3,750.[112]

(5) *Purchase Stock—Purchase Put Option.* The same insider also could have bought 1,000 shares of IBM stock on February 23, 1990, for $102,625, and on April 16, 1990, bought ten put option contracts (covering 1,000 IBM shares) expiring October 19 with an exercise price of $115, at a price of $7½ per share, or $7,500. By purchasing the put options, the insider locked in the ability to earn a profit of $4,875, when the insider could receive $115,000 for the 1,000 shares under the put options.[113]

In each of the five examples there was an acquisition of a beneficial ownership interest in an equity security of IBM followed by a disposition in less than six months, and in each case, the insider profited in a short-swing manner. Under the former rules, the profit would have been recoverable from the insider in examples 1 and 2. However, the outcome was uncertain for examples 3, 4 and 5. The Commission's rules did not specifically address the situations presented in those examples and many courts have had difficulty in concluding that transactions in derivative securities and transactions in underlying securities should be matched to permit short-swing profit recovery. Moreover, the courts have not determined whether section 16 applies to standardized options under the former rules.[114]

Given the growth of trading in derivative securities, increased sophistication in trading practices involving derivative securities, and continued Commission experience with derivative securities and practices, the rules adopted today eliminate this disparity in treatment, which is neither analytically warranted nor consistent with the purposes of section 16. Derivative securities are susceptible to the type of abuse that section 16 seeks to eliminate, and should be subject to the short-swing recovery provisions of section 16 to carry out the purpose of the statute.

The former Commission section 16 rules and case law, by failing to recognize the functional equivalence of derivative securities and the underlying equity securities, and by therefore focusing on the exercise, rather than the acquisition, of the derivative security, have left open a significant potential for short-swing abuse in trading derivative securities, while permitting recovery in situations that represent long-term investments. For example, an insider with knowledge of a positive material development, to be announced shortly, determines that while he wants to retain his existing equity position, he wants to take advantage of the information, so he purchases issuer warrants. After the public announcement and rise in stock price the insider sells his common stock, obtaining a short-swing profit, knowing that he can replace the shares at a predetermined price since he holds the warrants. Under the former rules, he could simply wait six months and a day to exercise the warrants so the profit would not be subject to section 16(b) and not recoverable by the company. Ironically, however, an insider who purchased a warrant for investment purposes, exercised the warrant after a year and sold the underlying stock five months later—17 months after the purchase of the warrant, far beyond the six month period the statute defines as short-swing—would be subject to short-swing profit recovery.[115]

Given the short-swing profit potential presented by transactions in derivative securities, the Commission has amended the rules to make it clear that ownership of derivative securities constitutes beneficial ownership of the underlying equity securities for purposes of section 16. Therefore, transactions in options, convertible securities, warrants and similar derivative securities will be matchable with transactions in other derivative securities and in the underlying equity, and the profits recoverable by the corporation.

In realigning the section 16(b) focus from the exercise of the derivative securities to the acquisition of the derivative securities, the new regulatory framework not only reverses the Commission's own regulatory approach but also differs from a line of cases that, in the absence of rules to the contrary, have held that the exercise of the option (rather than its acquisition) is the section 16(b) purchase of an equity security.[116] These cases have held that an acquisition of a right is not a purchase of an equity security unless accompanied by an irrevocable liability to pay for the stock, or other indicia of beneficial ownership. A few courts have found a purchase of an equity security to occur at the acquisition of the derivative security,[117] but usually the purchase has been found to occur at exercise. As the most recent judicial decision to address the operation of derivative securities stated:

> This judicial rule (treating exercise as a purchase under section 16(b)) cannot withstand careful analysis. A person who acquires a call option acquires the right to purchase the underlying stock at a given price. If the price of the stock subsequently rises and the person exercises the option and then sells the stock, the "profit" he earns represents the 'swing' in the price, not between the date of exercise of the option and later sale of the stock, but rather between the time he originally purchases the option and the time he sells the stock * * *. The courts have strayed because they have viewed the intervening event—the exercise of the option for stock—as an independent purchase. This is incorrect. Because the option holder already owns the right to purchase the stock at a fixed price, his decision to actually exercise the option does not provide him the ability to earn insider profits and thus does not constitute a section 16(b) "purchase".[118]

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[112] While the profit was less than the first example, the amount invested in Example 4 was less than one-tenth the amount invested in the first example. If the insider had invested $98,750 of the amount he invested in the first example, in options instead of stock, he would have made $37,500 profit, compared with the $8,125 profit in the first example, due to the leverage afforded by options.

[113] The profit is $3,250 less than the profit in the first example because the insider paid a premium of $3¼ over the intrinsic value of the put option. Since the stock was priced at $110¾, a right to sell the stock at $115 was worth $4¼ ($115 minus $110¾). However, the insider had to pay $7½ to buy the put option since the option did not expire until October.

[114] In examples 3 and 5 it is assumed that the insider, seeking to escape short-swing profit recovery under the former rules, would wait at least six months after the potential matching transaction to exercise the option acquired. Since the courts have been reluctant to match transactions in two different types of securities, except in the cases cited in n. 106 *supra*, it is questionable whether the courts would have found liability in examples 3 or 5. Only one case has involved a put option. *See Silverman* v. *Landa*, 306 F. 2d 422 (2d Cir. 1962) (no liability found where an insider sold both a call and put option within six months). In addition, the judicial outcomes in examples 3, 4, or 5 would have been uncertain, since no court has specifically ruled on the treatment of third party-issued options under section 16. One judicial decision addressed the matter and remanded the issue to the district court for its consideration. *See Miller* v. *General Outdoor Advertising Co.*, 337 F. 2d 944 (2d Cir. 1964). Although the issue was never determined, the Second Circuit indicated that the decision should be based upon whether transactions "were susceptible to the type of speculation the section seeks to eliminate." *Id.* at 948. *See also* section III.B, *infra*.

[115] In fact, former Rule 16b–6(b) (17 CFR 240.16b–6(b)) recognized the inconsistency of the prior treatment of derivative securities by limiting the amount of profit recoverable from options held longer than six months.

[116] *See, e.g., Colan* v. *Monumental Corp., supra*, 713 F.2d 330; *Morales* v. *Mapco, supra*, 541 F.2d 233; *Silverman* v. *Landa, supra*, 306 F.2d 422.

[117] *See, e.g., Bershad* v. *McDonough, supra*, 428 F.2d 693; Newmark v. *RKO General, Inc.*, 425 F.2d 348 (2d Cir.), *cert. denied* 400 U.S. 854 (1970).

[118] *Seinfeld* v. *Hospital Corp. of America*, 685 F. Supp. 1057, 1066 (N.D. Ill. 1988) (dictum)

Continued

The conceptual framework for derivative securities adopted today does not distinguish between standardized options and other options, such as those granted under employee benefit plans. Some have argued that employee stock options should be treated differently from other options, because employees do not pay cash for the options and, therefore, the exercise rather than the grant should be treated as the purchase. Under section 16, the Commission historically has recognized that a purchase takes place at the time of the grant of employee options or bonus stock and that the consideration for the bonus stock and options is the employee's services.[119] Just as with standardized options, the employee option requires further payment at the time of exercise, but the short-swing profit opportunity is set at the time of grant, just as it is with the acquisition of a standardized option. Indeed, not to treat the employee option or bonus stock grant as a purchase for section 16 purposes would be to provide a significant opportunity for the short-swing transactions Congress wished to eliminate. For example, an insider could sell employer stock in advance of bad news, and obtain a specially-authorized stock option grant at market after the price drop, without the concern that profit could be recoverable under section 16.

Nor do employee options justify different treatment because, unlike standardized options, they are non-transferable. Their non-transferability does not impair the short-swing profit opportunity provided by the right to acquire stock at a fixed price. The restriction on transferability, a Commission-imposed requirement for an exemption under Rule 16b–3 initially derived from the Internal Revenue Code as a reflection of prior business practice and designed to provide a further safeguard against abuse, should not operate to remove option grants from the scope of section 16.

Under the rules adopted today, acquisitions of call options from an issuer or third party are deemed purchases for purposes of section 16 and are matchable with sales of the underlying stock or sales of another call equivalent derivative security relating to the same equity security. The exercise of the option, which does not create a new opportunity for profit, is exempt unless the option is out-of-the-money.[120] Generally, there appears to be little economic justification for an insider to exercise an out-of-the-money option. While it may be possible to view exercises of out-of-the-money options as a similar change from indirect to direct ownership, the rules do not provide such treatment given concerns as to the reasons that an insider would exercise such an option. At-the-money options are treated as in-the-money options under the new rules.

The sale of the stock underlying an option is not exempt and therefore is matchable with a purchase of the same equity security or any call derivative security relating to the same equity security within six months. Thus, to avoid short-swing profit recovery, a grant of an employee stock option by an issuer, absent an exemption, must occur at least six months before or after a sale of the equity security or any derivative security relating to the equity security. While many employee stock option grants may be exempt under Rule 16b–3, that exemption reflects the safeguards imposed on the transaction and not a determination that an option grant is not within the purview of section 16.[121]

Some commenters have questioned the appropriateness of the Commission's exempting the exercise of derivative securities in light of the United States Court of Appeals for the Second Circuit decision in *Greene* v. *Dietz*.[122] In that case, the majority of a panel of the Second Circuit criticized a Commission rule that exempted the exercise of employee benefit plan stock options. One district court, in *Perlman* v. *Timberlake*, subsequently found the rule invalid, although another district court, in *Perlitz* v. *Continental Oil*, upheld the rule.[123] The Commission filed an amicus brief for rehearing in *Greene*, and an amicus brief before the court in *Perlman*, both of which were before the court in *Perlitz*.[124] These briefs set forth the Commission's view that the rule was a proper exercise of its authority.[125]

Moreover, there are significant differences between the rules adopted today and the rule challenged in these cases. For example, in contrast to the rules adopted today, the exemption for the exercise considered in *Greene* was not a corollary of a regulatory scheme that defined derivative securities as holdings of the underlying securities and specifically subjected transactions in derivative securities to section 16(b), as transactions matchable against transactions in the underlying equity. The rule scrutinized in 1957 was adopted without the concomitant application of short-swing liabilities to derivative securities transactions.[126] Now, after 30 years of study and experience with trading in derivative securities, the Commission's rules today recognize what they did not then,[127] that derivative securities are functionally equivalent to underlying equity securities for purposes of section 16.[128]

B. Definitions of Equity Securities of An Issuer and Derivative Security

The definition of equity securities of an issuer has been adopted as proposed.[129] The rule provides that

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(Acquisition of a "lock-up" option was the purchase, rather than the implied exercise accompanying the disposal of the option).

[119] In the Reproposing Release, the Commission noted commenter concern about the absence of an across-the-board exemption for issuer grants and expressed its unwillingness to grant such an exemption. However, it requested comment "as to examples of non-compensatory issuer option grants given without consideration or value." 54 FR at 35675. No examples of such option grants were provided by commenters in response to that request.

[120] When the exercise price for a call derivative security is less than the current market price of the underlying security, the derivative security is "in-the-money." If the exercise price and market price are the same, the call derivative security is "at-the-money." If the exercise price is greater than the market price, the call derivative security is "out-of-the-money." *See also* n.150 and surrounding text, *infra*.

[121] *See* discussion of Rule 16b–3 in section IV, *infra*.

[122] 247 F.2d 689 (2d Cir, 1957).

[123] *Perlman* v. *Timberlake*, 172 F. Supp. 246 (S.D.N.Y. 1959); *but see Perlitz* v. *Continental Oil*, 176 F. Supp. 219 (S.D. Tex. 1959) (upholding the Rule invalidated in *Perlman*).

[124] Memorandum of the Securities and Exchange Commission Amicus Curiae, *Greene* v. *Dietz*, 247 F.2d 689 (2d Cir. 1957); Memorandum of Securities and Exchange Commission Amicus Curiae, *Perlman* v. *Timberlake*, 172 F. Supp. 246 (S.D.N.Y. 1959). *See Perlitz* v. *Continental Oil*, 176 F. Supp. 219, 22 (S.D. Tex 1959).

[125] Recent Supreme Court decisions have emphasized the deference to be accorded agency rules. *See, e.g., Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[126] Moreover, unlike the former rule, the rules adopted today require a minimum period of six months between a grant to an insider and a sale of the underlying equity security. The six month holding period is also applicable to grants of bonus stock, whereas the former rules permitted immediate sale of bonus stock granted under a Rule 16b–3 plan. See section IV.C, infra.

[127] The Commission argued in *Perlman* that since the exercise price was fixed at grant and the option was not exercisable for one year, the profit was necessarily long-term. 172 F. Supp. at 255.

[128] *See Report of the Presidential Task Force on Market Mechanisms* 55 (Jan. 1988) ("From an economic viewpoint, what have been traditionally seen as separate markets—the markets for stocks, stock index futures, and stock options—are in fact one market."); *see also* "Report of the Special Study of the Options Markets", United States Securities and Exchange Commission 82 (1978) ("Options can be used as a substitute for short-term stock trading * * *").

[129] Rule 16a–1(d).

derivative securities written by third parties, so long as they relate to and derive their value from the equity securities of the issuer, are within the definition as functionally equivalent instruments representing beneficial ownership of the underlying securities. To do otherwise would be to countenance the evasion of section 16(b) liabilities through the trading of standardized or third party options or other rights issued by a third party relating to equity securities of the issuer.

While a few commenters expressed a contrary view, the application of section 16(b) to third-party derivative securities is consistent with both the statutory purposes of section 16(b) and its language. Defining an equity security of the issuer to include derivative securities written by third parties is consistent with the language of the statute, both because those securities represent beneficial ownership of the underlying equity and because they are securities relating to that issuer.[130] The Supreme Court stated in *Reliance Electric Co.* v. *Emerson Electric Co.*,[131] "where alternative constructions of the terms of section 16(b) are possible, those terms are to be given the construction that best serves the congressional purpose of curbing short-swing speculation by corporate insiders."[132] The prophylactic purpose of section 16(b) would be vitiated by the reading suggested by commenters who took issue with the approach of the proposed rules.

Derivative securities are defined in the rules to include options and convertible securities, and similar rights whose value depends upon the value of the issuer's equity securities.[133] The definition has been clarified to exclude securities without a fixed exercise price.[134] Rights without a fixed exercise price do not provide an insider the same kind of opportunity for short-swing profit since the purchase price is not known in advance. The opportunity to lock in a profit begins when the exercise price is fixed; at that time, the right becomes a derivative security subject to section 16.

The rules[135] specifically exempt from the definition of derivative security: (1) A pledgee's interest in pledged securities, (2) the obligation to receive or surrender securities in a merger, (3) cash-only securities, such as phantom stock, awarded under an employee benefit plan satisfying the provisions of Rule 16b–3(c) or with a fixed date of redemption beyond six months from the date of acquisition,[136] (4) interests in broad-based index options, futures, and baskets, (5) employee benefit plan interests or plan rights of participation, and (6) rights with an exercise or conversion privilege at a price that is not fixed.[137] The first three exclusions from the definition are adopted as proposed. The fourth exclusion from the definition, relating to broad-based index options and futures, has been expanded to include broad-based publicly traded market baskets of underlying equity securities, provided the basket has been approved for trading by the appropriate federal governmental authority.[138] The fifth exclusion has been added to clarify that employee benefit plan interests, or rights to participate in an employee plan, are not derivative securities.[139] The sixth exclusion, as discussed above, makes it clear that a derivative security must have a fixed exercise price.

C. Call and Put Equivalent Positions

Under the rules, transactions in derivative securities are matchable; the rules use the terms "call equivalent position" and "put equivalent position" to define those transactions that may be viewed as purchases and sales, respectively, and therefore matchable. The definitions of "call equivalent position"[140] and "put equivalent position"[141] are adopted as proposed. Derivative securities have either a "call" feature, permitting the owner to acquire securities upon exercise, or a "put" feature, permitting the owner to dispose of securities upon exercise.

A person owning a call option or writing a put option[142] would benefit from an increase in the value of the underlying security, while a person owning a put option or writing a call option would benefit from a decrease in the value of the underlying security.

D. Acquisition of Derivative Securities

When an insider purchases a derivative security in the open market or in a negotiated transaction, or is granted a derivative security by the issuer, the opportunity to realize the short-swing-profit begins. Thus the acquisition of a derivative security is a reportable event, whether or not the derivative security is presently exercisable.[143] Acquisitions of call derivative securities are matchable with any disposition of the related underlying security (or other call equivalent position related to the same class of underlying security) for purposes of short-swing profit recovery.[144] Likewise, acquisitions of put equivalent positions are matchable with any acquisition of the related underlying security (or any disposition of a put equivalent position related to the same class of underlying security).

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[130] Referring to the phrase "equity security of such issuer" in section 16, one commenter noted: "Since the word 'of' is part of the everyday language of men, resort should (be made) in the first instance to its significance in common usage. Defining the word 'of' to mean 'indicating the possessive relationship, otherwise expressed by the possessive case; belonging or pertaining to' not only eliminates the necessity for reading a basic English preposition as a legal term of art, but is altogether a more satisfactory means of effectuating the statutory purpose. The reading 'equity security *issued* by such issuer' looks only to the formalities attendant upon creation of the instrument, and in so doing eliminates from the scope of section 16(b) a whole class of instruments whose economic significance in the present day market is considerable. The reading 'equity security *pertaining to* such issuer' or even 'equity security *representing an interest in* such issuer,' on the other hand, looks to the nature of the legal relations evidenced by the instrument rather than to the technicalities attendant upon its creation, and in so doing comprehends the whole class of instruments subject to speculative abuse without requiring any artificial stretching of ordinary language." Michaely & Lee, *Put and Call Options under Section 16 of the Securities and Exchange Act of 1934*, 40 Notre Dame L. Rev. 239, 248 (1965) (footnotes omitted); *see* The Oxford English Dictionary 716 (2d ed. 1989) ("of" also means "relating to").

[131] 404 U.S. 418 (1972).

[132] *Id.* at 425; *see also Mendell* v. *Gollust*, 909 F.2d 724, 728 (2d Cir. 1990), *cert. granted*, 59 U.S.L.W 3460 (U.S. Jan. 7, 1991) (No. 90–659).

[133] Rule 16a–1(c). Included are novel securities, such as primes and scores, that provide an opportunity to profit from a price change in an underlying equity security.

[134] Rule 16a–1(c)(6). *See also* section III.D, *infra*. A convertible security with a fixed conversion privilege is deemed to have a fixed exercise price. A derivative security having a series of preset prices, or having a price that is adjusted to reflect pre-specified events such as a stock split, is considered fixed for purposes of the Rule. The adjustments for pre-specified events do not constitute acquisitions of additional equity securities.

[135] Rule 16a–1(c) (1)–(6).

[136] Rule 16a–1(c)(3). The rule adopted today codifies that death, disability, or termination of employment are deemed fixed dates of redemption, whether or not they occur within six months. In addition, a series of fixed dates of partial redemptions satisfies the requirement.

[137] These instruments exempted from the definition of derivative security would not be subject to the section 16 reporting or short-swing liability provisions.

[138] Rule 16a–1(c)(4). The treatment is the same as for broad-based baskets in determining beneficial ownership under section 16. *See* section II.B.2, *supra*. If a component security is traded independent of the basket, that transaction is subject to section 16.

[139] Rule 16a–1(c)(5). This excludes only rights to participate in a plan, not rights, options, or other derivative securities awarded under a plan.

[140] Rule 16a–1(b).

[141] Rule 16a–1(h).

[142] By "writing" an option, the writer, in return for a fee or premium, promises to buy or sell securities when the holder chooses to exercise the option.

[143] Rule 16a–4(a).

[144] Rule 16b–6(a). Acquisitions of put derivative securities mirror the acquisition of call derivative securities. Instead of a "purchase" occurring at acquisition, a "sale" occurs.

As noted above, a right to acquire an equity security with an exercise price that is not fixed is not deemed to be an equity security or derivative security subject to section 16.[145] The rules adopted today clarify that a right with a floating exercise price is not required to be reported and will not be deemed to be acquired or purchased, for section 16 purposes, until the purchase price of the underlying securities becomes fixed or established, which commonly occurs at exercise.[146] Thus, a right to purchase an equity security is deemed acquired as of the date the exercise or conversion price becomes fixed, and the acquisition, absent an exemption, would be matchable for section 16(b) purposes with a disposition within six months of the fixing of the price. For example, the acquisition of an option having an exercise price equal to 90 percent of the market price as of the date of exercise would be deemed to be a purchase of the underlying stock as of the date of exercise.[147] The receipt of such an option to purchase shares at a discount from the floating market price does not provide the same kind of opportunity for short-swing profit as a right with a fixed exercise price because the value relationship between the floating option and the underlying stock is a function of the issuer discount or subsidy, rather than capital appreciation.[148]

In the case of an option with a floating price that will become fixed as of an event or a specified date prior to exercise, the right is deemed to become a derivative security upon the fixing of the price, and is reportable as the acquisition of a derivative security. The rules have been modified to provide that if the timing of the event fixing the price is outside the control and knowledge of the holder, then the acquisition would be reportable on Form 4 as of the date of the event fixing the price, but would be exempt from section 16(b) matching with sales occurring before the fixing of the exercise price, but will not be exempt from section 16(b) matching with sales occurring thereafter.[149] Given the holder's lack of control over the timing of the fixing of the acquisition price, it would not be appropriate to put all sales at risk for the entire period, however long, prior to fixing of the price.

The exemption from section 16(b) for exercises of options does not apply to the exercise of out-of-the-money options, as discussed above, because there generally is no rational economic reason for such exercises. In response to commenters, however, the rule provides an exemption for out-of-the-money exercises necessary to satisfy the serial exercise requirement of the Internal Revenue Code, which requires insiders to exercise incentive stock options in the chronological order in which they were granted, even if they are out-of-the-money.[150]

E. Disposition of Derivative Securities

Dispositions of derivative securities are reportable events representing changes in beneficial ownership of the underlying securities, as well as in the derivative securities themselves, and are therefore subject to the short-swing profit recovery provisions of section 16(b). Dispositions of call derivative securities are matchable with any acquisition of related underlying securities (or other call equivalent position related to the same class of underlying securities). Likewise, dispositions of put equivalent positions are matchable with any disposition of related underlying securities (or call equivalent positions related to the same class of underlying securities). However, as under the former rules, the disposition of derivative securities in connection with an exercise or conversion is exempt from section 16(b), because it represents only a change in the form of beneficial ownership.[151]

1. Expiration of Derivative Securities

Rule 16b–6(d) exempts from section 16(b) the expiration or cancellation without value of a long derivative security. The Rule has been revised to make it clear that the expiration of short derivative securities positions may yield a profit which is subject to recovery under section 16(b).[152]

2. Options in a Merger

The exemption for option exercises as a result of a merger, contained in former Rule 16b–6(c), has been deleted as no longer necessary. The former rule was promulgated in response to concern that profit recovery under such circumstances would negate the accrued value of long-term options. An insider would be required to exercise the option, which was deemed a purchase under the former scheme, before surrendering the underlying securities into the merger. Without an exemption, the combination of the exercise and the surrender of the underlying securities would result automatically in a short-swing transaction subject to section 16(b). Under the rules adopted today, the exercise of the option is exempt if it is not out-of-the-money.[153] If the option was held six months before the merger, there would be no short-swing transaction for purposes of Section 16(b), assuming no matching purchase within six months.[154]

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[145] *See* section III.B, *supra*.

[146] Some issuers may grant options with an exercise price that is discounted from market price. The discount represents an issuer subsidy or matching contribution typically intended to act as an incentive for employees to purchase equity securities of the issuer. As a matter of policy, this matching contribution is not recoverable under section 16(b). A similar distinction is found in the Internal Revenue Code for options awarded under section 423 (26 U.S.C. 423 (1988)). For these statutory options, the discount is treated for tax purposes as issuer compensation and taxed as ordinary income, while the remainder of the profit derived from an increase in the value of the underlying stock is taxed as capital gains. *See* section 423(c) (26 U.S.C. 423(c) (1988)).

[147] Some stock purchase plans, such as plans satisfying section 423 of the Internal Revenue Code offer an ongoing right to purchase stock at the current market price or a discount from market such as 85 percent of market price. The rights or "options" tend to have a duration of six months or a year and operate through payroll deduction mechanisms. Although these plans offer a right to purchase underlying stock, the purchase price of the underlying security often is not fixed and therefore those rights without a fixed exercise price will not be treated as derivative securities until the purchase price is established, which occurs usually at exercise of the right. As such, only stock purchases will be reported, rather than the award of the right to participate. *See* section IV.C, *infra*.

[148] While an option to purchase stock at 90 percent of market value, for example, is more valuable as the price of the stock increases, the profit opportunity is different from a fixed price option. Therefore, for policy reasons floating price derivative securities have been treated differently. Assume Insider A is granted a fixed price option to purchase stock at the current market price of $100 per share. Insider B is granted a floating price option to purchase company stock at 90 percent of market value, $90 per share at the then current price. The initial value of Insider B's discount is $10 per share. If both insiders came into possession of inside information indicating that the stock price would rise to $150, Insider A would not need to do anything to benefit from the $50 price rise. Insider B, however, must exercise the option before the announcement of the inside information to profit a like amount. If Insider B did not exercise the option until the price had risen to $150, he would have to pay $135 a share, saving $15 per share (an increase of only $5 from the original discount of $10), while Insider A could profit $50 per share, even though he did not exercise his option prior to the announcement. As the example illustrates, the primary potential for abuse arises at the time of exercise for a floating price derivative security because only at exercise is the price fixed and, therefore, the extent of the profit opportunity defined. By treating the exercise of the floating price derivative security as the "acquisition" of the underlying security, the rules mitigate the incentives for insiders to abuse their informational advantage.

[149] Rule 16b–6(a).

[150] Rule 16b–6(b); I.R.C. 422(b)(7) (26 U.S.C. 422(b)(7) (1988)). This rule was deleted in 1986 with respect to options awarded after January 1, 1987.

[151] Rule 16b–6(b). Although the derivative security is surrendered, this is simply a procedural step necessary to receive the underlying securities. There is no change in profit potential, as the profit potential relates to the underlying securities.

[152] Rule 16b–6(d).

[153] Rule 16b–6(b).

[154] Former Rule 16b–6(c) provided an express exemption for dispositions of securities underlying

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3. Determination of Profit

The profit calculation standard for transactions in derivative securities is adopted as reproposed.[155] The Rule provides guidance to the courts and issuers seeking settlements with insiders, but permits consideration of other equitable factors in determining profits. If the same security is purchased and sold, the recovery would be the profit received. For transactions involving different types of equity securities, under the standard adopted today, the maximum short-swing profit recovery is the difference in market value of the underlying security between the date of purchase and the date of sale. If an insider can demonstrate that the amount of profit was less, then a court can order a lesser recovery.[156]

IV. Employee Benefit Plan Transactions

The substantive revisions to Rule 16b–3 [157] have been adopted substantially as reproposed, except that the shareholder approval requirement and the one year period of non-participation for disinterested administrators of the former rules have been retained. In addition, the Rule has been reorganized to clarify its application to acquisitions under grant plans and to employee-directed transactions under 401(k) and other thrift and similar plans.

Employee benefit plans, the subject of Rule 16b–3, have been a traditional vehicle through which employers have compensated and provided incentives to their employees. Since many plans provide for grants or awards at least every 12 months, if there were no acquisition exemption, any sale of any equity security by participating officers or directors would necessarily occur within six months before or after an acquisition, and therefore result in short-swing liability. Rule 16b–3 is intended to provide relief from this frustration of the legitimate use of employee benefit plans as a method of executive compensation, where the nature of the transaction and the safeguards imposed by the rule minimize the potential for abuse.[158] Recognizing the interests of companies in providing employee benefit plans for their officers and directors, the Commission historically has sought to establish "conditions * * * designed to preclude the unfair use of information which may have been obtained by an officer or director by reason of his relationship to the issuer" in order "to delineate situations in which (an employee benefit plan) transaction (is) not comprehended within the purpose of section 16(b)." [159]

The Rule as adopted divides plan transactions into two principal categories—grant and award transactions and participant-directed transactions.[160] Two conditions apply across-the-board to all plan transactions involving employer securities.[161] First, the transaction must be pursuant to a written plan. Second, the plan or a written agreement must require derivative securities to be non-transferable, with limited exceptions discussed below.

As proposed, the rule would have deleted the requirement that employee benefit plans and material plan amendments be approved by shareholders as a condition to exemption. The Rule as adopted retains the requirement for those employee benefit plans of the types subject to the shareholder approval requirement under the former Rule.[162] Thus, shareholder approval continues to apply to most grant and award plans and, as more fully discussed below, to participant-directed plans that would not have been eligible for exemption under former Rule 16a–8.

Additional conditions, which must be met for the transaction to qualify for exemption from section 16(b), vary depending on whether the transaction is a grant or award of securities (such as options or bonus stock) to the insider, or an insider-directed transaction, which commonly occurs in thrift or similar plans through payroll deduction.

To be exempt, in addition to satisfying the general conditions for exemption and the shareholder approval requirement, grants or awards of securities to insiders must be made pursuant to a plan in which either a disinterested committee of directors makes all substantive decisions regarding timing, eligibility, pricing and amount of awards, or an automatic formula specifies those terms.[163] These conditions are designed to preclude the insider from influencing the time, terms or amount of the grant of securities, so as to take advantage of inside information. In addition, all grants or awards now are subject to a six month holding period from the time of the grant by the company. Thus, for example, an insider cannot sell bonus stock within six months of its grant, or sell securities received upon exercise of an option within six months of the option grant, without losing the exemption for the acquisition and becoming subject to the short-swing profit recovery provisions of section 16(b).[164]

The conditions applicable to transactions in plans that permit participants to make investment elections, such as thrift or savings plans [165] ("participant-directed transactions"), primarily entail restrictions upon the timing of elections to acquire or dispose of equity securities held in the participant's plan account.[166] These restrictions are designed to assure that the transaction is part of a plan that permits only ongoing or other routine transactions, where the opportunity for abuse is limited because elections are not changed on a short-term basis.

Rule 16b–3, as adopted, continues to provide an exemption for cash settlements of stock appreciation rights ("SARs") satisfying the conditions of the former rule, including the requirements of shareholder approval and disinterested administration, and that elections generally be made in specified quarterly window periods.[167]

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options pursuant to a merger where the options were held for six months, as well as an implied exemption for the exercise in certain cases. While the rules adopted today would not provide an exemption for the disposition of the underlying securities, the exemption adopted for exercises should protect long-term accretion in the value of options from short-swing profit recovery as a result of a merger by providing an exemption for the acquisition of the underlying stock.

[155] Rule 16b–6(c).

[156] For example, the insider could demonstrate that part of the "profit" represented issuer matching contributions or subsidies that should not be recoverable.

[157] 17 CFR 240.16b–3, originally adopted in 1935.

[158] *See, e.g.*, Exchange Act Release No. 13097 (Dec. 22, 1976) (42 FR 754).

[159] Exchange Act Release No. 12374, 9 SEC Dock. 487, 488–489 (April 23, 1976) (41 FR 19983).

[160] The revisions make it clear that, as intended, the conditions of the rule need be satisfied only with respect to participation by insiders subject to section 16 and not other employee plan participants. Of course, plans with no insider participants need not comply with Rule 16b–3.

[161] Rule 16b–3(a).

[162] Rule 16b–3(b).

[163] Rule 16b–3(c).

[164] Securities other than those granted may be sold within the six months after an exempt grant. If the grant loses its exemption because of the sale of the bonus stock or the option stock within six months, the sales of other stock may be matchable with the grant. In these cases, the insider must report the original grant on a Form 4 as if the grant had occurred during the month the exemption was lost, unless the grant had been reported earlier. If the Form 4 is filed within ten days of the end of the month in which the exemption was lost, the transaction will not be deemed reported late under section 16(a). Therefore, insiders are encouraged to provide an explanation as to why the grant is being reported on a Form 4.

[165] These plans generally include section 401(k) plans. I.R.C. 401(k).

[166] Rule 16b–3(d).

[167] Rule 16b–3(e).

Consistent with the former rule, the rule also requires a six month holding period. Further, the exemptions for specified dispositions of plan securities to the issuer, such as cancellations and redemptions, are retained substantially as provided in the former and proposed rules, along with an exemption for dispositions pursuant to qualified domestic relations orders.[168] Finally, consistent with the former rules, the Rule has been revised from the reproposal to exempt all distributions to the participants from a Rule 16b–3 plan.[169]

The restructured rule is discussed in more detail below.[170]

A. General Exemptive Conditions of Rule 16b–3

Rule 16b–3 as adopted today establishes two general conditions, a shareholder approval condition, and additional transaction-specific conditions necessary for a transaction pursuant to an employee benefit plan to be exempt from section 16(b).[171] The rule requires that transactions be pursuant to a written plan specifying the basis for determining eligibility and either the price and amount of securities to be awarded or the method by which the price and amount are to be determined.[172] The plan or a written agreement also must provide that derivative securities are not transferable other than by will or the laws of descent and distribution.[173] This latter condition is similar to the condition imposed on incentive stock options under the Internal Revenue Code [174] and has been a condition of the Rule 16b–3 exemption since 1952.[175] At the suggestion of commenters, the rule adopted today also permits transfers pursuant to qualified domestic relations orders.[176]

B. Shareholder Approval

Upon reconsideration, the Commission has determined to retain the former shareholder approval condition in Rule 16b–3. This requirement was proposed to be deleted in favor of other safeguards against section 16(b) abuse, but concerned shareholders, commenting on the proposals, urged that shareholders have an interest in not only the level of compensation, but that compensation be designed to enhance the longer term horizons of management.[177] The adopted requirement parallels the former requirement, and thus plans that were not subject to the shareholder approval requirement under the former rules are not subject to shareholder approval under the new rules. There are two types of such plans, both established as trusts. First, plan trusts containing issuer securities where less than 20 percent of the securities are held by insiders are excluded.[178] Second, pension and retirement plan trusts that have broad-based employee participation are excluded.[179] The overall effect of these two exemptions is to carry forward the current scope of the shareholder approval requirement; most grant and award plans will be subject to the shareholder approval requirement, and many participant-directed plans will qualify for exemption from the requirement because of the manner in which they are structured.

C. Grant or Award Transactions

1. Disinterested Director Provision or Formula

In addition to meeting the general exemptive conditions of Rule 16b–3 and the shareholder approval requirement, grants and awards of equity securities under an employee benefit plan must be made by a committee of two or more disinterested directors [180] or pursuant to a specific formula.[181] As under the reproposal, the disinterested administration requirement has been strengthened by requiring that award decisions be made by directors, who have fiduciary responsibilities to the company and shareholders. Upon reconsideration, the reproposal to extend the prohibition against administrators participating in any plan of the issuer to one year following such service is not deemed necessary and has not been adopted. Instead, the former requirement prohibiting participation for one year prior to serving as an administrator is retained. The Rule adopted today provides that it is a director's actual participation in a plan, rather than the eligibility of a director to participate, that affects his or her disinterested status.[182]

Where an insider participating in an employee stock bonus or option plan can exercise discretion in determining either the amount of securities that may be acquired or other material terms of awards to the insider, the award is treated as a volitional acquisition, just like an open market purchase. If such an acquisition is preceded or followed by a matchable sale of a security within the statutory six-month period, any short-swing profit is recoverable. The disinterested administration requirement of Rule 16b–3 is designed to prevent insiders from having, directly or indirectly, any control over the terms of their own awards, and therefore removes the ability of the insiders to time their acquisitions under the plan to take advantage of inside information. It also provides assurance that plan administrators cannot be influenced by their own expectation of awards in plans of the issuer and accordingly shields them from any potential pressure from insiders to act in a less than independent fashion.

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[168] Rule 16b–3(f). The rule has been reorganized to specify all exempt plan dispositions in one paragraph.

[169] Rule 16b–3(g).

[170] Issuers and plan participants may continue to rely upon prior interpretive letters with respect to grants and transactions in existing rule 16b–3 plans until the Rules adopted today apply. *See* section VII.C, *infra*. When the issuer becomes subject to new Rule 16b–3, interpretive letters inconsistent with new Rule 16b–3 may not be relied upon for subsequent transactions under such plans.

[171] Transactions exempt under Rule 16b–3 will be reported on Form 5 (or, at the option of the reporting person, on a Form 4 filed before the due date of Form 5). *See* section II.C, *supra*.

[172] Rule 16b–3(a)(1).

[173] Rule 16b–3(a)(2). The Rule makes it clear that, in accordance with current interpretation, a written beneficiary designation is not a transfer. *See H.F. Ahmanson & Co.* (August 28, 1989).

[174] I.R.C. 422A.

[175] *See* Exchange Act Release No. 4754 (Sept. 24, 1952) (17 FR 8901).

[176] I.R.C. 401(a)(13) (26 U.S.C. 401(a)(13) (1988)) prohibits assignment or alienation of qualified trust interests, but provides an exception for transfers pursuant to qualified domestic relations orders. *See* I.R.C. 414(p) (26 U.S.C. 414(p) (1988)). Commenters suggested a similar exception for Rule 16b–3(a)(2). These transfers would be an exception to the Rule 16b–3 restrictions on transferability of derivative securities, even if the plan is not subject to section 401(a)(13), and an exemption from section 16(b) is provided for such transactions pursuant to Rule 16b–3(e)(3). *See Abbe* v. *Goss*, 411 F. Supp. 923 (S.D.N.Y. 1975) (court found an exemption for an acquisition pursuant to a divorce decree).

[177] It should be noted that companies may be required to seek shareholder approval for their benefit plans pursuant to state law or the rules of self-regulatory organizations. *See, e.g.*, N.Y. Bus. Corp. Law section 505(d); NYSE Company Manual section 312.

[178] These plans were exempt under former Rule 16a–8(b) (17 CFR 240.16a–8(b)). The phrase used in that rule, "consists of equity securities with respect to which reports would otherwise be required" has been replaced with "consists of equity securities held by persons subject to section 16(a) of the Act," which comports with the manner in which the former Rule was interpreted.

[179] These plans were exempt under former Rule 16a–8(g)(3) (17 CFR 240.16a–8(g)(3)). The phrase used in that Rule, "whose employees generally are the beneficiaries of the plan," has been replaced with "providing for broad-based employee participation," which comports with the manner in which the former rule was interpreted and is the same phrase used in Rule 16b–3(d)(2)(i)(A), discussed *infra*.

[180] Grants and awards also may be made by the entire Board of Directors, if all the members are disinterested persons.

[181] Rule 16b–3(c).

[182] Rule 16b–3(c). For greater clarity, the definition of "disinterested person" has been combined with the disinterested administration requirement.

As under former Rule 16b–3, where a grant of bonus stock or the award of derivative securities meets the conditions of the new Rule, and thus is not within the control of the insider, that non-volitional transaction is an exempt purchase. Since the substantive decisions concerning the grant are made by disinterested administrators, the grant transaction is not one that the insider can cause in order to take advantage of inside information unfairly to effect a short-swing transaction. Awards of derivative securities meeting the Rule 16b–3 conditions are subject to the same conditions for exemption as grants of bonus stock, since the new rules treat derivative securities as a form of beneficial ownership of the underlying equity securities.[183]

In response to comments, the disinterested administration requirement specifies several exceptions consistent with current staff interpretation. The Rule makes it clear that a director's disinterested status is not affected by participation in either a formula plan, automatic in operation,[184] or a broad-based participant-directed plan such as an employee thrift plan.[185] The Rule specifically provides that a director may choose between cash or an equivalent amount of issuer equity securities in lieu of the director's annual retainer fee or meeting fee without affecting the director's disinterested status.[186] Finally, as provided under former Rule 16b–3, a director of the issuer is disinterested for purposes of administering plans that are not open to directors.[187]

The rule provides that a formula may be used as an alternative to disinterested administration, or it may be used in tandem with decisions made by disinterested administrators.[188] Such formulas serve as a substitute for the disinterested administration requirement by automatically establishing the terms of awards. As with the disinterested administration condition, the rule as adopted strengthens the safeguards associated with use of a formula by requiring greater specificity concerning award terms than is currently required. The amount, price and timing of awards to individuals or classes of employees must be set forth in the plan or automatically determined by the formula.

2. Six Month Holding Period

The rule, adopted as reproposed, also conditions the exemption for grants or awards of bonus stock and derivative securities under an employee benefit plan on a six month holding period. If an insider fails to adhere to this condition, and sells the securities within the six month period, the Rule 16b–3 exemption for the grant or award of the stock or derivative security is lost and the sale is matchable with the grant or award transaction, or other non-exempt acquisitions, for purposes of section 16(b) short-swing profit recovery. The six month holding period provides an additional safeguard against short-swing transactions.

A total of six months must elapse between the grant of the derivative securities and the sale of the securities underlying those derivative securities; the timing of the exercise does not affect the six month period. Of course, if the exercise occurs when the option is out-of-the-money, the exercise would not be exempt, and would be matchable with any sales of equity securities within six months before or after the exercise. The out-of-the-money exercise will not affect the exempt status of the grant.

3. Treatment of Restricted Stock and Discount Stock

Under the new Rule, the date of a grant or award is the date of acquisition; if the acquisition is exempt pursuant to Rule 16b–3, it would be reported on a deferred basis on Form 5, or may be reported earlier on Form 4. Consistent with prior interpretation, the acquisition of restricted stock containing vesting or forfeiture provisions likewise is deemed to occur as of the date of grant even if not vested or subject to risk of forfeiture.[189] If the stock is forfeited, the forfeiture would be reported on Form 5 (or earlier, on Form 4, at the option of the insider) as a cancellation without value received. The vesting of the stock or the lapse of a forfeiture provision is not a reportable event for purposes of section 16.[190]

Interpretive questions have been raised concerning the treatment of discount or "cheap" stock grants.[191] Cheap stock is treated the same as any other right to purchase equity securities. Therefore, awards with a fixed exercise price, such as par value, will be treated as the award of a derivative security.[192] However, grants or awards of cheap stock or rights having a floating exercise price at a discount, such as a price related to a percentage of market value of the underlying equity security on the date of exercise, are deemed to involve acquisitions of neither derivative securities nor equity securities.[193] Thus, a grant of these rights is not a section 16 event. Commenters, however, were uncertain about the application of the new rules to the exercise of such rights. The rule, as adopted, clarifies that an insider is deemed to acquire the underlying equity securities, for purposes of Section 16(b), when the exercise price of an option or right with a floating exercise price is fixed.[194] In the case of cheap stock with a floating price, or other rights with a floating price, this usually occurs at exercise. Thus, the six month holding period begins at exercise. If the grant of the right satisfied the conditions of the grant or award exemption of the Rule, the acquisition of the underlying equity securities would be treated as an award of an equity security at the time of exercise and would be exempt from section 16(b), subject to satisfaction of the holding period.

D. Participant-Directed Transactions

The Rule as reproposed provided four exemptions for transactions in participant-directed plans. These exemptions have been restructured for clarity and modified to address commenters' concerns that a literal reading of the conditions as reproposed would render the exemptions unavailable to 401(k) plans and other similar stock purchase plans. In particular, commenters were concerned that the reproposed requirement that the plan be a retirement or pension plan could be read to preclude thrift plans from qualifying because they provide for in-service withdrawals. Concern was also raised that the reproposed requirement that the plan be open to all employees was too restrictive, because there may be separate classes of

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[183] See section III.A, *supra*.

[184] Rule 16b–3(c)(2)(i)(A).

[185] Rule 16b–3(c)(2)(i)(B).

[186] Rule 16b–3(c)(2)(i)(C). The rules adopted today do not distinguish between the director's ability to choose between stock, options, or cash for purposes of determining disinterested status. Thus, staff interpretive letters such as *SPS Technologies, Inc.* (June 1, 1988) no longer will apply.

[187] Rule 16b–3(c)(2)(i)(D).

[188] Rule 16b–3(c)(2).

[189] *See, e.g., UJB Financial Corp.* (Jan. 30, 1990).

[190] A note has been added to the Rule to reflect this position.

[191] "Cheap" stock is a right to purchase stock at a deep discount.

[192] Because the exercise is exempt under Rule 16b–6(b), there is no longer a need for separate interpretive relief for cheap stock. *See* Release No. 34–18114 Q.88(e).

[193] Rule 16a–1(c)(6). *See* sections III.A and III.D, *supra*, for a discussion of rights with a floating exercise price. Section IV.D, *infra*, addresses rights with floating exercise prices granted in the context of a participant-directed plan.

[194] Rule 16b–3(c)(3).

employees who do not participate in thrift plans, such as union employees who may receive different pension benefits pursuant to a collective bargaining agreement. The Commission did not intend to change the current exempt status of transactions in 401(k) plans or other broad-based thrift plans under Rule 16b–3, and has modified the rule to avoid such a result.

As adopted, the rule exempts specified transactions within any participant-directed plan of an issuer,[195] where the plan satisfies the general exemptive conditions of the Rule and has been approved by shareholders, where required, and the participant-directed transaction satisfies one of four additional sets of conditions of the rule discussed below. Shareholder approval is retained as a condition for those participant-directed plans that were subject to the condition under former Rule 16b–3 because they could not satisfy the conditions of former Rule 16a–8. Those plans would include director plans where the insider can choose periodically between cash and securities in lieu of an annual retainer.

The first two exemptions are available for transactions in any participant-directed plan.[196] If either condition is met and the plan qualifies under Rule 16b–3, the transaction is exempt. First, transactions in such a plan are exempt when the participant's election is made at least six months in advance of its effective date, *i.e.*, six months prior to any purchase of the securities under the plan.[197] Second, an exemption is provided for transactions conducted by terminated, retired, or disabled employees, or on behalf of deceased employees, to settle their plan accounts, because the timing of these events is not likely to present the opportunities for abuse that section 16 addresses.[198] This exemption, as adopted, differs from the reproposal by the inclusion of a death and retirement provision, and by providing that the exempt transaction can occur on the date of termination or retirement rather than being deferred for six months after election.

In contrast to the first two exemptions, the third and fourth exemptions are available only for participant-directed transactions relating to a thrift, pension, retirement, or other ongoing stock purchase plan.[199] These exemptions are provided for transactions undertaken as a result of an election to participate or to change participation levels and for intra-plan transfers.

The third exemption provides that the initial and periodic purchase transactions resulting from an election to participate or an election to change levels of participation [200] under a plan satisfying general exemptive conditions of the rule and the shareholder approval condition (where applicable) are exempt if four safeguards are met to assure that plan transactions are ongoing and routine.

First, the plan must be broad-based and not discriminate in favor of highly compensated employees.[201] This limits the exemption to routine plans where wide participation and equal treatment of all participating employees limits insiders' opportunities to engage in short-swing speculation.

Second, purchases under the plan within six months before an insider participant's withdrawal of plan securities (other than pursuant to a qualified domestic relations order, or at death, retirement, disability or termination) will lose their exempt status unless: (i) Following withdrawal, the insider ceases purchases of securities under the plan for six months, or (ii) the securities so distributed are held by the participant for six months before disposition.[202] This safeguard imposes a penalty on early withdrawal by insider participants to discourage non-periodic transactions generating short-swing profit and serves to encourage long-term investment strategies.[203]

Third, similar to the second safeguard, insider participants electing to cease participation in a plan may not renew participation for six months.[204] This penalty is likewise intended to discourage insiders from using a plan to make purchases on a one-shot or episodic, rather than on an ongoing, routine, basis.

The fourth safeguard is applicable to stock purchase plans, such as section 423 plans,[205] where the rights have floating exercise prices and there is no obligation to purchase the stock until the date of exercise or purchase. For such plans, the underlying securities must be held six months from the date the exercise or purchase price is determined.[206] Since rights to purchase stock at a price that floats with the market price provide different opportunities for abuse, the six month holding period requirement commencing at the date the price is fixed prevents insiders from profiting in a short-swing manner by selling the underlying stock

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[195] Rule 16b–3(d). The exemption does not apply to transactions in self-directed individual retirement accounts.

[196] Rule 16b–3(d)(1).

[197] Rule 16b–3(d)(1)(i). For example, insiders could elect to receive options or other securities in lieu of their annual retainer fee. As long as the election occurred at least six months prior to the implementation of the election, and was irrevocable, the acquisition would be exempt from section 16(b).

[198] Rule 16b–3(d)(1)(ii).

[199] Rule 16b–3(d)(2). These exemptions are not available for participant-directed plans that are not ongoing in nature; for example, certain deferred compensation plans and director-only plans permit a choice between securities and cash on a one-time rather than a periodic basis. Such plans should instead look to the exemption in Rule 16b–3(d)(1)(i).

[200] A note to the rule clarifies the application of section 16 to investment elections and the resulting transactions. The elections are not subject to section 16 and therefore would not be reported. If not exempt from section 16(b), the transactions resulting from the election would be reportable on Form 4; otherwise they would be reportable voluntarily on Form 4 or as required on Form 5.

[201] Rule 16b–3(d)(2)(i)(A). The broad-based and anti-discrimination conditions replace the reproposed requirement that the plan be open to all employees. A plan satisfying the conditions of I.R.C. 410(b) (26 U.S.C. 410(b) (1988)) would satisfy the requirement for broad-based employee participation. The plan cannot be a "top hat" plan or limited to insiders, but must include other classes of employees. The anti-discrimination requirement is similar to I.R.C. 401(a)(4) (26 U.S.C. 401(a)(4) (1988)), and a plan satisfying I.R.C. 401(a)(4) will satisfy this condition. It is not deemed discriminatory to base contributions or benefits on a percentage of salary.

[202] Rule 16b–3(d)(2)(i)(B).

[203] The reproposals would have required that in-service withdrawals be accompanied by "significant penalties," without further specification. Because of commenters' concerns as to what would constitute an adequate penalty, the rule, as adopted, provides two alternative penalties to accommodate different types of plans. For example, since many stock purchase plans are not retirement plans, the securities often are distributed automatically on a periodic basis. For these plans, it may be more appropriate and practical to permit participants to elect a six month holding period. On the other hand, in the case of thrift plans, distributions often are made as a result of an economic hardship, and a six month holding period requirement could defeat the purpose of the withdrawal, but the six month ban from participation serves as an alternate safeguard.

The rule as adopted also exempts extraordinary distributions of all of the issuer's securities held by the plan to participants, so that distributions resulting from cessation of the plan or transfer of plan assets will not be subject to the same restrictions as routine withdrawals.

[204] Rule 16b–3(d)(2)(i)(C). The decision to cease participation or decrease participation is neither a purchase nor sale that requires an exemption from section 16, but the restrictions upon such decisions are a condition to exemption for the ongoing purchases.

[205] I.R.C. 423.

[206] Rule 16b–3(d)(2)(i)(D). Unlike thrift plans, participants in section 423 plans generally do not purchase securities until the end of an "option period" of six months to a year, often at a discount such as 85 percent of market value. Participants commonly have the ability, until the last day of the option period, to change their election to participate in the plan and receive a refund of all monies withheld. If the plan, however, establishes a fixed purchase price, rather than a floating price, or does not permit the participant to cancel plan purchases retroactively, the six month holding period requirement is inapplicable.

received from such rights within six months.

The fourth and final participant-directed plan exemption covers acquisitions of employee securities or dispositions of such securities in connection with transfers among funds within a thrift plan, where the intra-plan transactions occur during a quarterly ten-day window period beginning on the third day after release of the issuer's quarterly financial information, if the insider has not within the prior six months made an election to effect an intra-plan transaction involving the issuer's securities.[207] Thus, an insider could make an intra-plan transfer during one of four window periods as long as there is only one election per six month period, or two window periods in a year. These window periods coincide with the release of the issuer's quarterly financial reports, which serves as a safeguard against the insider having material information that the public does not have. The six month period is designed to prevent an insider from electing to purchase issuer securities by participating in an employer securities fund and then electing to sell such securities by transferring out of the fund within six months, or vice versa.

E. Stock Appreciation Rights

SARs that may be settled only for cash, where either the award satisfied the conditions of Rule 16b–3(c) or the cash-only SAR may be redeemed or exercised only upon a fixed date of redemption at least six months after award, or upon death, retirement, disability or termination of employment, are not deemed to be derivative securities and are exempt from section 16.[208] In contrast, SARs settled for stock are derivative securities and are accorded the same treatment as options.[209] SARs that can be settled in either cash or stock, but are settled in cash, are treated as an exercise of an option (generally an exempt transaction) and the simultaneous sale of the underlying stock.[210] If the cash settlement satisfies the conditions of the safe harbor, the sale upon the receipt of cash is exempt from section 16(b). The rule continues to impose conditions of shareholder approval, issuer information availability, disinterested administration, exercise of the SAR only during a window period except in specified situations,[211] and a six month holding period from the acquisition of the right to the date of the cash settlement.[212]

Apart from traditional SARs, other securities or rights related to the securities have been deemed SARs under current staff interpretation where there is a right to receive cash in return for the surrender of the right or securities. For example, the right to surrender securities to satisfy tax withholding consequences of an option exercise is deemed an SAR equivalent.[213] A right that, by its terms, affords an opportunity to receive cash related to an appreciation in the value of the underlying equity securities will be treated as an SAR, but other derivative securities or underlying equity securities that do not have a cash component will not be so treated. The ability to receive cash in certain circumstances, such as a change of control, creates a cash component similar to a grant of an SAR. The addition of a cash component must satisfy the conditions of Rule 16b–3 for exemption.[214]

F. Cancellations, Expirations, Surrenders, and Qualified Domestic Relations Orders

Historically, Rule 16b–3 has provided an exemption for specified dispositions of plan securities, including cancellations and expirations. The proposals provided similar exemptions. The reproposals added a condition for exemption that the cancellation, expiration, or surrender must not be accompanied by the receipt of consideration. Concern was expressed that a cancellation of an option accompanied by a grant of a new option would not be exempt. As a result, the Rule adopted today provides a specific exemption for cancellations attendant on grants of replacement options.[215] Additionally, an exemption for a disposition of plan securities pursuant to a qualified domestic relation order has been added.[216]

G. Distributions From a Plan

The rule adopted today makes it clear that the exemption for distributions applies to participant-directed plans as well as distributions from grant or award plans if the conditions of the rule are satisfied.[217] Since securities are deemed purchased when acquired under the plan, distributions from a plan simply represent a change from indirect to direct ownership. Thus, it is appropriate to apply the exemption to distributions from either type of plan.[218] The exemption applies only to distributions of equity securities, not cash payments in lieu of the equity security. If, for example, the insider surrenders 500 shares of stock in his or her account to the issuer for cash, the receipt of cash would be deemed a sale of the 500 shares for purposes of section 16.[219]

V. Other Rules

A. Pro Rata Rights, Stock Splits and Stock Dividends

In response to comment received, the reproposed rule exempting the pro rata

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[207] Rule 16b–3(d)(2)(ii); *see also* Rule 16b–3(e)(3). Although this exemption imports the window period requirements of the SAR exemption, participant-directed intra-plan transactions present different opportunities for abuse and, therefore, the staff interpretations concerning a change of control exemption from the window period requirement of the SAR safe harbor do not necessarily apply.

[208] Rule 16a–1(c)(3). Since traditional phantom stock is settled solely in cash, and has a long term fixed date of redemption, such phantom stock is not a derivative security and is outside the scope of section 16, and consequently is not required to be reported. *See* section III.B, *supra*.

[209] Just as with other derivative securities, any SAR that may be settled for stock, or cash and stock, would be reported at grant and eligible for the exercise exemption of Rule 16b–6(b).

[210] Likewise, an SAR granted in tandem with a stock option, such that the exercise of one automatically cancels the other, will be treated the same as an SAR that can be settled either in cash or stock. The fact that the SAR granted in tandem with a stock option can be settled only in cash and otherwise could satisfy the exclusion of Rule 16a–1(c)(3) if it were granted alone does not change the analysis.

[211] The election to exercise the SAR for cash, or to withhold shares underlying an option to satisfy tax withholding requirements, must be made during this quarterly window period, or the election may be made in advance but take effect as of the next window period.

[212] Rule 16b–3(e). One of the conditions of the safe harbor is that the issuer releases information on a regular basis. Rule 16b–3(e)(1)(ii) has been modified to make it clear that a press release is sufficient, whether or not it results in actual publication.

[213] *Id.* An exercise of an option can be a taxable event under the Internal Revenue Code. Many plans permit option holders to surrender some of the stock that would be received upon exercise to satisfy the withholding tax requirement. This choice is similar to a cash settlement feature of an SAR and has been treated as such. *See, e.g., Morgan Stanley Group, Inc.* (June 22, 1990). This interpretation has been codified in the rule.

[214] Staff interpretive letters issued under the former rules inconsistent with this position may not be relied upon for transactions occurring after the effective date of the new rules. *See, e.g., Warner-Lambert Co.* (Feb. 6, 1990) (cash component added to restricted stock immediately prior to change of control treated as an SAR without new six month holding period requirement).

[215] Rule 16b–3(f)(1). Cancellations without value received are no longer addressed in Rule 16b–3 because they are exempt under the general derivative securities rule, Rule 16b–6(d).

[216] Rule 16b–3(f)(3).

[217] Rule 16b–3(g).

[218] The reproposed requirement that past acquisitions be reported prior to or contemporaneously with the distribution has been deleted as unnecessary.

[219] Cash distributions from a plan fund or account unrelated to equity securities of the issuer are not subject to section 16. Thus, if an insider withdraws cash from his or her interest in the plan's money market fund, this event would be neither a purchase nor a sale for purposes of section 16.

grant of subscription rights has been modified to include an exemption for the acquisition of pro rata grants of rights to all holders of a class of equity securities registered under section 12 of the Exchange Act.[220] As commenters pointed out, there is no reason under section 16 to distinguish subscription rights from other rights, such as a repurchase right or "poison pill," that are awarded pro rata to all holders of the underlying equity security registered under section 12, since the opportunity for the abuse addressed by section 16 is limited where all shareholders are treated equally. When subscription or similar rights are exercised, the transaction is treated as the exercise of a derivative security and is reported accordingly.[221]

The rules as proposed would have exempted stock splits and stock dividends from section 16(b) but would have required the transaction to be reported on Form 5. The Commission has concluded that neither section 16 reporting nor short-swing liability should apply to stock splits, stock dividends, or grants of rights where the grants are provided pro rata to all security holders, as these are non-discretionary transactions, and do not present the opportunity for abuse intended to be addressed by section 16. Information regarding stock splits and stock dividends is readily available to the public through issuer press releases and periodic Commission filings. Accordingly, the exemption provides both a reporting and short-swing profit recovery exemption for pro rata awards such as subscription rights or shareholder rights, as well as changes in the number of equity securities owned pursuant to pro rata stock splits and stock dividends. Should the holdings of an insider change as a result of such events, the insider may note the reason for the change in the space provided on the Form 4 or Form 5.[222]

B. Canadian Issuers

The reproposals contained an exemption for reporting persons of Canadian issuers. The Commission has determined not to adopt the exemption at this time. The matter will be considered in connection with the Commission's proposed multijurisdictional disclosure system.[223]

C. Owner of Any Security of the Issuer

The Commission continues to believe that a shareholder does not lose standing to sue under section 16(b) by virtue of the fact that, as a result of a business combination transaction, the shareholder is divested of ownership of shares in the company in whose securities the short-swing profits are alleged to have been made.[224] However, in light of the fact that the Supreme Court has granted certiorari in the case of *Mendell* v. *Gollust*, the Commission has determined not to adopt the proposed definition of "owner of any security of the issuer" [225] at this time.

D. Section 16(d)—Market Makers

The Commission also has determined not to adopt proposed Rule 16d–1 at this time. Prior interpretations and no-action letters under section 16(d) remain in effect.

In addition, questions have been raised concerning the applicability of section 16(d) to transactions on a national securities exchange that are incident to over-the-counter market making activities. Persons making a market on a national securities exchange are not eligible for the section 16(d) exemption. However, section 16(d) has been interpreted by the staff to exempt purchases and sales of closed-end fund shares by an affiliated market maker for its trading account even though the shares may be purchased on a national securities exchange, if the transactions occur in the ordinary course of business for the purpose of maintaining a foreign over-the-counter market for the securities and the purchases and sales are in response to actual or anticipated demand of its customers in the foreign market.[226] This interpretation is extended to transactions, even those made on a national securities exchange, that are incident to the establishment or maintenance of a domestic or foreign over-the-counter market, provided that the transactions are in the ordinary course of the dealer's business in providing liquidity in the over-the-counter market and the securities purchased on a national securities exchange are held in the dealer's trading account to be used solely for providing liquidity and not for investment.

VI. Compliance With Section 16(a)

A. Delinquent Reporting Under Section 16(a)

Compliance with section 16(a) continues to be a problem,[227] despite publicly expressed Commission concern, continued enforcement actions against delinquent filers, and recent legislation that permits the Commission to seek fines for section 16(a) violations.[228] Although the percentage of delinquencies has decreased in the past two years, it continues to be unacceptably high.

B. Item 405 of Regulation S–K

To address the non-compliance problem, Item 405 of Regulation S–K adopted today requires a registrant [229] to disclose in proxy and information statements, Form 10–K reports, and Form N–SAR reports information regarding delinquent section 16 filings by insiders.[230] A registrant must identify by name its insiders who, during the fiscal year, reported transactions late or failed to file required reports, and must disclose the number of delinquent filings and

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[220] Rule 16a–9. This rule replaces proposed Rules 16b–2 and 16b–10.

[221] With the deletion of the separate Rule 16b–2 exemption for subscription rights, reproposed Rule 16b–9 has been renumbered Rule 16b–2.

[222] The same is true if the exercise price or amount of shares underlying a derivative security are changed as a result of a stock split or stock dividend.

[223] *See* Release No. 33–6879 (Oct. 22, 1990) [55 FR 46288].

[224] *See* Brief for the Securities and Exchange Commission, *Amicus Curiae*, *Mendell* v. *Gollust*, 909 F.2d 724 (2d Cir. 1990), *cert granted*, 59 U.S.L.W. 3460 (U.S. Jan. 7, 1991) (No. 90–659).

[225] Proposed Rule 16a–1(h), reproposed Rule 16a–1(g).

[226] *See Nomura Securities Co., Ltd.* (November 1, 1990). In *C.R.A. Realty* v. *Tri-South Investments*, 738 F.2d 73 (2d Cir. 1984), the court held that transactions in the underlying common stock, which was listed on a national securities exchange, were exempt under section 16(d) where the transactions were incidental to the maintenance of an over-the-counter market in debentures convertible into the common stock. In this case, the convertible debentures were traded over-the-counter while the underlying common stock was listed on a national securities exchange.

[227] During calendar year 1988, approximately 37 percent of reportable market transactions were filed more than three days late. For calendar year 1989 the delinquency rate was 36 percent. For the first ten months of calendar year 1990, the rate was 21 percent. These figures do not take into account required Forms 3 and 4 that never have been filed. *See also* section VIII.A of both the Proposing and Reproposing Releases.

[228] "Securities Enforcement Remedies and Penny Stock Reform Act of 1990," S. 647, Public Law 101–429.

[229] Registrants having a class of equity securities registered pursuant to section 12 of the Exchange Act, closed-end investment companies registered under the Investment Company Act, and holding companies registered under the Public Utility Holding Company Act of 1935 are subject to Item 405.

[230] Item 405(a). Such disclosure will be required in definitive proxy or information statements and will not create a separate obligation to file preliminary proxy or information statements. This disclosure is required in part III of Form 10–K, or may be incorporated by reference from the definitive proxy or information statement as required by Form 10–K.

transactions for each such insider. It is not necessary to disclose the details of the late reported transactions. Upon further consideration, the Commission has determined not to adopt the proposal to require registrants to disclose their procedures to assist insiders with their section 16(a) compliance, since such a requirement would not likely result in disclosure useful to shareholders.

Item 405 requires a registrant to disclose any known late filing or failure by an insider to file a report required by section 16(a).[231] As stated in the proposing releases, a registrant will not be liable for incorrect disclosures pursuant to Item 405 if the information reported is consistent with the information disclosed on the Forms 3, 4 and 5 or amendments sent to the registrant by the insider pursuant to Rule 16a-3(e). A registrant does not have an obligation under Item 405 to research or make inquiry regarding delinquent section 16(a) filings. Any form received by the registrant within three calendar days of the required filing date may be presumed to have been filed with the Commission on a timely basis.[232] An issuer may rely on a written representation from the insider that no Form 5 filing is required.[233] The Item has been revised to make it clear that, while the registrant must retain the written representation for two years, failure to do so does not violate the Commission rules, but simply removes the safe harbor protection for responsibility for incorrect disclosure.

If a particular transaction or holding has not been reported, the insider should amend the original filing or make a new filing to report the transaction.[234] The transaction reported in an untimely manner would be disclosed pursuant to Item 405 for the fiscal year in which the report was filed, even if the transaction related to and should have been reported in a prior fiscal year.[235]

Delinquent filings reported prior to the effective date of the new rules are not required to be disclosed pursuant to Item 405. Although not disclosed in the proxy statement, such delinquencies nonetheless are violations of section 16(a). On or after the effective date of the new rules, if a registrant receives a Form 3, 4, or 5 during the fiscal year reporting holdings or transactions that were required to have been reported at an earlier date, disclosure of delinquent filers under Item 405 would be required.

To assist the Commission and shareholders in identifying those registrants disclosing delinquent filings or transactions by insiders, the cover page of Form 10-K has been amended. Registrants will check the designated space on the cover page if disclosure of delinquent filers pursuant to Item 405 is not contained in the Form and will not be contained in the proxy or information statement incorporated by reference. If at the time of filing the Form 10-K the registrant does not yet know whether such disclosure will be contained in the proxy or information statement or the Form 10-K amendment containing the part III information, the box should not be checked. If the box is not checked, this will not be taken as a statement that there will be Item 405 disclosure of delinquent filers, but rather that the registrant may not have the requisite knowledge at the time the Form 10-K is filed.[236]

VII. Transition to New System

A. General Application

All of the rules adopted today, except for Rule 16b-3, Item 405 of Regulation S-K, and, in certain cases, Rule 16b-6(b) become effective May 1, 1991 ("effective date"). As discussed below, a phase-in period until September 1, 1992 is provided for employee benefit plans. Disclosure of delinquent filers under Item 405 will be required for registrants whose fiscal year ends on or after November 1, 1991. In general, the Rule 16b-6(b) exemption for specified option exercises is effective May 1, 1991, subject to a six month holding period requirement as discussed below.

There is no "grandfathering" of the former rules. Thus, no benefit plan or reporting person will be entitled to rely on the former rules once the new rules are phased in, except as to reporting and transactions conducted prior to the effective date of the new rules. Staff interpretations inconsistent with the new rules may not be relied upon for transactions occurring after the effective date of the rules and the related phase-in schedule.

The new rules affect the application of section 16 to various persons. Those subject to section 16 under the new rules will be required to file a Form 3 by the later of May 1, 1991, or 10 days after becoming an officer, director or ten percent holder, if they have not already filed one under the former rules. Transactions made prior to the effective date by persons becoming insiders solely as a result of the new rules would not be reportable, or subject to short-swing profit recovery. Persons ceasing to be insiders as a result of the new rules should file a Form 4 by May 1, 1991 (or, in the case of transactions conducted in April 1991, by May 10, 1991) disclosing all reportable transactions prior to the effective date that have not yet been reported.[237] Unlike other situations where insider status is terminated,[238] those persons ceasing to be insiders by operation of the rules adopted today will have no post-termination reporting obligations.

Transactions required to be reported under the new rules, but not under the former rules, would be reportable as of the effective date of the rules.[239] Thus, all transactions conducted on or after May 1, 1991, would be reportable unless exempt from reporting under the new rules.

Transactions occurring prior to the effective date that were exempt under the former rules would continue to be exempt from the short-swing profit recovery provisions of section 16(b), even if such transaction would not be exempt if made under the new rules. However, transactions not exempt from section 16(b) under the former rules that are conducted prior to the effective date would continue to be matchable with non-exempt transactions conducted after the effective date for short-swing profit recovery purposes.

The new Forms 3, 4, and 5 should be used for any filings after May 1, 1991.[240] Form 5 must be filed within 45 days after the registrant's fiscal year-end following the effective date of the new rules, even where the year-end occurs a short time after the effective date, to reflect (1) transactions exempt from section 16(b) that took place on or after May 1, 1991 not previously reported, and (2) holdings and transactions, whether or not before the effective date, that were required to be reported on a Form

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[231] A known failure to file would include, but not be limited to, a failure to file a Form 3, which is required of all insiders, and a failure to file a Form 5 in the absence of a written representation by the insider that no such filing is required.

[232] Item 405(b)(1).

[233] Item 405(b)(2).

[234] For a discussion of the insider's duty to review past transactions to ascertain whether all required reports have been filed, *see* section II.C.2, *supra*.

[235] *See* Note to Item 405(a).

[236] *See* the Instruction to Item 10 of Form 10-K.

[237] The insider should use the old forms to report these transactions and is encouraged to note on the Form 4 that this is expected to be the final filing. For a discussion of the insider's duty to disclose unreported transactions, *see* section II.C.2, *supra*.

[238] *See* section II.A.2, *supra*.

[239] For example, option grants pursuant to Rule 16b-3 and dividend reinvestment plan transactions were not required to be reported under the former rules, but must be reported on Form 5 under the new rules.

[240] Copies of new forms can be requested from the Commission's publications unit at (202) 272-7460 or (202) 272-7461.

3 or 4, but were not so reported by the due date of the Form 5.

B. Derivative Securities

Derivative securities not previously reported that were acquired under the former rules should be reported on the first form otherwise required to be filed after May 1. Holdings of derivative securities should be reported regardless of whether they are presently exercisable or vested.[241]

The new exemption for exercises on or after May 1 of options that are not out-of-the-money [242] will apply to options acquired under the former rules in the following manner. For options acquired under a Rule 16b–3 plan, the exemption is available if at least six months elapses between the acquisition of the option and the disposition of the underlying securities. For other derivative securities, the derivative security must be held six months from the date of acquisition and may not be exercised during this time. If the insider does not comply with the six month holding period requirement, the newly adopted exemption for the exercise would not be available.

Staff interpretation under the former rules will continue to apply to cash-only instruments (*e.g.*, phantom stock or performance units) awarded prior to May 1, 1991. On or after that date, an award of a cash-only instrument will not be deemed a derivative security under Rule 16a–1(c) if the instrument has a fixed date of redemption or its grant complies with the disinterested administration requirement of either former or adopted Rule 16b–3.[243]

C. Employee Benefit Plans

While the new reporting rules under section 16(a) concerning employee benefit plan transactions become effective on May 1, 1991 with the other rules adopted today, the substantive conditions of new Rule 16b–3 need not be phased in until September 1, 1992. Until this date, registrants may elect to rely on the section 16(b) exemptions contained in former Rules 16a–8(b), 16a–8(g)(3), and 16b–3, and the staff interpretations thereunder, not otherwise vacated by the staff, or they may conform their plans to new Rule 16b–3. The delayed phase-in period is to provide ample time for registrants to review the rule changes and amend their plans accordingly.[244] If registrants delay phase-in of new Rule 16b–3, they must continue to comply with the former rules.

During the phase-in period, registrants may not elect to comply with selected provisions of either the former or new rules. When a registrant chooses to adopt a plan that complies with the new rules or convert one of its plans to the new rules, all plans must be converted. This will provide consistency of application of the new rules to insiders of the registrant. The former rules may not continue to be relied on by registrants and insiders beyond September 1, 1992.

Transactions under Rule 16b–3 must be reported as provided by the new rules during the phase-in period. Many insiders participating in employee plans established in trust form, such as ERISA plans, relied upon former Rule 16a–8 for both a reporting and liability exemption for intra-trust transactions. Insiders may continue to rely upon the former rule during the phase-in period for purposes of section 16(b), but they will lose the reporting exemption on May 1, 1991 since only the substantive requirements for the exemption from section 16(b) are to be phased in. Therefore, these transactions, although exempt from section 16(b), would be required to be reported on Form 5 with other exempt transactions.

D. Item 405 Disclosure of Delinquent Reporting Persons

The Commission has determined to permit registrants to delay Item 405 disclosure if the fiscal year ends before November 1, 1991. These registrants would include the required disclosure for the partial year with the Item 405 disclosure for the next fiscal year. As a result, some registrants may have up to 18 months of disclosure under Item 405 in their 1992 filing. Late reports filed with the Commission before May 1, 1991 are not included in the issuer's Item 405 disclosure obligation. In contrast, late reports filed on or after that date are included and must be disclosed by the issuer, whether or not the transactions to which the reports relate occurred in an earlier fiscal year. Accordingly, insiders filing reports late or reporting late transactions on or after May 1, 1991 will be identified in the proxy statement, information statement, Form 10–K, or Form N–SAR pursuant to Item 405 of Regulation S–K, for fiscal years ending on or after November 1, 1991.

VIII. Charts Comparing Former and New Rules and Interpretations

A. The following chart lists the former rules and how they will change under the new regulatory scheme.

Former rule	New rule	Substantive changes
12h–2	None	Deleted because it related to transactions occurring prior to November 1, 1967.
16a–1(a)	16a–3(a)	Added a Form 5 requirement.
16a–1(b)	16a–3(b)	No change.
16a–1(c)	16a–3(c)	No change.
16a–1(d)	16a–2(a)	Only persons who become subject to section 16 by the issuer's registration under section 12 will have pre-insider transactions subject to section 16.
16a–1(e)	16a–2(b)	No change.
16a–2(a)	16a–1(a)(1)	For purposes of determining status as a ten percent holder, the rules use a 13(d) analysis. Exceptions are provided for customer accounts of institutions eligible to file a Schedule 13G.
16a–2(b)	None	Deleted since it is not relevant whether a derivative security is presently exercisable.
16a–3	16a–1(a)(4)	No change.
16a–4	16a–2(d)	After the 12-month grace period for fiduciaries an estate or trust additionally is subject to section 16 if the trustee is an insider with a pecuniary interest in the trust corpus. Paragraphs (c) and (d) have been deleted. Since the issuer is not subject to section 16, (c) is unnecessary. Paragraph (d) was a typographical error.
16a–5	16a–5	No change.

[241] Former Rule 16a–6(a) (17 CFR 240.16a–6(a)) provided that options were not reportable until they became exercisable. This exemption has been deleted.

[242] Rule 16b–6(b).

[243] The 16 month phase-in period for employee benefit plans discussed in section C below will apply to plans awarding cash-only derivative securities, except that a decision to use the adopted rule for cash-only derivative securities will not trigger a requirement to conform all other plans of the issuer.

[244] Plan amendments designed to conform with the rules adopted today are not deemed material and need not satisfy the shareholder approval requirement of Rule 16b–3. It should be noted that the staff of the Division of Corporation Finance intends to issue shortly an interpretive release regarding the shareholder approval requirement. Further, where a plan amendment is submitted for shareholder approval, whether or not such amendment is for the purpose of conforming a plan to the new rules, the proposal will no longer trigger a requirement to file the proxy or information statement in preliminary form.

Former rule	New rule	Substantive changes
16a-6	16a-1(c), 16a-4	Deleted and replaced by general rules regarding derivative securities.
16a-7	16a-3(d)	No change.
16a-8	16a-1(a)(2), 16a-1(a)(5), 16a-8.	1. Insider trustee with pecuniary interest and investment control subjects trust to section 16. 2. Beneficiary or settlor directed transactions are not attributed to trust. 3. Deletion of 20 percent trust exemption of former Rule 16a-8(b) (but see new Rule 16b-3(d)). 4. Trustee no longer may report in place of the beneficiaries. 5. Remainder interests are excluded only where remainder holders do not exercise investment control. 6. Deletion of exclusion for pension or retirement plans (but see new Rule 16b-3(d)(2)) and business trusts with over 25 beneficiaries. 7. Definition of "immediate family" expanded to include grandchildren, grandparents, siblings, in-laws, and adoptive relationships. Moved to Rule 16a-1(e).
16a-9	16a-6, 16b-5	Bona fide gifts exempt from section 16(b), as well as transfers pursuant to the laws of descent.
16a-10	16a-10	No change.
16a-11	16b-2	Exemption from section 16(b) only.
16b-1	16b-1(a)	Expanded exemption for investment companies transactions exempted by rule under section 17(a) of the Investment Company Act.
16b-2	16a-7	Distributions and related transactions are not reported and equal participation requirement deleted.
16b-3	16b-3	1. The disinterested administration requirement has been modified by requiring a committee of two or more disinterested directors to make grants and awards. The alternative to disinterested administration for automatic plans has been strengthened to permit no discretion by interested persons. 2. Deletion of paragraph (c) plan limitations. 3. Addition of transferability restriction exception for qualified domestic relations. 4. Deletion of the definition of "exercise of an option." 5. Six-month holding period for many transactions. 6. Specific exemption for participant-directed transactions. 7. Exemption for distributions from a plan.
16b-4	16b-1(b)	No change.
16b-5	16b-4	No change.
16b-6	None	
16b-7	16b-7	No change.
16b-8	16b-8	No change.
16b-9	16b-6(b)	Conversions exempt from section 16(b) without need to satisfy the conditions of Rule 16b-9.
16b-10	16b-1(c)	No change.
16b-11	16a-9	Exemption for acquisition rather than disposition of subscription rights and other pro rata rights. Exemption from reporting as well. Exemption for stock splits and dividends added.
16c-1	16c-1	No change.
16c-2	16c-2	Deletion of the equal participation requirement.
16c-3	16c-3	No change.
16e-1	16e-1	No change.
30f-1 (investment company act).	30f-1	No change.

B.The following chart lists the new rules, the former rule from which the new rule is derived, and a summary of the new rule's content.

New rule	Former rule	Summary of new rule
16a-1(a)	16a-2, 16a-3 16a-8(f), (g).	Beneficial ownership, Two tier analysis of ownership. Section 13(d) determines 10% holder. For other purposes, pecuniary interest determines ownership. Indirect pecuniary interests and exclusions from beneficial ownership identified.
16a-1(b)	None	Definition of call equivalent position as one that benefits from an increase in value of underlying security.
16a-1(c)	None	Definition of derivative securities. Excludes pledges, pro rata merger rights, specified cash-only securities (phantom stock), broad-based products, and interests in employee benefit plans.
16a-1(d)	None	Definition of equity security of such issuer. Includes any right related to equity security of the issuer.
16a-1(e)	16a-8(e)	Definition of immediate family. 16a-1(f) None Definition of officer to include policy-making executives and principal financial and accounting officers of the issuer.
16a-1(g)	None	Definition of portfolio security.
16a-1(h)	None	Definition of put equivalent position as one that benefits from a decrease in value of underlying security.
16a-2(a)	16a-1(d)	Transactions by officers and directors before issuer registers under section 12 are subject to section 16.
16a-2(b)	16a-1(e)	Transactions by officers and directors are subject to section 16 after termination of insider status.
16a-2(c)	None	Transaction creating status as a ten percent holder is exempt from section 16.
16a-2(d)	16a-4	Transactions by certain fiduciaries exempt for 12 months.
16a-3(a)	16a-1(a)	General filing requirement.
16a-3(b)	16a-1(b)	Additional Form 3 is not required under certain circumstances.
16a-3(c)	16a-1(c)	Copies of forms filed with one exchange.
16a-3(d)	16a-7	One filing satisfies Exchange Act, ICA, and PUHCA.
16a-3(e)	None	Copies of all filings must be delivered to issuer.
16a-3(f)	None	Form 5 must be filed within 45 days after end of issuer's fiscal year unless no transactions conducted and reporting is current.
16a-3(g)	None	Specifies the transactions that may be reported on Form 5.
16a-3(h)	None	Date on which a Form 3, 4, or 5 is deemed filed.
16a-4	16a-2(b)	Derivative and underlying securities are the same class of securities. Specifies reporting of exercises and conversions.
16a-5	16a-5	Exemption for odd-lot dealers.
16a-6	16a-9(a)	Deferred reporting for small purchases. Separate exemption for gifts contained in Rule 16b-5.
16a-7	16b-2	Distribution related transactions are not reported.
16a-8	16a-8	Trusts.
16a-9	16b-11	Exemption for stock splits, dividends, and grants of pro rata rights.
16a-10	16a-10	An exemption from section 16(a) serves as an exemption from section 16(b).
16b-1(a)	16b-1	Investment companies.

New rule	Former rule	Summary of new rule
16b-1(b)	16b-4	Public utility holding companies.
16b-1(c)	16b-10	Railroad mergers.
16b-2	16a-11	Dividend reinvestment plans.
16b-3	16b-3	Employee benefit plans.
16b-3(a)	16b-3(d)(1)	General plan requirements for exemption.
16b-3(b)	16b-3(a)	Shareholder approval requirement.
16b-3(c)	16b-3(b), 16b-3(d)(3).	Grant and award transactions. Additional conditions for exemption.
16b-(d)	None	Participant-directed transactions. Additional conditions for exemption.
16b-3(e)	16b-3(e)	SAR cash settlement conditions for exemption.
16b-3(f)	16b-3	Exemption for cancellations, expiration, surrenders and qualified domestic relations orders.
16b-3(g)	None	Exemption for plan distributions.
16b-4	16b-5	Exemptions for redemptions of securities of a holding company in return for distribution of securities held.
16b-5	16a-9(b)	Exemption for bona-fide gifts and transactions resulting from the laws of descent and distribution.
16b-6	None	Derivative securities.
16b-6(a)	None	Transactions in derivative securities equivalent to transactions in the underlying securities.
16b-6(b)	16b-9	Exemption for exercises and conversions.
16b-6(c)	None	Formula for determining short-swing profit.
16b-6(d)	None	Expirations.
16b-7	16b-7	Non-substantive mergers or consolidations.
16b-8	16b-8	Voting trusts.
16c-1	16c-1	Exemption for broker transactions.
16c-2	16c-2	Exemption for when-issued securities dispositions.
16c-4	None	Exemption for "net long" derivative security position.
16e-1	16e-1	Arbitrage transactions.
30f-1	30f-1	Applicability of section 16 to investment companies.
Item 405 of Regulation S-K.	None	Requirement to disclose delinquent reporting persons.

C. The following chart notes the effect of the new rules upon the Division of Corporation Finance's interpretations under Release 34-18114 (Sept. 24, 1981) (46 FR 48147). Listed below are the questions where the answers have been modified substantively by the new rules. Answers not listed here remain the same under the new rules.

Question No.	Effect of the new rules
1(a)	These persons are officers if they perform policymaking functions that are not insignificant.
1(b)	If officers of a subsidiary have a policymaking function for the issuer they would be considered officers of the issuer.
5	There is now a two-tier analysis of beneficial ownership under Rule 16a-1(a); one for purposes of determining whether a person is a ten percent holder subject to section 16 and the other, involving pecuniary interests, which is otherwise applicable to transactions and securities reported. Mr. Smith would report the foundation's holdings only if he had a pecuniary interest (which is unlikely in this case). In addition, if Mr. Smith shared or exercised investment control and he or a member of his immediate family had a pecuniary interest, pursuant to Rule 16a-8(a)(1)(ii) the charitable trust would itself become an insider because Mr. Smith is an insider trustee.
9	The analysis is now the same for public and nonpublic companies pursuant to the new safe harbor provided in Rule 16a-1(a)(2)(iii).
10	Footnote 25 would change. If the person with the power to revoke is the settlor, whoever has investment control reports. Rule 16a-8(b)(4).
17	Stock dividends are no longer reportable events, pursuant to Rule 16a-9.
22	Rule 16a-1(c)(3) addresses cash-only SARs. Where the timing of exercise of a cash-only SAR is within the control of the holder and the award of the SAR does not comply with Rule 16b-3, the SAR may be a derivative security subject to section 16. The grant of an SAR not exempt under Rule 16a-1(c)(3) is deemed a purchase. The exercise of the SAR for stock is treated as a stock option. The receipt of cash is treated as a sale.
23	Last sentence is true no longer. A holder of convertible securities would not become a ten percent holder unless he or she would beneficially own over ten percent of the underlying equity securities if converted.
33	Only persons who are already officers or directors and become subject to section 16 solely as a result of the issuer's registration of equity securities under section 12 are required to report transactions that may have occurred prior to becoming subject to section 16. (See Question 34.)
37-40	To determine what constitutes 10% of a class of equity securities, the rules under section 13(d) would apply. A class of section 12 voting preferred stock is deemed a separate class of equity securities.
43	Although former Rule 16a-4(c) has been deleted, transactions by the issuer are not subject to section 16 since the issuer is the beneficiary of the short-swing profit provision. Thus, no exemption is necessary.
47	The SAR and option are reportable, even if not presently exercisable. Transactions exempted under Rule 16b-3 are reportable on Form 5. Of course, if a derivative security is not exercisable within 60 days, the securities underlying such derivative security are not beneficially owned for purposes of determining 10% beneficial owner status under Rules 16a-1(a)(1) and 13d-3.
48	The acquisition of the right is reported at grant.
49	The answer remains the same except that the transactions could be reported on Form 5, if exempt under Rule 16b-3.
52	The exercise of the option would be reported no later than the first Form 4 or next Form 5 required to be filed.
53	Answer remains the same, except an option awarded under Rule 16b-3 would be reported on Form 5, rather than not being reported.
54	Answer remains the same although former Rule 16a-6 was deleted. Standardized options are required to be reported under Rule 16a-4.
55	The acquisition of the performance units must be reported unless it is not deemed a derivative security because of its cash-only nature under Rule 16a-1(c)(3).
57	Answer remains the same although definition has changed, by adding persons such as grandparents and grandchildren. *See* Rule 16a-1(e).
58	The officer has a pecuniary interest in the trust.
59	The power to remove the trustee without the approval of the beneficiaries is not the power to revoke the trust, so the settlor is not the beneficial owner.
60-61	The 20 percent exemption of former Rule16a-8(b) has been deleted. However, intra-plan transactions may be exempt under Rule 16b-3(d).
62-63	Distributions of securities from any benefit plans are exempt pursuant to Rule 16b-3(g).
64	Since a distribution is exempt from section 16(b), it is reportable on Form 5.
65	If the insider trustee, or a member of the trustee's immediate family, has a pecuniary interest in the trust corpus, the trust becomes subject to section 16. *See* Rule 16a-8(a)(1)(ii).

Question No.	Effect of the new rules
66–68	Former Rule 16a–8(d) has been deleted. Each beneficiary must report individually his or her beneficial ownership, subject to Rule 16a–8(b).
69–71	Former Rule 16a–8(g)(3) has been deleted in favor of Rule 16b–3(d). The answer remains the same although the analysis changes.
72	Former Rule 16a–8(g)(4) has been deleted. Business trusts are treated as corporations.
73, 75	Substitute $10,000 for $3,000. Gift transactions are exempted separately.
74	Bona fide gifts are exempt under Rule 16b–5.
77	DRIP acquisitions are exempt pursuant to Rule 16b–2 and are reported on Form 5.
84	The "equal participation requirement" of the Rule has been deleted.
86	There are three provisions, rather than one, in Rule 16b–3 that exempt specified dispositions. See Rule 16b–3(f).
87	Vacated. The acquisition of underlying securities upon the exercise of an option generally is exempt under Rule 16b–6(b).
88 (a)	Performance share plans are treated as stock appreciation rights. If they satisfy the conditions of Rule 16a–1(c)(3), they are not deemed derivative securities.
	(b) The SAR is treated as a stock option and the exercise is exempt under Rule 16b–6(b).
	(c) The "options" received in this plan (a section 423 plan) are not derivative securities because the acquisition price is floating.
	(d) Restricted stock is not a derivative security because it is not exercisable or convertible into other securities. Vesting periods do not change the analysis.
	(e) If the exercise price is fixed, such as par value, the right is a derivative security. The exercise of the right is exempt under Rule 16b–6(b). If the exercise price is floating, such as ten percent of market value, the right is not treated as a derivative security until the price is determined, usually at exercise.
89	The right to defer receipt of cash or securities does not create a derivative security where the holder does not have a choice between cash or securities. Even though receipt of the securities are deferred, they are deemed acquired under section 16 when they are awarded.
90	Situations (a) and (b) do not create a derivative security. Situation (c) is a transaction subject to section 16(b), unless exempt under Rule 16b–3(d)(1)(ii).
91	Option exercises are exempt. The shares received from the exercise may be sold, but are matchable with purchases made within six months of the sale.
92	The interpretation was reversed by staff letters to *Nixon, Hargrave, Devans & Doyle* (Jan. 7, 1982) and *Debevoise & Plimpton* (Jan. 7, 1982). The interpretations set forth in the cited letters would not be changed.
103	The illustrated plan does not satisfy the disinterested administration requirement; however, it may be exempt under Rule 16b–3(d).
104	The transaction must comply with Rule 16b–3(d) to be exempt since plan participants may exercise investment discretion.
106(c)	If the grant of options is subject to discretion of a third party, the recipient is not disinterested. Illustration (2) changes because disinterested status is contingent on participation, rather than eligibility to participate.
107	Either the plan must be administered by a committee where all committee members are disinterested or awards are made automatically under a formula, or a combination of both.
109	Former Rule 16b–3(c) has been deleted.
110	A one person plan is eligible for exemption.
112	Each example meets the requirement of Rule 16b–3(a)(1).
113	Options may be transferred pursuant to a qualified domestic relations order.
114	Exercises of SARs for stock are exempt pursuant to Rule 16b–6(b).
115(e)	A cancellation of stock options for cash does not necessarily equate to a SAR. A cancellation for cash generally equates to a sale of the security cancelled. If the option has no cash component and one is added it is deemed a grant of an SAR, requiring a new six month holding period for exemption.
118	The letters permitting "tacking" of the six month period, and thereby modifying this interpretation (and the interpretation under Q. 115 above), should not be relied upon for future transactions. *See, e.g., Gannett Co., Inc.* (Nov. 3, 1989); *Firstar Corp.* (June 23, 1989).
122	Only two disinterested administrators are required under the new rules.
123(b)	The rule is not satisfied because insiders effectively can choose between cash and stock by determining the date of exercise.
129	Limited rights with a cash component are treated the same as SARs.
130	Securities with a cash component may be cash settled outside of the window period in connection with a change of control situation if the following conditions are met: (1) The ability to cash settle the SAR in such situations is provided in the plan; (2) the SAR so settled must be held (and subject to market price fluctuations) at least six months from the date of grant of the right to cash settle; and (3) the change in control is subject to shareholder approval by non-insider shareholders. The third condition insures that the change in control is outside of the control of the insiders. For tender offers, the change of control is deemed to occur at consummation, rather than at announcement. Letters inconsistent with this interpretation may not be relied upon for future transactions. *See, e.g., Lyphomed, Inc.* (Nov. 29, 1989); *Hilton Hotels Corp.* (Nov. 21, 1989); *West Point-Peppérell, Inc.* (avail. Oct. 28, 1987).
135–136	Exercises are exempt generally pursuant to Rule 16b–6(b).
137–141	Rule 16b–6(c) has been deleted as no longer necessary.
146–149	Conversions are exempt pursuant to Rule 16b–6.
151	Grants of subscription rights are exempt pursuant to Rule 16a–9.

IX. Cost-Benefit Analysis

It appears to the Commission that, while some additional costs to issuers and insiders may result from the comprehensive restructuring of the rules under section 16, such costs will be outweighed by the savings to insiders with respect to deferred reporting for exempt transactions and increased compliance with section 16(a) as a result of Item 405, which will benefit issuers, shareholders, and investors.

X. Availability of Final Regulatory Flexibility Analysis

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 604, the Commission has prepared a Final Regulatory Flexibility Analysis with regard to proposed amendments to Rules 16a–1, 16a–2, 16a–3, 16a–4, 16a–5, 16a–6, 16a–7, 16a–8, 16a–9, 16a–10, 16a–11, 16b–1, 16b–2, 16b–3, 16b–4, 16b–5, 16b–6, 16b–7, 16b–8, 16b–9, 16b–10, 16b–11, 16c–1, 16c–2, 16c–3, Schedule 14A, Forms 10–K, 3, and 4, the addition of a new Form 5, Rule 16c–4, and the deletion of Rule 12h–2 under the Exchange Act, as well as the addition of a new Item 405 to Regulation S–K. Also a subject of this analysis is a proposed amendment to Rule 30f–1 and Form N–SAR under the Investment Company Act of 1940. A corresponding Initial Regulatory Flexibility Analysis was prepared and a summary of that analysis was included in the proposing release. A summary of the revised corresponding Initial Regulatory Flexibility Analysis was included in the reproposing release. Members of the public who wish to obtain a copy of the Final Regulatory Flexibility Analysis should contact Brian J. Lane or Richard P. Konrath, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

XI. Request for Comment

Any interested person wishing to submit written comments on the exit box requirement on Form 4 and Form 5 are requested to do so by March 31,

1991. Comments on this inquiry will be considered by the Commission in complying with its responsibilities under section 23(a) of the Exchange Act.[245]

XII. Statutory Basis

The amendments to the proxy rules, Form 10–K, Regulation S–K, and the section 16 rules are being adopted by the Commission pursuant to Exchange Act sections 3(a)(11),[246] 3(a)(12),[247] 3(b),[248] 9(b),[249] 10(a),[250] 12(h),[251] 13(a),[252] 14,[253] 16, and 23(a). The amendments to Form N–SAR and Rule 30f–1 are being adopted pursuant to Investment Company Act sections 30 [254] and 38.[255] As the section 16 rules relate to the Investment Company Act and the Public Utility Holding Company Act they also are adopted pursuant to Investment Company Act sections 30 and 38, and Public Utility Holding Company Act Sections 17 [256] and 20,[257] respectively.

List of Subjects in 17 CFR Parts 229, 240, 249, 270, and 274

Reporting, recordkeeping requirements, and securities.

XIII. Text of New Rules

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

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

1. The authority citation for part 229 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78p, 78w, 80a–8, 80a–29, 80a–30 and 80a–37, unless otherwise noted.

2. New § 229.405 is added to subpart 229.400 to read as follows:

§ 229.405 (Item 405) Compliance with section 16(a) of the Exchange Act.

Every registrant having a class of equity securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*), every closed-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.), and every holding company registered pursuant to the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq.) shall:

(a) Based solely upon a review of Forms 3 (§ 249.103) and 4 (§ 249.104) and amendments thereto furnished to the registrant pursuant to § 240.16a–3(e) during its most recent fiscal year and Forms 5 and amendments thereto (§ 249.105) furnished to the registrant with respect to its most recent fiscal year, and any written representation referred to in paragraph (b)(2)(i) of this Item.

(1) Identify each person who, at any time during the fiscal year, was a director, officer, beneficial owner of more than ten percent of any class of equity securities of the registrant registered pursuant to section 12 of the Exchange Act, or any other person subject to section 16 of the Exchange Act with respect to the registrant because of the requirements of section 30 of the Investment Company Act or section 17 of the Public Utility Holding Company Act ("reporting person") that failed to file on a timely basis, as disclosed in the above Forms, reports required by section 16(a) of the Exchange Act during the most recent fiscal year or prior fiscal years.

(2) For each such person, set forth the number of late reports, the number of transactions that were not reported on a timely basis, and any known failure to file a required Form.

Note: The disclosure requirement is based on a review of the forms submitted to the registrant during and with respect to its most recent fiscal year, as specified above. Accordingly, a failure to file timely need only be disclosed once. For example, if in the most recently concluded fiscal year a reporting person filed a Form 4 disclosing a transaction that took place in the prior fiscal year, and should have been reported in that year, the registrant should disclose that late filing and transaction pursuant to this Item 405 with respect to the most recently concluded fiscal year, but not in material filed with respect to subsequent years.

(b) With respect to the disclosure required by paragraph (a) of this Item:

(1) A form received by the registrant within three calendar days of the required filing date may be presumed to have been filed with the Commission by the required filing date.

(2) If the registrant (i) receives a written representation from the reporting person that no Form 5 is required; and (ii) maintains the representation for two years, making a copy available to the Commission or its staff upon request, the registrant need not identify such reporting person pursuant to paragraph (a) of this Item as having failed to file a Form 5 with respect to that fiscal year.

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

3. The authority citation for Part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77s, 78c, 78d, 78i, 78j, 78l, 78m, 78n, 78o, 78p, 78s, 78w, 78x, 79q, 79t, 80a–29, 80a–37, unless otherwise noted.

4. The authority citations following §§ 240.16a–1 through 240.16a–10 are removed.

5. By amending § 240.3b–7 by revising the following phrases in the fifth and sixth lines to read as follows:

§ 240.3b–7 Definition of "executive officer."

* * * principal business unit, division or function (such as sales, administration, or finance), * * *

§ 240.12h–2 [Removed]

6. Section 240.12h–2 is removed.

7. By revising Item 7(b) of § 240.14a–101 to read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 7. Directors and executive officers.

* * * * *

(b) The information required by Items 401, 404 (a) and (c), and 405 of Regulation S–K (§ 229.401, § 229.404 and § 229.405 of this chapter).

* * * * *

8. Sections 240.16a–1 through 16a–10 are revised, and the undesignated center heading preceding them is revised, as follows, and § 240.16a–11 is removed:

Reports of Directors, Officers, and Principal Shareholders

§ 240.16a–1 Definition of Terms.

Terms defined in this rule shall apply solely to section 16 of the Act and the rules thereunder. These terms shall not be limited to section 16(a) of the Act but also shall apply to all other subsections under section 16 of the Act.

(a) The term *beneficial owner* shall have the following applications:

(1) Solely for purposes of determining whether a person is a beneficial owner

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[245] 15 U.S.C. 78w(a) (1988).
[246] 15 U.S.C. 78c(a)(11) (1988).
[247] 15 U.S.C. 78c(a)(12) (1988).
[248] 15 U.S.C. 78c(b) (1988).
[249] 15 U.S.C. 78i(b) (1988).
[250] 15 U.S.C. 78j(a) (1988).
[251] 15 U.S.C. 78l(h) (1988).
[252] 15 U.S.C. 78m(a) (1988).
[253] 15 U.S.C. 78n (1988).
[254] 15 U.S.C. 80a–29 (1988).
[255] 15 U.S.C. 80a–37 (1988).
[256] 15 U.S.C. 79q (1988).
[257] 15 U.S.C. 79t (1988).

of more than ten percent of any class of equity securities registered pursuant to section 12 of the Act, the term "beneficial owner" shall mean any person who is deemed a beneficial owner pursuant to section 13(d) of the Act and the rules thereunder; *provided, however*, that the following institutions or persons shall not be deemed the beneficial owner of securities of such class held for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business (or in the case of an employee benefit plan specified in paragraph (a)(1)(vi) of this section, of securities of such class allocated to plan participants where participants have voting power) as long as such shares are acquired by such institutions or persons without the purpose or effect of changing or influencing control of the issuer or engaging in any arrangement subject to Rule 13d–3(b) (§ 240.13d–3(b)):

(i) A broker or dealer registered under Section 15 of the Act;

(ii) A bank as defined in section 3(a)(6) of the Act;

(iii) An insurance company as defined in section 3(a)(19) of the Act;

(iv) An investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8);

(v) An investment adviser registered under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3);

(vi) An employee benefit plan or a pension fund which is subject to the provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1001 *et seq.* ("Employee Retirement Income Security Act"), or an endowment fund;

(vii) A parent holding company, provided the aggregate amount held directly by the parent, and directly and indirectly by its subsidiaries that are not persons specified in § 240.16a–1(a)(1) (i) through (vi), does not exceed one percent of the securities of the subject class; and

(viii) A group, provided that all the members are persons specified in § 240.16a–1(a)(1) (i) through (vii).

Note to paragraph (a). Pursuant to this section, a person deemed a beneficial owner of more than ten percent of any class of equity securities registered under section 12 of the Act would file a Form 3 (§ 249.103), but the securities holdings disclosed on Form 3, and changes in beneficial ownership reported on subsequent Forms 4 (§ 249.104) or 5 (§ 249.105), would be determined by the definition of "beneficial owner" in paragraph (a)(2) of this section.

(2) Other than for purposes of determining whether a person is a beneficial owner of more than ten percent of any class of equity securities registered under Section 12 of the Act, the term *beneficial owner* shall mean any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares a direct or indirect pecuniary interest in the equity securities, subject to the following:

(i) The term *pecuniary interest* in any class of equity securities shall mean the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the subject securities.

(ii) The term *indirect pecuniary interest* in any class of equity securities shall include, but not be limited to:

(A) Securities held by members of a person's immediate family sharing the same household;

(B) A general partner's proportionate interest in the portfolio securities held by a general or limited partnership. The general partner's proportionate interest, as evidenced by the partnership agreement in effect at the time of the transaction and the partnership's most recent financial statements, shall be the greater of:

(1) The general partner's share of the partnership's profits, including profits attributed to any limited partnership interests held by the general partner and any other interests in profits that arise from the purchase and sale of the partnership's portfolio securities; or

(2) The general partner's share of the partnership capital account, including the share attributable to any limited partnership interest held by the general partner.

(C) A performance-related fee, other than an asset-based fee, received by any broker, dealer, bank, insurance company, investment company, investment adviser, investment manager, trustee or person or entity performing a similar function; *provided, however*, that no pecuniary interest shall be present where:

(1) The performance-related fee, regardless of when payable, is calculated based upon net capital gains and/or net capital appreciation generated from the portfolio or from the fiduciary's overall performance over a period of one year or more; and

(2) Equity securities of the issuer do not account for more than ten percent of the market value of the portfolio. A right to a nonperformance-related fee alone shall not represent a pecuniary interest in the securities;

(D) A person's right to dividends that is separated or separable from the underlying securities. Otherwise, a right to dividends alone shall not represent a pecuniary interest in the securities;

(E) A person's interest in securities held by a trust, as specified in § 240.16a–8(b); and

(F) A person's right to acquire equity securities through the exercise or conversion of any derivative security, whether or not presently exercisable.

(iii) A shareholder shall not be deemed to have a pecuniary interest in the portfolio securities held by a corporation or similar entity in which the person owns securities if the shareholder is not a controlling shareholder of the entity and does not have or share investment control over the entity's portfolio.

(3) Where more than one person subject to section 16 is deemed to be a beneficial owner of the same equity securities, all such persons must report as beneficial owners of the securities. In such cases, the amount of short-swing profit recoverable shall not be increased above the amount recoverable if there were only one beneficial owner.

(4) Any person filing a statement pursuant to section 16(a) of the Act may state that the filing shall not be deemed an admission that such person is, for purposes of section 16 of the Act or otherwise, the beneficial owner of any equity securities covered by the statement.

(5) The following interests are deemed not to confer beneficial ownership for purposes of section 16 of the Act:

(i) Interests in portfolio securities held by any holding company registered under the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*);

(ii) Interests in portfolio securities held by any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); and

(iii) Interests in securities comprising part of a broad-based, publicly traded market basket or index of stocks, approved for trading by the appropriate federal governmental authority.

(b) The term *call equivalent position* shall mean a derivative security position that increases in value as the value of the underlying equity increases, including, but not limited to, a long convertible security, a long call option, and a short put option position.

(c) The term *derivative securities* shall 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) Securities that may be redeemed or exercised only for cash and do not permit the receipt of equity securities in lieu of cash, if the securities either:

(i) Are awarded pursuant to an employee benefit plan satisfying the provisions of § 240.16b–3(c); or

(ii) May be redeemed or exercised only upon a fixed date or dates at least six months after award, or upon death, retirement, disability or termination of employment;

(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.

(d) The term *equity security of such issuer* shall mean any equity security or derivative security relating to an issuer, whether or not issued by that issuer.

(e) The term *immediate family* shall mean 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.

(f) The term *officer* shall mean an issuer's president, principal financial officer, or 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.

Note: "Policy-making function" is not intended to include policy-making functions that are not significant. If pursuant to Item 401(b) of Regulation S–K (§ 229.401(b)) the issuer identifies a person as an "executive officer," it is presumed that the Board of Directors has made that judgment and that the persons so identified are the officers for purposes of Section 16 of the Act, as are such other persons enumerated in this paragraph (f) but not in Item 401(b).

(g) The term *portfolio securities* shall mean all securities owned by an entity, other than securities issued by the entity.

(h) The term *put equivalent position* shall mean a derivative security position that increases in value as the value of the underlying equity decreases, including, but not limited to, a long put option and a short call option position.

§ 240.16a–2 Persons and transactions subject to section 16.

Any person who is the beneficial owner, directly or indirectly, of more than ten percent of any class of equity securities ("ten percent beneficial owner") registered pursuant to section 12 of the Act, any director or officer of the issuer of such securities, and any person specified in section 17(a) of the Public Utility Holding Company Act of 1935 or section 30(f) of the Investment Company Act of 1940, including any person specified in § 240.16a–8, shall be subject to the provisions of section 16 of the Act. The rules under section 16 of the Act apply to any class of equity securities of an issuer whether or not registered under section 12 of the Act. The rules under section 16 of the Act also apply to non-equity securities as provided by the Public Utility Holding Company Act of 1935 and the Investment Company Act of 1940. With respect to transactions by persons subject to section 16 of the Act:

(a) A transaction(s) carried out by a director or officer in the six months prior to the director or officer becoming subject to section 16 of the Act shall be subject to section 16 of the Act and reported on the first required Form 4 only if the transaction(s) occurred within six months of the transaction giving rise to the Form 4 filing obligation and the director or officer became subject to section 16 of the Act solely as a result of the issuer registering a class of equity securities pursuant to section 12 of the Act.

(b) A transaction(s) following the cessation of director or officer status shall be subject to section 16 of the Act only if executed within six months of a transaction that occurred while that person was a director or officer.

(c) The transaction that results in a person becoming a ten percent beneficial owner is not subject to section 16 of the Act unless the person otherwise is subject to section 16 of the Act. A ten percent beneficial owner not otherwise subject to section 16 of the Act must report only those transactions conducted while the beneficial owner of more than ten percent of a class of equity securities of the issuer registered pursuant to section 12 of the Act.

(d)(1) Transactions by a person or entity shall be exempt from the provisions of section 16 of the Act for the 12 months following appointment and qualification, to the extent such person or entity is acting as:

(i) Executor or administrator of the estate of a decedent;

(ii) Guardian or member of a committee for an incompetent;

(iii) Receiver, trustee in bankruptcy, assignee for the benefit of creditors, conservator, liquidating agent, or other similar person duly authorized by law to administer the estate or assets of another person; or

(iv) Fiduciary in a similar capacity.

(2) Transactions by such person or entity acting in a capacity specified in paragraph (d)(1) of this section after the period specified in that paragraph shall be subject to section 16 of the Act only where the estate, trust or other entity is a beneficial owner of more than ten percent of any class of equity security registered pursuant to section 12 of the Act, or the fiduciary is a person described in § 240.16a–8(a)(1)(ii).

§ 240.16a–3 Reporting transactions and holdings.

(a) Initial statements of beneficial ownership of equity securities required by section 16(a) of the Act shall be filed on Form 3. Statements of changes in beneficial ownership required by that section shall be filed on Form 4. Annual statements shall be filed on Form 5. At the election of the reporting person, any transaction required to be reported on Form 5 may be reported on an earlier filed Form 4. All such statements shall be prepared and filed in accordance with the requirements of the applicable form.

(b) A person filing statements pursuant to section 16(a) of the Act with respect to any class of equity securities registered pursuant to section 12 of the Act need not file an additional statement on Form 3:

(1) When an additional class of equity securities of the same issuer becomes registered pursuant to section 12 of the Act; or

(2) When such person assumes a different or an additional relationship to the same issuer (for example, when an officer becomes a director).

(c) Any issuer that has equity securities listed on more than one

national securities exchange may designate one exchange as the only exchange with which reports pursuant to section 16(a) of the Act need be filed. Such designation shall be made in writing and shall be filed with the Commission and with each national securities exchange on which any equity security of the issuer is listed at the time of such election. The reporting person's obligation to file reports with each national securities exchange on which any equity security of the issuer is listed shall be satisfied by filing with the exchange so designated.

(d) Any person required to file a statement with respect to securities of a single issuer under both section 16(a) of the Act and either section 17(a) of the Public Utility Holding Company Act of 1935 or section 30(f) of the Investment Company Act of 1940 may file a single statement containing the required information, which will be deemed to be filed under both Acts.

(e) Any person required to file a statement under section 16(a) of the Act shall, not later than the time the statement is transmitted for filing with the Commission, send or deliver a duplicate to the person designated by the issuer to receive such statements, or, in the absence of such a designation, to the issuer's corporate secretary or person performing equivalent functions.

(f)(1) A Form 5 shall be filed by every person who at any time during the issuer's fiscal year was subject to section 16 of the Act with respect to such issuer, except as provided in paragraph (f)(2) of this section. The Form shall be filed within 45 days after the issuer's fiscal year end, and shall disclose the following holdings and transactions not reported previously on Forms 3, 4 or 5:

(i) All transactions during the most recent fiscal year that were either exempt from section 16(b) of the Act or constituted small acquisitions pursuant to § 240.16a–6(a);

(ii) All holdings and transactions that should have been reported during the most recent fiscal year, but were not; and

(iii) With respect to the first Form 5 requirement for a reporting person, all holdings and transactions that should have been reported in each of the issuer's last two fiscal years but were not, based on the reporting person's reasonable belief in good faith in the completeness and accuracy of the information.

(2) Notwithstanding the above, no Form 5 shall be required where all transactions otherwise required to be reported on the Form 5 have been reported before the due date of the Form 5.

Note: Persons no longer subject to section 16 of the Act, but who were subject to the Section at any time during the issuer's fiscal year, must file a Form 5 unless paragraph (f)(2) is satisfied. *See also* § 240.16a–2(b) regarding the reporting obligations of persons ceasing to be officers or directors.

(g) All transactions shall be reported on Form 4, except as follows:

(1) Small acquisitions as specified in § 240.16a–6(a) shall be reported in the manner specified by that section;

(2) Exercises and conversions of derivative securities exempted pursuant to § 240.16b–6(b) shall be reported in the manner specified by § 240.16a–4; and

(3) Transactions that are exempted by operation of any rule pursuant to section 16(b) of the Act, other than exercises and conversions of derivative securities exempted pursuant to § 240.16b–6(b), shall be reported on either Form 5, or, at the option of the reporting person, Form 4, but in no event later than the due date of the Form 5 with respect to the fiscal year in which the transaction occurred.

(h) The date of filing with the Commission shall be the date of receipt by the Commission; *Provided, however,* That a Form 3, 4, or 5 shall be deemed to have been timely filed if the filing person establishes that the Form had been transmitted timely to a third party company or governmental entity providing delivery services in the ordinary course of business, which guaranteed delivery of the filing to the Commission no later than the required filing date.

§ 240.16a–4 Derivative securities.

(a) For purposes of section 16 of the Act, both derivative securities and the underlying securities to which they relate shall be deemed to be the same class of equity securities, *except that* the acquisition or disposition of any derivative security shall be separately reported.

(b) The exercise or conversion of a call equivalent position shall be reported no later than the next Form 4 otherwise required or the Form 5 filed with respect to the fiscal year in which the transaction occurred, whichever is earlier, and shall be treated for reporting purposes as:

(1) A purchase of the underlying security; and

(2) A closing of the derivative security position.

(c) The exercise of a put equivalent position shall be reported no later than the next Form 4 otherwise required or the Form 5 filed with respect to the fiscal year in which the transaction occurred, whichever is earlier, and shall be treated for reporting purposes as:

(1) A sale of the underlying security; and

(2) A closing of the derivative security position.

(d) If the next Form 4 otherwise required or the Form 5 is due within fewer than ten days after an exercise or conversion, the exercise or conversion may be reported on the next required report.

Note: Under § 240.16b–6(b), a purchase or sale resulting from an exercise or conversion of a derivative security generally is exempt from section 16(b) of the Act.

§ 240.16a–5 Odd-lot dealers.

Transactions by an odd-lot dealer (a) in odd-lots as reasonably necessary to carry on odd-lot transactions, or (b) in round lots to offset odd-lot transactions previously or simultaneously executed or reasonably anticipated in the usual course of business, shall be exempt from the provisions of section 16(a) of the Act with respect to participation by such odd-lot dealer in such transaction.

§ 240.16a–6 Small acquisitions.

(a) Any acquisition of an equity security not exceeding $10,000 in market value, or of the right to acquire such securities, shall be reported no later than the next Form 4 otherwise required or the Form 5 filed with respect to the fiscal year in which the transaction occurred, whichever is earlier, subject to the following conditions:

(1) Total acquisitions of securities of the same class (including securities underlying derivative securities) within the prior six months do not exceed $10,000 in market value; and

(2) The person making the acquisition does not within six months thereafter make any disposition, other than by a transaction exempt from section 16(b) of the Act.

(b) Should an acquisition no longer qualify for the reporting deferral in paragraph (a) of this section, all such acquisitions that have not yet been reported shall be reported on a Form 4 within ten days after the close of the calendar month in which the conditions of paragraph (a) of this section are no longer met.

(c) If the next Form 4 otherwise required or the Form 5 is due within fewer than ten days after an acquisition subject to the section, the acquisition may be reported on the next required report.

§ 240.16a-7 Transactions effected in connection with a distribution.

(a) Any purchase and sale, or sale and purchase, of a security that is made in connection with the distribution of a substantial block of securities shall be exempt from the provisions of section 16(a) of the Act, to the extent specified in this rule, subject to the following conditions:

(1) The person effecting the transaction is engaged in the business of distributing securities and is participating in good faith, in the ordinary course of such business, in the distribution of such block of securities; and

(2) The security involved in the transaction is:

(i) Part of such block of securities and is acquired by the person effecting the transaction, with a view to distribution thereof, from the issuer or other person on whose behalf such securities are being distributed or from a person who is participating in good faith in the distribution of such block of securities; or

(ii) A security purchased in good faith by or for the account of the person effecting the transaction for the purpose of stabilizing the market price of securities of the class being distributed or to cover an over-allotment or other short position created in connection with such distribution.

(b) Each person participating in the transaction must qualify on an individual basis for an exemption pursuant to this section.

§ 240.16a-8 Trusts.

(a) *Persons subject to section 16.—(1) Trusts.* A trust shall be subject to section 16 of the Act with respect to securities of the issuer if:

(i) The trust is a beneficial owner, pursuant to § 240.16a-1(a)(1), of more than ten percent of any class of equity securities of the issuer registered pursuant to section 12 of the Act ("ten percent beneficial owner"); or

(ii) The trustee otherwise is subject to section 16 of the Act and exercises or shares investment control over the issuer's securities held by the trust, and either the trustee or a member of the trustee's immediate family has a pecuniary interest in the issuer's securities held by the trust, except where the trustee is:

(A) An entity or person that in the ordinary course of business acts as trustee, and is specified in § 240.16a-1(a)(1) (i) through (viii); or

(B) An officer or director of the issuer serving as trustee for the issuer's employee benefit plan trust.

(2) *Trustees, beneficiaries, and settlors.* In determining whether a trustee, beneficiary, or settlor is a ten percent beneficial owner with respect to the issuer:

(i) Such persons shall be deemed the beneficial owner of the issuer's securities held by the trust, to the extent specified by § 240.16a-1(a)(1); and

(ii) Settlors shall be deemed the beneficial owner of the issuer's securities held by the trust where they have the power to revoke the trust without the consent of another person.

(b) *Trust holdings and transactions.* If the trust is subject to section 16 of the Act, all holdings and transactions in the issuer's securities held by the trust shall be reported by the trustee on behalf of the trust, and need not be reported by other parties, except as follows:

(1) *Trusts.* The trust need not report holdings and transactions in the issuer's securities held by the trust in an employee benefit plan subject to the Employee Retirement Income Security Act over which no trustee exercises investment control.

(2) *Trustees.* If, as provided by § 240.16a-1(a)(2), a trustee subject to section 16 of the Act has a pecuniary interest in any holding or transaction in the issuer's securities held by the trust, such holding or transaction shall be attributed to the trustee and shall be reported by the trustee in the trustee's individual capacity, as well as on behalf of the trust. With respect to performance fees and holdings of the trustee's immediate family, trustees shall be deemed to have a pecuniary interest in the trust holdings and transactions in the following circumstances:

(i) A performance fee is received that does not meet the proviso of § 240.16a-1(a)(2)(ii)(C); or

(ii) At least one beneficiary of the trust is a member of the trustee's immediate family. The pecuniary interest of the immediate family member(s) shall be attributed to and reported by the trustee.

(3) *Beneficiaries.* A beneficiary subject to section 16 of the Act shall have or share reporting obligations with respect to transactions in the issuer's securities held by the trust, if the beneficiary is a beneficial owner of the securities pursuant to § 240.16a-1(a)(2), as follows:

(i) If a beneficiary shares investment control with the trustee with respect to a trust transaction, the transaction shall be attributed to and reported by both the beneficiary and the trust;

(ii) If a beneficiary has investment control with respect to a trust transaction without consultation with the trustee, the transaction shall be attributed to and reported by the beneficiary only; and

(iii) In making a determination as to whether a beneficiary is the beneficial owner of the securities pursuant to § 240.16a-1(a)(2), beneficiaries shall be deemed to have a pecuniary interest in the issuer's securities held by the trust to the extent of their pro rata interest in the trust where the trustee does not exercise exclusive investment control.

(4) *Settlors.* If a settlor subject to section 16 of the Act reserves the right to revoke the trust without the consent of another person, the trust holdings and transactions shall be attributed to and reported by the settlor instead of the trust; *Provided, however,* That if the settlor does not exercise or share investment control over the issuer's securities held by the trust, the trust holdings and transactions shall be attributed to and reported by the trust instead of the settlor.

(c) *Remainder interests.* Remainder interests in a trust are deemed not to confer beneficial ownership for purposes of section 16 of the Act, provided that the persons with the remainder interests have no power, directly or indirectly, to exercise or share investment control over the trust.

(d) A trust, trustee, beneficiary or settlor becoming subject to section 16(a) of the Act pursuant to this rule also shall be subject to sections 16(b) and 16(c) of the Act.

§ 240.16a-9 Stock splits, stock dividends, and pro rata rights.

The following shall be exempt from section 16 of the Act:

(a) 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; and

(b) 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 Act.

Note: The exercise or sale of a pro rata right shall be reported pursuant to § 240.16a-4 and the exercise shall be eligible for exemption from section 16(b) of the Act pursuant to § 240.16b-6(b).

§ 240.16a-10 Exemptions under section 16(a).

Except as provided in § 240.16a-6, any transaction exempted from the requirements of section 16(a) of the Act, insofar as it is otherwise subject to the provisions of section 16(b), shall be likewise exempt from section 16(b) of the Act.

9. Sections 240.16b–1 through 16b–8 are revised, §§ 240.16b–9 through 16b–11 are removed and the center heading is republished as follows:

Exemption of Certain Transactions From Section 16(b)

§ 240.16b–1 Transactions approved by a regulatory authority.

(a) Any purchase and sale, or sale and purchase, of a security shall be exempt from section 16(b) of the Act, if the transaction is effected by an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) and both the purchase and sale of such security have been exempted from the provisions of section 17(a) (15 U.S.C. 80a–17(a)) of the Investment Company Act of 1940, by rule or order of the Commission.

(b) Any purchase and sale, or sale and purchase, of a security shall be exempt from the provisions of section 16(b) of the Act if:

(1) The person effecting the transaction is either a holding company registered under the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*) or a subsidiary thereof; and

(2) Both the purchase and the sale of the security have been approved or permitted by the Commission pursuant to the applicable provisions of that Act and the rules and regulations thereunder.

(c) Any acquisition of securities made in exchange for other securities shall be exempt from the provisions of section 16(b) of the Act if:

(1) The securities are acquired from the issuer;

(2) The person acquiring the securities is subject to one or more of the provisions of part I of the Interstate Commerce Act;

(3) (i) The person acquiring the securities is subject to an order of, or has accepted a condition imposed by, the Interstate Commerce Commission in connection with an approval of a unification, merger or acquisition of control pursuant to 49 U.S.C. 11343–11347, requiring such person to dispose of all securities of the same class as those exchanged for the securities acquired; and

(ii) The issuance of the securities acquired by such person has been approved by the Interstate Commerce Commission pursuant to 49 U.S.C. 11301; and

(4) (i) The person acquiring voting equity securities has transferred all voting rights on an unrestricted basis to one or more banks or trust companies; and

(ii) Such transfer remains in effect until such securities are disposed of by such person.

§ 240.16b–2 Dividend or interest reinvestment plans.

Any acquisition of securities resulting from the reinvestment of dividends or interest on securities of the same issuer shall be exempt from section 16(b) of the Act if made pursuant to a plan, available on the same terms to all holders of that class of securities, providing for the regular reinvestment of dividends or interest.

§ 240.16b–3 Employee benefit plan transactions.

(a) *Plan Conditions.* A transaction by an officer or director shall be exempt from section 16(b) of the Act if it is pursuant to an employee benefit plan that satisfies the following two conditions and the condition of paragraph (b) of this section, if applicable; and the transaction satisfies one of the transaction exemptions of paragraphs (c), (d), (e), (f), or (g) of this section.

(1) *Written plan.* The plan shall set forth in writing the means or basis for determining eligibility to participate, as it relates to officers and directors, and either the price at which the securities may be offered and the amount of securities to be awarded or the method by which the price and the amount of the award are to be determined; and

(2) *Transferability restriction.* Either the plan or an agreement in writing signed by the officer or director participating in the plan shall provide that a derivative security issued under the employee benefit plan is not transferable by the participant other than by will or the laws of descent and distribution or pursuant to a qualified domestic relations order as defined by the Internal Revenue Code of 1986, as amended, 26 U.S.C. 1 *et seq.* ("Internal Revenue Code") or title I of the Employee Retirement Income Security Act, or the rules thereunder. The designation of a beneficiary by an officer or director does not constitute a transfer.

(b) *Approval by security holders.* The plan, other than a plan specified in paragraph (b)(3) of this section, has been approved, directly or indirectly,

(1) By the affirmative votes of the holders of a majority of the securities of the issuer present, or represented, and entitled to vote at a meeting duly held in accordance with the applicable laws of the state or other jurisdiction in which the issuer was incorporated, or

(2) By the written consent of the holders of a majority of the securities of the issuer entitled to vote: *Provided, however,* That if such vote or written consent was not solicited substantially in accordance with the rules and regulations, if any, in effect under section 14(a) of the Act at the time of such vote or written consent, the issuer shall furnish in writing to the holders of record of the securities entitled to vote for the plan substantially the same information concerning the plan which would be required by the rules and regulations in effect under section 14(a) of the Act at the time such information is furnished, if proxies to be voted with respect to the approval or disapproval of the plan were then being solicited, on or prior to the date of the first annual meeting of security holders held subsequent to the later of

(i) The first registration of an equity security under section 12 of the Act or

(ii) The acquisition of an equity security for which exemption is claimed.

Such written information may be furnished by mail to the last known address of the security holders of record within 30 days prior to the date of mailing. Four copies of such written information shall be filed with, or mailed for filing to, the Commission not later than the date on which it is first sent or given to security holders of the issuer. For the purposes of this paragraph, the term "issuer" includes a predecessor corporation if the plan or obligations to participate thereunder were assumed by the issuer in connection with the succession. In addition, any amendment to the plan shall be similarly approved if the amendment would:

(A) Materially increase the benefits accruing to participants under the plan;

(B) Materially increase the number of securities which may be issued under the plan; or

(C) Materially modify the requirements as to eligibility for participation in the plan.

(3) A plan, established and operated as a trust, satisfying one of the following conditions below need not satisfy paragraph (b) of this section.

(i) Less than 20 percent in market value of the securities having a readily ascertainable market value held by such trust, determined as of the end of the preceding fiscal year of the trust, consists of equity securities held by persons subject to section 16(a) of the Act; or

(ii) The plan is a pension or retirement plan holding securities of the issuer, providing for broad-based employee participation.

(c) *Grant and award transactions.* The grant or award of an equity security,

including a derivative security, shall be exempt from section 16(b) of the Act if the plan satisfies the conditions of paragraph (a) and paragraph (b) of this section, if applicable, and the following conditions are met:

(1) *Six month holding period.* The equity security is held for six months from the date of grant or, in the case of a derivative security, at least six months elapse from the date of acquisition of the derivative security to the date of disposition of the derivative security (other than upon exercise or conversion) or its underlying equity security;

(2) *Plan administration.* The plan is administered in the manner specified in either paragraph (c)(2) (i) or (ii) of this section: *Provided, however,* That compliance with this paragraph (c)(2) is not required with respect to a grant or award of an equity security prior to the date the issuer first registers the class of equity security under section 12 of the Act:

(i) *Disinterested administration.* The grant or award is made pursuant to an employee benefit plan in which selection of officers and directors for participation and decisions concerning the timing, pricing, and amount of a grant or award, if not determined under a formula meeting the conditions in paragraph (c)(2)(ii) of this section, are made solely by the board of directors, if each member is a disinterested person, or a committee of two or more directors, each of whom is a disinterested person, *i.e.,* a director who is not, during the one year prior to service as an administrator of a plan, granted or awarded equity securities pursuant to the plan or any other plan of the issuer or any of its affiliates, except that:

(A) Participation in a formula plan meeting the conditions in paragraph (c)(2)(ii) of this section shall not disqualify a director from being a disinterested person;

(B) Participation in an ongoing securities acquisition plan meeting the conditions in paragraph (d)(2)(i) of this section shall not disqualify a director from being a disinterested person;

(C) An election to receive an annual retainer fee in either cash or an equivalent amount of securities, or partly in cash and partly in securities, shall not disqualify a director from being a disinterested person; and

(D) Participation in a plan shall not disqualify a director from being a disinterested person for the purpose of administering another plan that does not permit participation by directors.

(ii) *Formula awards.* The grant or award is made pursuant to a plan that by its terms:

(A) Permits officers and/or directors to receive awards; either states the amount and price of securities to be awarded to designated officers and directors or categories of officers and directors, though not necessarily to others who may participate in the plan, and specifies the timing of awards to officers and directors; or sets forth a formula that determines the amount, price and timing, using objective criteria such as earnings of the issuer, value of the securities, years of service, job classification, and compensation levels; and

(B) Provides that these plan provisions shall not be amended more than once every six months, other than to comport with changes in the Internal Revenue Code, the Employee Retirement Income Security Act, or the rules thereunder.

(3) *Rights without a fixed price.* Rights granted or awarded with an exercise price that is not fixed at the time of grant or award shall not be deemed acquired until the price is fixed, and the six month holding period of § 240.16b–3(c)(1) shall not commence until such time.

(d) *Participant-directed transactions.* A participant-directed transaction and any related employer matching contribution shall be exempt from section 16(b) of the Act, if the plan satisfies the conditions of paragraph (a) and paragraph (b) of this § 240.16b–3, if applicable, and the transaction satisfies the conditions of either paragraph (d) (1) or (2) of this § 240.16b–3.

(1) A transaction in any participant-directed plan of the issuer meets the requirements of either paragraph (d)(1) (i) or (ii) of this section:

(i) The transaction is pursuant to an irrevocable election made by the participant at least six months in advance of the effective date of the transaction; or

(ii) The transaction is pursuant to an election to receive either securities or cash, or a combination of securities and cash, or to defer a distribution of securities or cash in whole or in part, incident to death, retirement, disability, or termination of employment; or

(2) A transaction in a thrift, stock purchase, or similar ongoing securities acquisition plan meets the requirements of either paragraph (d)(2) (i) or (ii) of this section:

(i) For initial or periodic transactions resulting from an election to participate or change levels of participation with respect to securities of the issuer:

(A) The plan provides for broad-based employee participation and the terms of the plan do not discriminate in favor of highly compensated employees;

(B) Officer or director participants making withdrawals must cease further purchases in the plan for six months, or the securities so distributed must be held by the participant six months prior to disposition: *Provided, however,* That extraordinary distributions of all of the issuer's securities held by the plan and distributions in connection with death, retirement, disability, termination of employment, or a qualified domestic relations order as defined by the Internal Revenue Code or title I of the Employee Retirement Income Security Act, or the rules thereunder, are not subject to this requirement;

(C) Officer or director participants who cease participation in the plan may not participate again for at least six months; and

(D) For stock purchase plans under section 423 of the Internal Revenue Code or similar plans, where the purchase price of the stock is not fixed and the participant is not obligated to purchase the stock until exercise of a right, in addition to the foregoing conditions, the stock acquired is held for six months from the date the stock purchase price is fixed; or

(ii) For intra-plan transfers between an equity securities of the issuer fund and another fund, the transaction is pursuant to an election made on a quarterly date specified in paragraph (e)(3) of this section at least six months after the date of the previous intra-plan transfer election relating to an equity securities of the issuer fund.

(e) *Cash settlements of stock appreciation rights and tax withholding.* A transaction involving the exercise and cancellation of a stock appreciation right (whether or not the transaction also involves the related surrender and cancellation of a stock option), and the receipt of cash in complete or partial settlement of that right, or the cash settlement of an equity security to satisfy the tax withholding consequences of an exercise of a derivative security related to the equity security, which shall be deemed a stock appreciation right, shall be exempt from section 16(b) of the Act if the plan satisfies the conditions of paragraph (a) and paragraph (b) of this § 240.16b–3, if applicable, and the following conditions are met:

(1) *Information about the issuer.* (i) The issuer of the stock appreciation right has been subject to the reporting requirements of section 13(a) of the Act for at least a year prior to the transaction and has filed all reports and statements required to be filed pursuant to that section for that year; and

(ii) The issuer of the stock appreciation right on a regular basis releases for publication quarterly and annual summary statements of sales and earnings. This condition shall be deemed satisfied if the specified financial data (A) appears on a wire service, (B) appears in a financial news service, (C) appears in a newspaper of general circulation, or (D) is otherwise made publicly available, for example, by press releases to a wire service, financial news service, or newspapers of general circulation;

(2) *Administration of the plan.* (i) The plan is administered in the manner specified in paragraph (c)(2) of this section; and

(ii) The board of directors of the issuer or a committee of two or more directors who are disinterested persons as defined in paragraph (c)(2)(i) of this section has sole discretion either (A) to determine the form in which payment of the right will be made (*i.e.*, cash, securities, or any combination thereof) or (B) to approve the election of the participant to receive cash in whole or in part in settlement of the right. Such approval or disapproval may be given at any time after the election to which it relates;

(3) *Timing of the election.* The election by the participant to receive cash in full or partial settlement of the stock appreciation right, as well as the exercise by the participant of the stock appreciation right for cash, is made during the period beginning on the third business day following the date of release of the financial data specified in paragraph (e)(1)(ii) of this section and ending on the twelfth business day following such date. This condition, however, shall not apply to any exercise by the participant of a stock appreciation right for cash where the date of exercise is automatic or fixed in advance under the plan and is outside the control of the participant; and

(4) *Holding period.* The right is held for six months from the date of acquisition to the date of cash settlement.

(f) *Cancellations, expirations, surrenders, and qualified domestic relations orders.* If the plan satisfies the conditions of paragraph (a) and paragraph (b) of this § 240.16b–3, if applicable, the following transactions are exempt from section 16(b) of the Act:

(1) The expiration, cancellation, or surrender to the issuer of a stock option or stock appreciation right in connection with the grant of a replacement option or right;

(2) The surrender or delivery to the issuer of shares of its stock as payment for the exercise of an option, warrant or right with respect to shares of the same class; and

(3) The disposition of plan securities pursuant to a qualified domestic relations order as defined in the Internal Revenue Code or title I of the Employee Retirement Income Security Act, or the rules thereunder.

(g) *Distributions of plan securities.* A distribution to a participant of securities that have been held pursuant to a plan for the benefit of that participant shall be exempt from section 16(b) of the Act if the plan satisfies the conditions of paragraph (a), paragraph (b), if applicable, and either paragraph (c) or (d) of this § 240.16b–3.

Note: The following are not transactions subject to section 16 of the Act and need not be reported: The vesting of the right to receive a security, the lapse of restrictions relating to a security, and the election to participate in a plan, cease participation or change the level of participation. However, transactions resulting from elections to participate or change the level of participation are subject to section 16 of the Act and shall be reported on Form 4 or 5 as appropriate.

§ 240.16b–4 Issuer redemptions.

An acquisition by a person subject to section 16 of the Act of an issuer's equity securities shall be exempt, provided the securities are acquired through an issuer redemption transaction where:

(a) The securities redeemed ("surrendered securities"):

(1) Represent equity securities of an issuer whose assets consist entirely of cash, government securities, and equity securities in the issuer whose equity securities are acquired;

(2) Have a value equivalent to the equity securities acquired in the redemption; and

(3) Confer upon the holder the right to receive the acquired equity securities without the payment of any consideration other than the security redeemed;

(b) The person has not acquired or disposed of any surrendered securities during any six month period before or after the redemption transaction;

(c) The security acquired in the redemption transaction is not a derivative security; and

(d) The issuer of the securities acquired in the redemption has taken appropriate board action to establish the relationship between its equity securities and the surrendered securities and to establish the issuer's right to redeem.

§ 240.16b–5 Bona fide gifts and inheritance.

Both the acquisition and the disposition of equity securities shall be exempt from the operation of section 16(b) of the Act if they are: (a) Bona fide gifts; or (b) transfers of securities by will or the laws of descent and distribution.

§ 240.16b–6 Derivative securities.

(a) The establishment of or increase in a call equivalent position or liquidation of or decrease in a put equivalent position shall be deemed a purchase of the underlying security for purposes of section 16(b) of the Act, and the establishment of or increase in a put equivalent position or liquidation of or decrease in a call equivalent position shall be deemed a sale of the underlying securities for purposes of section 16(b) of the Act: *Provided, however,* That if the increase or decrease occurs as a result of the fixing of the exercise price of a right initially issued without a fixed price, where the date the price is fixed is not known in advance and is outside the control of the recipient, the increase or decrease shall be exempt from section 16(b) of the Act with respect to any offsetting transaction within the six months prior to the date the price is fixed.

(b) The closing of a derivative security position as a result of its exercise or conversion shall be exempt from the operation of section 16(b) of the Act, and the acquisition of underlying securities at a fixed exercise price due to the exercise or conversion of a call equivalent position or the disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position shall be exempt from the operation of section 16(b) of the Act: *Provided, however,* That the acquisition of underlying securities from the exercise of an out-of-the-money option, warrant, or right shall not be exempt unless the exercise is necessary to comport with the sequential exercise provisions of the Internal Revenue Code (26 U.S.C. 422A).

(c) In determining the short-swing profit recoverable pursuant to section 16(b) of the Act from transactions involving the purchase and sale or sale and purchase of derivative and other securities, the following rules apply:

(1) Short-swing profits in transactions involving the purchase and sale or sale and purchase of derivative securities that have identical characteristics (*e.g.*, purchases and sales of call options of the same strike price and expiration date, or purchases and sales of the same series of convertible debentures) shall

be measured by the actual prices paid or received in the short-swing transactions.

(2) Short-swing profits in transactions involving the purchase and sale or sale and purchase of derivative securities having different characteristics but related to the same underlying security (*e.g.*, the purchase of a call option and the sale of a convertible debenture) or derivative securities and underlying securities shall not exceed the difference in price of the underlying security on the date of purchase or sale and the date of sale or purchase. Such profits may be measured by calculating the short-swing profits that would have been realized had the subject transactions involved purchases and sales solely of the derivative security that was purchased or solely of the derivative security that was sold, valued as of the time of the matching purchase or sale, and calculated for the lesser of the number of underlying securities actually purchased or sold.

(d) Upon cancellation or expiration of an option within six months of the writing of the option, any profit derived from writing the option shall be recoverable under section 16(b) of the Act. The profit shall not exceed the premium received for writing the option. The disposition or closing of a long derivative security position, as a result of cancellation or expiration, shall be exempt from section 16(b) of the Act where no value is received from the cancellation or expiration.

§ 240.16b-7 Mergers, reclassifications, and consolidations.

(a) The following transactions shall be exempt from the provisions of section 16(b) of the Act:

(1) The acquisition of a security of a company, pursuant to a merger or consolidation, in exchange for a security of a company which, prior to the merger or consolidation, owned 85 percent or more of either

(i) The equity securities of all other companies involved in the merger or consolidation, or in the case of a consolidation, the resulting company; or

(ii) The combined assets of all the companies involved in the merger or consolidation, computed according to their book values prior to the merger or consolidation as determined by reference to their most recent available financial statements for a 12 month period prior to the merger or consolidation, or such shorter time as the company has been in existence.

(2) The disposition of a security, pursuant to a merger or consolidation, of a company which, prior to the merger or consolidation, owned 85 percent or more of either

(i) The equity securities of all other companies involved in the merger or consolidation or, in the case of a consolidation, the resulting company; or

(ii) The combined assets of all the companies undergoing merger or consolidation, computed according to their book values prior to the merger or consolidation as determined by reference to their most recent available financial statements for a 12 month period prior to the merger or consolidation.

(b) A merger within the meaning of this section shall include the sale or purchase of substantially all the assets of one company by another in exchange for equity securities which are then distributed to the security holders of the company that sold its assets.

(c) Notwithstanding the foregoing, if a person subject to section 16 of the Act makes any non-exempt purchase of a security in any company involved in the merger or consolidation and any non-exempt sale of a security in any company involved in the merger or consolidation within any period of less than six months during which the merger or consolidation took place, the exemption provided by this Rule shall be unavailable to the extent of such purchase and sale.

§ 240.16b-8 Voting trusts.

Any acquisition or disposition of an equity security or certificate representing equity securities involved in the deposit or withdrawal from a voting trust or deposit agreement shall be exempt from section 16(b) of the Act if substantially all of the assets held under the voting trust or deposit agreement immediately after the deposit or immediately prior to the withdrawal consisted of equity securities of the same class as the security deposited or withdrawn: *Provided, however,* That this exemption shall not apply if there is a non-exempt purchase or sale of an equity security of the class deposited within six months (including the date of withdrawal or deposit) of a non-exempt sale or purchase, respectively, of any certificate representing such equity security (other than the actual deposit or withdrawal).

10. Sections 240.16c-1 through 240.16c-3 and the undesignated center heading preceding them are revised and § 240.16c-4 is added, as follows:

Exemption of Certain Transactions From Section 16(c)

§ 240.16c-1 Brokers.

Any transaction shall be exempt from section 16(c) of the Act to the extent necessary to render lawful the execution by a broker of an order for an account in which the broker has no direct or indirect interest.

§ 240.16c-2 Transactions effected in connection with a distribution.

Any transaction shall be exempt from section 16(c) of the Act to the extent necessary to render lawful any sale made by or on behalf of a dealer in connection with a distribution of a substantial block of securities, where the sale is represented by an over-allotment in which the dealer is participating as a member of an underwriting group, or the dealer or a person acting on the dealer's behalf intends in good faith to offset such sale with a security to be acquired by or on behalf of the dealer as a participant in an underwriting, selling, or soliciting-dealer group of which the dealer is a member at the time of the sale, whether or not the security to be acquired is subject to a prior offering to existing security holders or some other class of persons.

§ 240.16c-3 Exemption of sales of securities to be acquired.

(a) Whenever any person is entitled, incident to ownership of an issued security and without the payment of consideration, to receive another security "when issued" or "when distributed," the sale of the security to be acquired shall be exempt from the operation of section 16(c) of the Act: *Provided,* That:

(1) The sale is made subject to the same conditions as those attaching to the right of acquisition;

(2) Such person exercises reasonable diligence to deliver such security to the purchaser promptly after the right of acquisition matures; and

(3) Such person reports the sale on the appropriate form for reporting transactions by persons subject to section 16(a) of the Act.

(b) This section shall not exempt transactions involving both a sale of the issued security and a sale of a security "when issued" or "when distributed" if the combined transactions result in a sale of more securities than the aggregate of issued securities owned by the seller plus those to be received for the other security "when issued" or "when distributed."

§ 240.16c-4 Derivative securities.

Establishing or increasing a put equivalent position shall be exempt from section 16(c) of the Act, so long as the amount of securities underlying the put equivalent position does not exceed the amount of underlying securities otherwise owned.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

11. The authority citation for part 249 continues to read, in part, as follows:

Authority: The Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.* * * *

12. By revising § 249.103 (the description of Form 3) as follows:

§ 249.103 Form 3, initial statement of beneficial ownership of securities.

This Form shall be filed pursuant to Rule 16a–3 (§ 240.16a–3 of this chapter) for initial statements of beneficial ownership of securities. The Commission is authorized to solicit the information required by this Form pursuant to sections 16(a) and 23(a) of the Securities Exchange Act of 1934 (17 CFR part 240); sections 17(a) and 20(a) of the Public Utility Holding Company Act of 1935 (17 CFR part 250); and sections 30(f) and 38 of the Investment Company Act of 1940 (17 CFR part 270), and the rules and regulations thereunder. Disclosure of information specified on this Form is mandatory, except for disclosure of IRS or Social Security numbers of the reporting person, which is voluntary. If such numbers are furnished, they will assist the Commission in distinguishing reporting persons with similar names and will facilitate the prompt processing of the Form. The information will be used for the primary purpose of disclosing the holdings of directors, officers and beneficial owners of registered companies. Information disclosed will be a matter of public record and available for inspection by members of the public. The Commission can use the information in investigations or litigation involving the federal securities laws or other civil, criminal, or regulatory statutes or provisions, as well as for referral to other governmental authorities and self-regulatory organizations. Failure to disclose required information may result in civil or criminal action against persons involved for violations of the federal securities laws and rules.

13. By revising § 249.104 (the description of Form 4) as follows:

§ 249.104 Form 4, statement of changes in beneficial ownership of securities.

This Form shall be filed pursuant to Rule 16a–3 (§ 240.16a–3 of this chapter) for statements of changes in beneficial ownership of securities. The Commission is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Securities Exchange Act of 1934 (17 CFR part 240); sections 17(a) and 20(a) of the Public Utility Holding Company Act of 1935 (17 CFR part 250); and sections 30(f) and 38 of the Investment Company Act of 1940 (17 CFR part 270), and the rules and regulations thereunder. Disclosure of information specified on this Form is mandatory, except for disclosure of IRS or Social Security numbers of the reporting person, which is voluntary. If such numbers are furnished, they will assist the Commission in distinguishing reporting persons with similar names and will facilitate the prompt processing of the Form. The information will be used for the primary purpose of disclosing the transactions and holdings of directors, officers and beneficial owners of registered companies. Information disclosed will be a matter of public record and available for inspection by members of the public. The Commission can use the information in investigations or litigation involving the federal securities laws or other civil, criminal, or regulatory statutes or provisions, as well as for referral to other governmental authorities and self-regulatory organizations. Failure to disclose required information may result in civil or criminal action against persons involved for violations of the federal securities laws and rules.

14. By adding § 249.105 (the description of Form 5) to subpart B to read as set forth below:

§ 249.105 Form 5, annual statement of beneficial ownership of securities.

This Form shall be filed pursuant to Rule 16a–3 (§ 240.16a–3 of this chapter) for annual statements of beneficial ownership of securities. The Commission is authorized to solicit the information required by this Form pursuant to sections 16(a) and 23(a) of the Securities Exchange Act of 1934 (17 CFR part 240); sections 17(a) and 20(a) of the Public Utility Holding Company Act of 1935 (17 CFR part 250); and sections 30(f) and 38 of the Investment Company Act of 1940 (17 CFR part 270), and the rules and regulations thereunder. Disclosure of information specified on this Form is mandatory, except for disclosure of IRS or Social Security numbers of the reporting person, which is voluntary. If such numbers are furnished, they will assist the Commission in distinguishing reporting persons with similar names and will facilitate the prompt processing of the Form. The information will be used for the primary purpose of disclosing the transactions and holdings of officers, directors and beneficial owners of registered companies. Information disclosed will be a matter of public record and available for inspection by members of the public. The Commission can use the information in investigations or litigation involving the federal securities laws or other civil, criminal, or regulatory statutes or provisions, as well as for referral to other governmental authorities and self-regulatory organizations. Failure to disclose required information may result in civil or criminal action against persons involved for violations of the federal securities laws and rules.

§ 249.310 (Form 10–K) [Amended]

15. By amending Form 10–K (§ 249.310) by adding the following paragraph at the bottom of the cover page, and revising part III Item 10, as follows:

Note: The text of Form 10–K does not and this amendment will not appear in the Code of Federal Regulations.

Form 10–K, annual report pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934.

* * * * *

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S–K (§ 229.405 of this chapter) is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in part III of this Form 10–K or any amendment to this Form 10–K. [ ]

* * * * *

Part III

* * * * *

Item 10. Directors and Executive Officers of the Registrant

Furnish the information required by Items 401 and 405 of Regulation S–K. (§ 229.401 and § 229.405 of this chapter).

Instruction

Checking the box provided on the cover page of this Form to indicate that Item 405 disclosure of delinquent Form 3, 4, or 5 filers is not contained herein is intended to facilitate Form processing and review. Failure to provide such indication will not create liability for violation of the federal securities laws. The space should be checked only if there is no disclosure in this Form of reporting person delinquencies in response to Item 405 and the registrant, at the time of filing the Form 10–K, has reviewed the information necessary to ascertain, and has determined that, Item 405 disclosure is not expected to be contained in part III of the Form 10–K or incorporated by reference.

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

16. The authority citation for part 270 continues to read, in part, as follows:

Authority: Secs. 38, 40, 54 Stat. 841, 842; 15 U.S.C. 80a–37, 80c–89; The Investment

Company Act of 1940, as amended, 15 U.S.C. 80a–1 *et seq.*, unless otherwise noted; * * *

17. Section 270.30f–1 is revised to read as follows:

§ 270.30f–1. Applicability of section 16 of the Exchange Act to section 30(f)

(a) The filing of any statement prescribed under section 16(a) of the Securities Exchange Act of 1934 shall satisfy the corresponding requirements of section 30(f) of the Investment Company Act of 1940.

(b) The rules under section 16 of the Securities Exchange Act of 1934 shall apply to any duty, liability or prohibition imposed with respect to a transaction involving any security of a registered closed-end company under section 30(f) of the Act.

(c) No statements need be filed pursuant to section 30(f) of the Act by an affiliated person of an investment adviser in his or her capacity as such if such person is solely an employee, other than an officer, of such investment adviser.

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

18. The authority citation for part 274 continues to read in part as follows:

Authority: The Investment Company Act of 1940, 15 U.S.C. § 80a–1 *et seq.* * * *

§ 274.101 (Form N–SAR) [Amended]

19. By amending instructions to Form N–SAR (§ 274.101) by redesignating instructions to sub-item 77Q as instructions to sub-item 77Q1, redesignating instructions to sub-item 102P as instructions to sub-item 102P1, and by adding instructions to sub-items 77Q2–3 and 102P2–3 as follows:

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

* * * * *

Instructions to Specific Items

* * * * *

SUB-ITEM 77Q1 Exhibits

* * * * *

SUB-ITEM 77Q2

For closed-end management companies except small business investment companies, furnish the information called for by Item 405 of Regulation S–K (17 CFR 229.405). Notwithstanding requirements in General Instruction A of this Form to file all items except Items 80 through 85 semi-annually, registrants need complete this paragraph of the sub-item only once each year as an annual supplement to the form filed after the end of a registrant's fiscal year.

SUB-ITEM 77Q3

Furnish any other information required to be included as an exhibit pursuant to such rules and regulations as the Commission may prescribe.

* * * * *

SUB-ITEM 102P1 Exhibits

* * * * *

SUB-ITEM 102P2

Furnish the information called for by Item 405 of Regulation S–K (17 CFR 229.405). Notwithstanding requirements in General Instruction A of this Form to file all items except Items 105 through 110 semi-annually, registrants need complete this paragraph of the sub-item only once each year as an annual supplement to the form filed after the end of a registrant's fiscal year.

SUB-ITEM 102P3

Furnish any other information required to be included as an exhibit pursuant to such rules and regulations as the Commission may prescribe.

* * * * *

XIV. Text of New Forms

20. By amending Form 3 (§ 249.103) and Form 4 (§ 249.104) and adding Form 5 (§ 249.105) as set forth below.

Note: The text and instructions of Forms 3, 4 and 5 do not and the amendments will not appear in the Code of Federal Regulations.

OMB Approval

OMB Number: 3235–0104
Expires: February 1, 1994
Estimated average burden hours per response: 0.5

United States Securities and Exchange Commission
Washington, DC 20549

Form 3—Initial Statement of Beneficial Ownership of Securities

The Commission is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Securities Exchange Act of 1934; sections 17(a) and 20(a) of the Public Utility Holding Company Act of 1935; and sections 30(f) and 38 of the Investment Company Act of 1940, and the rules and regulations thereunder.

Disclosure of information specified on this form is mandatory, except for disclosure of IRS or Social Security numbers of the reporting person, which is voluntary. If such numbers are furnished, they will assist the Commission in distinguishing reporting persons with similar names and will facilitate the prompt processing of the form. The information will be used for the primary purpose of disclosing the holdings of directors, officers, and beneficial owners of registered companies. Information disclosed will be a matter of public record and available for inspection by members of the public. The Commission can use it in investigations or litigation involving the Federal securities laws or other civil, criminal, or regulatory statutes or provisions, as well as for referral to other governmental authorities and self-regulatory organizations. Failure to disclose required information may result in civil or criminal action against persons involved for violations of the Federal securities laws and rules.

General Instructions

1. Who Must File

(a) This Form must be filed by the following persons ("reporting person"):

(i) Any director or officer of an issuer with a class of equity securities registered pursuant to section 12 of the Securities Exchange Act of 1934 ("Exchange Act");

(Note: Title is not determinative for purposes of determining "officer" status. *See* Rule 16a–1(f) for the definition of "officer");

(ii) Any beneficial owner of greater than 10% of a class of equity securities registered under Section 12 of the Exchange Act, as determined by voting or investment control over the securities pursuant to Rule 16a–1(a)(1) ("ten percent holder");

(iii) Any officer or director of a registered holding company pursuant to section 17(a) of the Public Utility Holding Company Act of 1935;

(iv) Any officer, director, member of an advisory board, investment adviser, affiliated person of an investment adviser, or beneficial owner of more than 10% of any class of outstanding securities (other than short-term paper) of a registered closed-end investment company, under Section 30(f) of the Investment Company Act of 1940; and

(v) Any trust, trustee, beneficiary or settlor required to report pursuant to Rule 16a–8.

(b) If a reporting person is not an officer, director, or 10% holder, the person should check "other" in Item 5 (Relationship of Reporting Person to Issuer) and describe the reason for reporting status in the space provided.

(c) If a person described above does not beneficially own any securities required to be reported (*see* Rule 16a–1 and Instruction 5), the person is required to file this Form and state that no securities are beneficially owned.

2. When Form Must be Filed

(a) This Form must be filed within 10 days after the event in which the person becomes a reporting person (*i.e.*, officer, director, ten percent holder or other person). This Form and any amendment

is deemed filed with the Commission or the Exchange on the date it is received by the Commission or the Exchange, respectively. *See*, however, Rule 16a-3(h) regarding delivery to a third party business that guarantees delivery of the filing no later than the specified due date.

(b) A reporting person of an issuer that is registering securities for the first time under section 12 of the Exchange Act must file this Form no later than the effective date of the registration statement.

(c) A separate Form shall be filed to reflect beneficial ownership of securities of each issuer, except that a single statement shall be filed with respect to the securities of a registered public utility holding company and all of its subsidiary companies.

3. Where Form Must be Filed

(a) File three copies of this Form or any amendment, at least one of which is manually signed, with the Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

(Note: Acknowledgment of receipt by the Commission may be obtained by enclosing a self-addressed stamped postcard identifying the Form or amendment filed.)

(b) At the time this Form or any amendment is filed with the Commission, file one copy with each Exchange on which any class of securities of the issuer is registered. If the issuer has designated a single Exchange to receive Section 16 filings, the copy shall be filed with that Exchange only.

(c) Any person required to file this Form or amendment shall, not later than the time the Form is transmitted for filing with the Commission, send or deliver a copy to the person designated by the issuer to receive the copy or, if no person is so designated, the issuer's corporate secretary (or person performing similar functions) in accordance with Rule 16a-3(e).

4. Class of Securities Reported

(a)(i) Persons reporting pursuant to section 16(a) of the Exchange Act shall include information as to their beneficial ownership of any class of equity securities of the issuer, even though one or more of such classes may not be registered pursuant to Section 12 of the Exchange Act.

(ii) Persons reporting pursuant to section 17(a) of the Public Utility Holding Company Act of 1935 shall include information as to their beneficial ownership of any class of securities (equity or debt) of the registered holding company and of all of its subsidiary companies and specify the name of the parent or subsidiary issuing the securities.

(iii) Persons reporting pursuant to section 30(f) of the Investment Company Act of 1940 shall include information as to their beneficial ownership of any class of securities (equity or debt) of the registered closed-end investment company (other than "short-term paper" as defined in section 2(a)(38) of the Investment Company Act).

(b) The title of the security should clearly identify the class, even if the issuer has only one class of securities outstanding; for example, "Common Stock," "Class A Common Stock," "Class B Convertible Preferred Stock," etc.

(c) The amount of securities beneficially owned should state the face amount of debt securities (U.S. Dollars) or the number of equity securities, whichever is appropriate.

5. Holdings Required to be Reported

(a) *General Requirements.* Report holdings of each class of securities of the issuer beneficially owned as of the date of the event requiring the filing of this Form. See Instruction 4 as to securities required to be reported.

(b) *Beneficial Ownership Reported (Pecuniary Interest).* (i) Although, for purposes of determining status as a ten percent holder, a person is deemed to beneficially own securities over which that person has voting or investment control (*see* Rule 16a-1(a)(1)), for reporting purposes, a person is deemed to be the beneficial owner of securities if that person has or shares the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the securities ("pecuniary interest"). *See* Rule 16a-1(a)(2). *See also* Rule 16a-8 for application of the beneficial ownership definition to trust holdings and transactions.

(ii) Both direct and indirect beneficial ownership of securities shall be reported. Securities beneficially owned directly are those held in the reporting person's name or in the name of a bank, broker or nominee for the account of the reporting person. In addition, securities held as joint tenants, tenants in common, tenants by the entirety, or as community property are to be reported as held directly. If a person has a pecuniary interest, by reason of any contract, understanding or relationship (including a family relationship or arrangement), in securities held in the name of another person, that person is an indirect beneficial owner of those securities. *See* Rule 16a-1(a)(2)(ii) for certain indirect beneficial ownerships.

(iii) Report securities beneficially owned directly on a separate line from those beneficially owned indirectly. Report different forms of indirect ownership on separate lines. The nature of indirect ownership shall be stated as specifically as possible; for example, "By Self as Trustee for X," "By Spouse," "By X Trust," "By Y Corporation," etc.

(iv) In stating the amount of securities owned indirectly through a partnership, corporation, trust, or other entity, report the number of securities representing the reporting person's proportionate interest in securities beneficially owned by that entity. Alternatively, at the option of the reporting person, the entire amount of the entity's interest may be reported. *See* Rule 16a-1(a)(2)(ii)(B) and Rule 16a-1(a)(2)(iii).

(c) *Non-Derivative and Derivative Securities.* (i) Report non-derivative securities beneficially owned in Table I and derivative securities (*e.g.*, puts, calls, options, warrants, convertible securities, or other rights or obligations to buy or sell securities) beneficially owned in Table II. Derivative securities beneficially owned that are both equity securities and convertible or exchangeable for other equity securities (*e.g.*, convertible preferred securities) should be reported only on Table II.

(ii) The title of a derivative security and the title of the equity security underlying the derivative security should be shown separately in the appropriate columns in Table II. The "puts" and "calls" reported in Table II include, in addition to separate puts and calls, any combination of the two, such as spreads and straddles. In reporting an option in Table II, state whether it represents a right to buy, a right to sell, an obligation to buy, or an obligation to sell the equity securities subject to the option.

(iii) Describe in the appropriate columns in Table II characteristics of derivative securities, including title, exercise or conversion price, date exercisable, expiration date, and the title and amount of securities underlying the derivative security.

(iv) Securities constituting components of a unit shall be reported separately on the applicable table (*e.g.*, if a unit has a non-derivative security component and a derivative security component, the non-derivative security component shall be reported in Table I and the derivative security component shall be reported in Table II). The relationship between individual securities comprising the unit shall be indicated in the space provided for explanation of responses.

6. Additional Information

If space provided in the line items of this Form or space provided for additional comments is insufficient, attach another Form (or copy of the Form) completed as appropriate. Each Form attached as a continuation must include information required in Items 1, 4 and 6 of the Form. The number of pages comprising the report (Form plus attachment) shall be indicated at the bottom of each report page (*e.g.*, 1 of 3, 2 of 3, 3 of 3). If additional information is not reported in this manner, the Commission will assume no additional information was provided.

7. Signature

(a) If the Form is filed for an individual, it shall be signed by that person or specifically on behalf of the individual by a person authorized to sign for the individual. If signed on behalf of the individual by another person, the authority of such person to sign the Form shall be confirmed to the Commission in writing in an attachment to the Form or as soon as practicable in an amendment by the individual for whom the Form is filed, unless such a confirmation still in effect is on file with the Commission. The confirming statement need only indicate that the reporting person authorizes and designates the named person or persons to file the Form on the reporting person's behalf, and state the duration of the authorization.

(b) If the Form is filed for a corporation, partnership, trust, or other entity, the capacity in which the individual signed shall be set forth. (*e.g.*, John Smith, Secretary, on behalf of X Corporation.)

U.S. SECURITIES AND EXCHANGE COMMISSION, WASHINGTON, D.C. 20549

INITIAL STATEMENT OF BENEFICIAL OWNERSHIP

(Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(f) of the Investment Company Act of 1940)

1. Name and Address of Reporting Person

(Last)	(First)	(Middle)
	(Street)	
(City)	(State)	(Zip)

2. Date of Event Requiring Statement (Month/Day/Year)

3. IRS or Social Security Number of Reporting Person (Voluntary)

4. Issuer Name and Ticker or Trading Symbol

5. Relationship of Reporting Person to Issuer (Check all applicable)
___ Director ___ Officer (give title below) ___ 10% Owner ___ Other (specify below)

6. If Amendment, Date of Original (Month/Day/Year)

TABLE I.—NON-DERIVATIVE SECURITIES BENEFICIALLY OWNED

1. Title of Security (Instruction 4)	2. Amount of Securities Beneficially Owned (Instruction 4)	3. Ownership Form: Direct (D) or Indirect (I) (Instruction 5)	4. Nature of Indirect Beneficial Ownership (Instruction 5)

Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.
(Print or Type Responses)

TABLE II.—DERIVATIVE SECURITIES BENEFICIALLY OWNED (E.G., PUTS, CALLS, WARRANTS, OPTIONS, CONVERTIBLE SECURITIES)

1. Title of Derivative Security (Instruction 4)	2. Date Exercisable and Expiration Date (Month/Day/Year)		3. Title and Amount of Securities Underlying Derivative Security (Instruction 4)		4. Conversion or Exercise Price of Derivative Security	5. Ownership Form of Derivative Security: Direct (D) or Indirect (I) (Instruction 5)	6. Nature of Indirect Beneficial Ownership (Instruction 5)
	Date Exercisable	Expiration Date	Title	Amount or Number of Shares			

TABLE II.—DERIVATIVE SECURITIES BENEFICIALLY OWNED (E.G., PUTS, CALLS, WARRANTS, OPTIONS, CONVERTIBLE SECURITIES)—Continued

1. Title of Derivative Security (Instruction 4)	2. Date Exercisable and Expiration Date (Month/Day/Year)		3. Title and Amount of Securities Underlying Derivative Security (Instruction 4)		4. Conversion or Exercise Price of Derivative Security	5. Ownership Form of Derivative Security: Direct (D) or Indirect (I) (Instruction 5)	6. Nature of Indirect Beneficial Ownership (Instruction 5)
	Date Exercisable	Expiration Date	Title	Amount or Number of Shares			

Explanation of Responses:
**Signature of Reporting Person _____ Date _____
Note: File three copies of this Form, one of which must be manually signed. If space provided is insufficient. *See* Instruction 6 for procedure.
**Intentional misstatements or omissions of facts constitute Federal Criminal Violations. *See* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).
Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.

(Print or Type Responses)

FORM 3

OMB APPROVAL: OMB Number: 3235-0104, Expires: February 1, 1994, Estimated average burden hours per response: 0.5.

OMB Approval

OMB Number: 3235-0287
Expires: February 1, 1994
Estimated average burden hours per response: 0.5
United States Securities and Exchange Commission
Washington, DC 20549

Form 4—Statement of Changes of Beneficial Ownership of Securities

The Commission is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Securities Exchange Act of 1934; sections 17(a) and 20(a) of the Public Utility Holding Company Act of 1935; and sections 30(f) and 38 of the Investment Company Act of 1940, and the rules and regulations thereunder.

Disclosure of information specified on this form is mandatory, except for disclosure of IRS or Social Security numbers of the reporting person, which is voluntary. If such numbers are furnished, they will assist the Commission in distinguishing reporting persons with similar names and will facilitate the prompt processing of the form. The information will be used for the primary purpose of disclosing the transactions and holdings of directors, officers, and beneficial owners of registered companies. Information disclosed will be a matter of public record and available for inspection by members of the public. The Commission can use it in investigations or litigation involving the Federal securities laws or other civil, criminal, or regulatory statutes or provisions, as well as for referral to other governmental authorities and self-regulatory organizations. Failure to disclose required information may result in civil or criminal action against persons involved for violations of the Federal securities laws and rules.

General Instructions

1. When Form Must be Filed

(a) This Form must be filed on or before the tenth day after the end of the month in which a change in beneficial ownership has occurred (the term "beneficial owner" is defined in Rule 16a-1(a)(2) and discussed in Instruction 4). This Form and any amendment is deemed filed with the Commission or the Exchange on the date it is received by the Commission or the Exchange, respectively. *See*, however, Rule 16a-3(h) regarding delivery to a third party business that guarantees delivery of the filing no later than the specified due date.

(b) A reporting person no longer subject to Section 16 of the Securities Exchange Act of 1934 ("Exchange Act") must check the exit box appearing on this Form. However, Form 4 and Form 5 obligations may continue to be applicable. *See* Rules 16a-3(f) and 16a-2(b). Form 5 transactions to date may be included on this Form and subsequent Form 5 transactions may be reported on a later Form 4 or Form 5, provided all transactions are reported by the required date.

(c) A separate Form shall be filed to reflect beneficial ownership of securities of each issuer, except that a single statement shall be filed with respect to the securities of a registered public utility holding company and all of its subsidiary companies.

(d) If a reporting person is not an officer, director, or 10% holder, the person should check "other" in Item 6 (Relationship of Reporting Person to Issuer) and describe the reason for reporting status in the space provided.

2. Where Form Must be Filed

(a) File three copies of this Form or any amendment, at least one of which is manually signed, with the Securities and Exchange Commission, 450 5th Street, NW., Washington, DC, 20549. (*Note*: Acknowledgment of receipt by the Commission may be obtained by enclosing a self-addressed stamped postcard identifying the Form or amendment filed.)

(b) At the time this Form or any amendment is filed with the Commission, file one copy with each Exchange on which any class of securities of the issuer is registered. If the issuer has designated a single Exchange to receive Section 16 filings, the copy shall be filed with that Exchange only.

(c) Any person required to file this Form or amendment shall, not later than the time the Form or amendment is

transmitted for filing with the Commission, send or deliver a copy to the person designated by the issuer to receive the copy or, if no person is so designated, the issuer's corporate secretary (or person performing similar functions) in accordance with Rule 16a–3(e).

3. Class of Securities Reported

(a)(i) Persons reporting pursuant to Section 16(a) of the Exchange Act shall report each transaction resulting in a change in beneficial ownership of any class of equity securities of the issuer and the beneficial ownership at the end of the month of that class of equity securities, even though one or more of such classes may not be registered pursuant to Section 12 of the Exchange Act.

(ii) Persons reporting pursuant to Section 17(a) of the Public Utility Holding Company Act of 1935 shall report each transaction resulting in a change in beneficial ownership of any class of securities (equity or debt) of the registered holding company and of all of its subsidiary companies and the beneficial ownership at the end of the month of that class of securities. Specify the name of the parent or subsidiary issuing the securities.

(iii) Persons reporting pursuant to Section 30(f) of the Investment Company Act of 1940 shall report each transaction resulting in a change in beneficial ownership of any class of securities (equity or debt) of the registered closed-end investment company (other than "short-term paper" as defined in Section 2(a)(38) of the Investment Company Act) and the beneficial ownership at the end of the month of that class of securities.

(b) The title of the security should clearly identify the class, even if the issuer has only one class of securities outstanding; for example, "Common Stock," "Class A Common Stock," "Class B Convertible Preferred Stock," etc.

(c) The amount of securities beneficially owned should state the face amount of debt securities (U.S. Dollars) or the number of equity securities, whichever is appropriate.

4. Transactions and Holdings Required to be Reported

(a) *General Requirements.* (i) Report, in accordance with Rule 16a–3(g), all transactions resulting in a change of beneficial ownership in the issuer's securities, except those transactions reportable on Form 5. Every transaction shall be reported even though acquisitions and dispositions during the month with respect to a class of securities are equal, or the change involves only the nature of ownership, such as a change from indirect ownership through a trust or corporation to direct ownership by the reporting person. Report total beneficial ownership as of the end of the month for each class of securities in which a transaction was reported.

(ii) Each transaction should be reported on a separate line. Transaction codes specified in Instruction 8 should be used to identify the nature of the transaction resulting in an acquisition or disposition of a security.

Note: Transactions reportable on Form 5 may, at the option of the reporting person, be reported on a Form 4 filed before the due date of the Form 5. Exercises or conversions of derivative securities and small acquisitions specified in Rule 16a–6(a) must be reported on the next required Form 4 or Form 5 but may be reported voluntarily on Form 4 at an earlier date. (*See* Instruction 8 for the code for voluntarily reported transactions.)

(b) *Beneficial Ownership Reported (Pecuniary Interest).* (i) Although for purposes of determining status as a ten percent holder, a person is deemed to beneficially own securities over which that person has voting or investment control (*see* Rule 16a–1(a)(1)), for reporting transactions and holdings, a person is deemed to be the beneficial owner of securities if that person has or shares the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the securities ("pecuniary interest"). *See* Rule 16a–1(a)(2). *See also* Rule 16a–8 for the application of the beneficial ownership definition to trust holdings and transactions.

(ii) Both direct and indirect beneficial ownership of securities shall be reported. Securities beneficially owned directly are those held in the reporting person's name or in the name of a bank, broker or nominee for the account of the reporting person. In addition, securities held as joint tenants, tenants in common, tenants by the entirety, or as community property are to be reported as held directly. If a person has a pecuniary interest, by reason of any contract, understanding, or relationship (including a family relationship or arrangement), in securities held in the name of another person, that person is an indirect beneficial owner of the securities. *See* Rule 16a–1(a)(2)(ii) for certain indirect beneficial ownerships.

(iii) Report transactions in securities beneficially owned directly on separate lines from those beneficially owned indirectly. Report different forms of indirect ownership on separate lines. The nature of indirect ownership shall be stated as specifically as possible; for example, "By Self as Trustee for X," "By Spouse," "By X Trust," "By Y Corporation," etc.

(iv) In stating the amount of securities acquired, disposed of, or beneficially owned indirectly through a partnership, corporation, trust, or other entity, report the number of securities representing the reporting person's proportionate interest in transactions conducted by that entity or holdings of that entity. Alternatively, at the option of the reporting person, the entire amount of the entity's interest may be reported. *See* Rule 16a–1(a)(2)(ii)(B) and Rule 16a–1(a)(2)(iii).

(c) *Non-Derivative and Derivative Securities.* (i) Report acquisitions or dispositions and holdings of non-derivative securities in Table I. Report acquisitions or dispositions and holdings of derivative securities (*e.g.*, puts, calls, options, warrants, convertible securities, or other rights or obligations to buy or sell securities) in Table II. Report the exercise or conversion of a derivative security in Table II (as a disposition of the derivative security) and report in Table I the holdings of the underlying security. Report acquisitions or dispositions and holdings of derivative securities that are both equity securities and convertible or exchangeable for other equity securities (*e.g.*, convertible preferred securities) only on Table II.

(ii) The title of a derivative security and the title of the equity security underlying the derivative security should be shown separately in the appropriate columns in Table II. The "puts" and "calls" reported in Table II include, in addition to separate puts and calls, any combination of the two, such as spreads and straddles. In reporting an option in Table II, state whether it represents a right to buy, a right to sell, an obligation to buy, or an obligation to sell the equity securities subject to the option.

(iii) Describe in the appropriate columns in Table II characteristics of derivative securities, including title, exercise or conversion price, date exercisable, expiration date, and the title and amount of securities underlying the derivative security. If the transaction reported is a purchase or sale of a derivative security, the purchase or sale price of that derivative security shall be reported in column 8. If the transaction is the exercise or conversion of a derivative security, leave column 8 blank and report the exercise or conversion price of the derivative security in column 2.

(iv) Securities constituting components of a unit shall be reported separately on the applicable table (*e.g.*, if a unit has a non-derivative security component and a derivative security

component, the non-derivative security component shall be reported in Table I and the derivative security component shall be reported in Table II). The relationship between individual securities comprising the unit shall be indicated in the space provided for explanation of responses. When securities are purchased or sold as a unit, state the purchase or sale price per unit and other required information regarding the unit securities.

5. Price of Securities

(a) Prices of securities shall be reported in U.S. dollars on a per share basis, not an aggregate basis, except that the aggregate price of debt shall be stated. Amounts reported shall exclude brokerage commissions and other costs of execution.

(b) If consideration other than cash was paid for the security, describe the consideration, including the value of the consideration, in the space provided for explanation of responses.

6. Additional Information

If space provided in the line items of this Form or space provided for additional comments is insufficient, attach another Form (or copy of the Form) completed as appropriate. Each Form attached as a continuation must include information required in Items 1, 4 and 6 of the Form. The number of pages comprising the report (Form plus attachment) shall be indicated at the bottom of each report page (*e.g.*, 1 of 3, 2 of 3, 3 of 3). If additional information is not reported in this manner, the Commission will assume no additional information was provided.

7. Signature

(a) If the Form is filed for an individual, it shall be signed by that person or specifically on behalf of the individual by a person authorized to sign for the individual. If signed on behalf of the individual by another person, the authority of such person to sign the Form shall be confirmed to the Commission in writing in an attachment to the Form or as soon as practicable in an amendment by the individual for whom the Form is filed, unless such a confirmation still in effect is on file with the Commission. The confirming statement need only indicate that the reporting person authorizes and designates the named person or persons to file the Form on the reporting person's behalf, and state the duration of the authorization.

(b) If the Form is filed for a corporation, partnership, trust, or other entity, the capacity in which the individual signed shall be set forth (e.g., John Smith, Secretary, on behalf of X Corporation).

8. Transaction Codes

Use the codes listed below to indicate in Table I, Column 3 and Table II, Column 4 the character of the transaction reported. Use the code that most appropriately describes the transaction. If the transaction is not specifically listed, use transaction Code "J" and describe the nature of the transaction in the space for explanation of responses. If a transaction is voluntarily reported earlier than required, place "V" in the appropriate column to so indicate; otherwise, the column should be left blank.

General Transaction Codes

P—Open market or private purchase of non-derivative or derivative security

S—Open market or private sale of non-derivative or derivative security

V—Transaction voluntarily reported earlier than required

Employee Benefit Plan Transaction Codes

A—Grant or award transaction pursuant to Rule 16b-3(c)

M—Exercise of in-the-money or at-the-money derivative security acquired pursuant to Rule 16b-3 plan

B—Participant-directed transaction in ongoing acquisition plan pursuant to Rule 16b-3(d)(2) (except for intra-plan transfers specified in Code I)

N—Participant-directed transaction pursuant to Rule 16b-3(d)(1)

F—Payment of option exercise price or tax liability by delivering or withholding securities incident to exercise of a derivative security issued in accordance with Rule 16b-3

I—Intra-plan transfer in accordance with Rule 16b-3(d)(2)(ii) resulting in an acquisition or disposition of issuer securities

T—Acquisition or disposition transaction under an employee benefit plan other than pursuant to Rule 16b-3

Derivative Securities Codes

E—Expiration of short derivative position

H—Expiration (or cancellation) of long derivative position

C—Conversion of derivative security

O—Exercise of out-of the-money derivative security

X—Exercise of in-the-money or at-the-money derivative security

Other Section 16(b) Exempt Transactions and Small Acquisition Codes (except for employee benefit plan codes above)

G—Bona fide gift

R—Acquisition pursuant to reinvestment of dividends or interest (DRIPS)

W—Acquisition or disposition by will or laws of descent and distribution

L—Small acquisition under Rule 16a-6

Z—Deposit into or withdrawal from voting trust

Other Transaction Codes

J—Other acquisition or disposition (describe transaction)

Q—Transfer pursuant to a qualified domestic relations order

U—Disposition pursuant to a tender of shares in a change of control transaction

U.S. SECURITIES AND EXCHANGE COMMISSION, WASHINGTON D.C. 20549

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP

[Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(f) of the Investment Company Act of 1940]

1. Name and Address of Reporting Person

(Last) (First) (Middle)

(Street)

(City) (State) (Zip)

2. Issuer Name and Ticker or Trading Symbol

3. IRS or Social Security Number of Reporting Person (Voluntary)

U.S. SECURITIES AND EXCHANGE COMMISSION, WASHINGTON D.C. 20549—Continued

[Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(f) of the Investment Company Act of 1940]

4. Statement for Month/Year

5. If Amendment, Date of Original (Month/Year)

6. Relationship of Reporting Person to Issuer. (Check all applicable)
___Director ___Officer (give title below) ___10% Owner ___Other (specify below)

TABLE I.—NON-DERIVATIVE SECURITIES, ACQUIRED, DISPOSED OF, OR BENEFICIALLY OWNED

1. Title of Security (Instruction 3)	2. Transaction Date (Month/ Day/Year)	3. Transaction Code (Instruction 8)		4. Securities Acquired (A) or Disposed of (D) (Instructions 3, 4 and 5)			5. Amount of Securities Beneficially Owned at End of Month (Instructions 3 and 4)	6. Ownership Form: Direct (D) or Indirect (I) (Instruction 4)	7. Nature of Indirect Beneficial Ownership (Instruction 4)
		Code	V	Amount	(A) or (D) or	Price			

TABLE II.—DERIVATIVE SECURITIES ACQUIRED, DISPOSED OF, OR BENEFICIALLY OWNED (E.G. PUTS, CALLS, WARRANTS, OPTIONS, CONVERTIBLE SECURITIES)

1. Title of Derivative Security (Instructions 3)	2. Conversion or Exercise Price of Derivative Security	3. Transaction Date (Month/ Day/Year)	4. Transaction Code (Instruction 8)		5. Number of Derivative Securities Acquired (A) or Disposed of (D) (Instructions 3 and 4)		6. Date Exercisable and Expiration Date (Month/Day/Year)		7. Title and Amount of Underlying Securities (Instructions 3 and 4)		8. Price of Derivative Security (Instr. 5)	9. Number of Derivative Securities Beneficially Owned at End of Month (Instruction 4)	10. Ownership Form of Derivative Security: Direct (D) Indirect (I) (Instruction 4)	11. Nature of Indirect Beneficial Ownership (Instruction 4)
			T	V	(A)	(D)	Date Exercisable	Expiration Date	Title	Amount or Number of Shares				

Explanation of Responses:

**Signature of Reporting Person _____ Date _____

Note: File three copies of this Form, one of which must be manually signed. If space provided is insufficient, *See* Instruction 6 for procedure.
** Intentional misstatements or omissions of facts constitute Federal Criminal Violations. *See* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).
Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.

(Print or Type Responses)

Form 4
[ ] Check box is no longer subject to Section 16. Form 4 or Form 5 obligations may continue. *See* Instruction 1(b).
OMB Approval
Expires: Febuary 1, 1994
Estimated average burden hours per response 0.5

OMB APPROVAL

OMB Number: 3235–0362
Expires: February 1, 1994
Estimated average burden hours per response: 1.0

United States Securities and Exchange Commission
Washington, DC 20549

Form 5—Annual Statement of Beneficial Ownership of Securities

The Commission is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Securities Exchange Act of 1934,

sections 17(a) and 20(a) of the Public Utility Holding Company Act of 1935, and sections 30(f) and 38 of the Investment Company Act of 1940, and the rules and regulations thereunder.

Disclosure of information specified on this form is mandatory, except for disclosure of IRS or Social Security numbers of the reporting person, which is voluntary. If such numbers are furnished, they will assist the Commission in distinguishing reporting persons with similar names and will facilitate the prompt processing of the form. The information will be used for the primary purpose of disclosing the transactions and holdings of directors, officers, and beneficial owners of registered companies. Information disclosed will be a matter of public record and available for inspection by members of the public. The Commission can use it in investigations or litigation involving the Federal securities laws or other civil, criminal, or regulatory statutes or provisions, as well as for referral to other governmental authorities and self-regulatory organizations. Failure to disclose required information may result in civil or criminal action against persons involved for violations of the Federal securities laws and rules.

General Instructions

1. When Form Must be Filed

(a) This Form must be filed on or before the 45th day after the end of the issuer's fiscal year in accordance with Rule 16a–3(f). This Form and any amendment is deemed filed with the Commission or the Exchange on the date it is received by the Commission or the Exchange, respectively. *See*, however, Rule 16a-3(h) regarding delivery to a third party business that guarantees delivery of the filing no later than the specified due date.

(b) A reporting person no longer subject to Section 16 of the Securities Exchange Act of 1934 ("Exchange Act") must check the exit box appearing on this Form. Transactions and holdings previously reported are not required to be included on this Form. Form 4 or Form 5 obligations may continue to be applicable. *See* Rules 16a–3(f) and 16a–2(b).

(c) A separate Form shall be filed to reflect beneficial ownership of securities of each issuer, except that a single statement shall be filed with respect to the securities of a registered public utility holding company and all of its subsidiary companies.

(d) If a reporting person is not an officer, director, or 10% holder, the person should check "other" in Item 6 (Relationship of Reporting Person to Issuer) and describe the reason for reporting status in the space provided.

2. Where Form Must be Filed

(a) File three copies of this Form or any amendment, at least one of which is manually signed, with the Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

(Note: Acknowledgment of receipt by the Commission may be obtained by enclosing a self-addressed stamped postcard identifying the Form or amendment filed.)

(b) At the time this Form or any amendment is filed with the Commission, file one copy with each Exchange on which any class of securities of the issuer is registered. If the issuer has designated a single Exchange to receive Section 16 filings, the copy shall be filed with that Exchange only.

(c) Any person required to file this Form or amendment shall, not later than the time the Form or amendment is transmitted for filing with the Commission, send or deliver a copy to the person designated by the issuer to receive the copy or, if no person is so designated, the issuer's corporate secretary (or person performing similar functions) in accordance with Rule 16a–3(e).

3. Class of Securities Reported

(a)(i) Persons reporting pursuant to section 16(a) of the Exchange Act shall include information as to transactions and holdings required to be reported in any class of equity securities of the issuer and the beneficial ownership at the end of the year of that class of equity securities, even though one or more of such classes may not be registered pursuant to section 12 of the Exchange Act.

(ii) Persons reporting pursuant to section 17(a) of the Public Utility Holding Company Act of 1935 shall include transactions and holdings required to be reported in any class of securities (equity or debt) of the registered holding company and any of its subsidiary companies and the beneficial ownership at the end of the issuer's fiscal year of that class of securities. Specify the name of the parent or subsidiary issuing the securities.

(iii) Persons reporting pursuant to section 30(f) of the Investment Company Act of 1940 shall include transactions and holdings required to be reported in any class of securities (equity or debt) of the registered closed-end investment company (other than "short-term paper" as defined in Section 2(a) (38) of the Act) and the beneficial ownership at the end of the year of that class of securities.

(b) The title of the security should clearly identify the class, even if the issuer has only one class of securities outstanding; for example, "Common Stock," "Class A Common Stock," "Class B Convertible Preferred Stock," etc.

(c) The amount of securities beneficially owned should state the face amount of debt securities (U.S. Dollars) or the number of equity securities, whichever is appropriate.

4. Transactions and Holdings Required To Be Reported

(a) *General Requirements.* (i) Pursuant to Rule 16a–3(f), if not previously reported, the following transactions, and total beneficial ownership as of the end of the issuer's fiscal year (or the earlier date applicable to a person ceasing to be an insider during the fiscal year) for any class of securities for which a transaction is reported, shall be reported:

(A) Any transaction during the issuer's fiscal year that was exempt by operation of any rule under Section 16(b);

(B) Any small acquisition or series of acquisitions in a six month period during the issuer's fiscal year not exceeding $10,000 in market value (*see* Rule 16a–6); and

(C) Any transactions or holdings that should have been reported during the issuer's fiscal year on a Form 3 or Form 4, but were not reported. The first Form 5 filing obligation shall include all holdings and transactions that should have been reported in each of the issuer's last two fiscal years but were not. *See* Instruction 8 for the code to identify delinquent Form 3 holdings or Form 4 transactions reported on this Form 5.

Note: A required Form 3 or Form 4 must be filed within the time specified by the Form. Form 3 holdings or Form 4 transactions reported on Form 5 represent delinquent Form 3 and Form 4 filings.

(ii) Report transactions and holdings in Rule 16b–3(d) ongoing securities acquisition plans as of the most recent date for which the information is reasonably available, specifying the date of the information. Also, report transactions and holdings in ongoing securities acquisition plans for the portion of the prior fiscal year not included on the Form 5 for the prior year, specifying the date of the information, or, alternatively, this information may be included on a Form 4 or an amendment to the Form 5 filed promptly. Plan acquisitions for the

period reported, but not dispositions, may be presented on an aggregate basis for each plan. If reported on an aggregate basis, disclose the range of prices paid.

(iii) Each transaction should be reported on a separate line. Transaction codes specified in Instruction 8 should be used to identify the nature of the transaction resulting in an acquisition or disposition of a security.

(iv) Except for transactions related to Rule 16b–3(d) ongoing acquisition plans noted in (ii) above, every transaction shall be reported even though acquisitions and dispositions with respect to a class of securities are equal, or the change involves only the nature of ownership, such as a change from indirect ownership through a trust or corporation to direct ownership by the reporting person. Report total beneficial ownership as of the end of the issuer's fiscal year for all classes of securities in which a transaction was reported.

(b) *Beneficial Ownership Reported (Pecuniary Interest).* (i) Although, for purposes of determining status as a ten percent holder, a person is deemed to beneficially own securities over which that person has voting or investment control (*see* Rule 16a–1(a)(1)), for reporting transactions and holdings, a person is deemed to be the beneficial owner of securities if that person has or shares the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the securities ("pecuniary interest"). *See* Rule 16a–1(a)(2). *See also* Rule 16a–8 for the application of the beneficial ownership definition to trust holdings and transactions.

(ii) Both direct and indirect beneficial ownership of securities shall be reported. Securities beneficially owned directly are those held in the reporting person's name or in the name of a bank, broker or nominee for the account of the reporting person. In addition, securities held as joint tenants, tenants in common, tenants by the entirety, or as community property are to be reported as held directly. If a person has a pecuniary interest, by reason of any contract, understanding, or relationship (including a family relationship or arrangement), in securities held in the name of another person, that person is an indirect beneficial owner of the securities. *See* Rule 16a–1(a)(2)(ii) for certain indirect beneficial ownerships.

(iii) Report transactions in securities beneficially owned directly on separate lines from those beneficially owned indirectly. Report different forms of indirect ownership on separate lines. The nature of indirect ownership shall be stated as specifically as possible; for example, "By Self as Trustee for X," "By Spouse," "By X Trust," "By Y Corporation," etc.

(iv) In stating the amount of securities acquired, disposed of, or beneficially owned indirectly through a partnership, corporation, trust, or other entity, report the number of securities representing the reporting person's proportionate interest in transactions conducted by that entity or holdings of that entity. Alternatively, at the option of the reporting person, the entire amount of the entity's interest may be reported. *See* Rule 16a–1(a)(2)(ii)(B) and Rule 16a–1(a)(2)(iii).

(c) *Non-Derivative and Derivative Securities.* (i) Report acquisitions or dispositions and holdings of non-derivative securities in Table I. Report acquisitions or dispositions and holdings of derivative securities (*e.g.*, puts, calls, options, warrants, convertible securities, or other rights or obligations to buy or sell securities) in Table II. Report the exercise or conversion of a derivative security in Table II (as a disposition of the derivative security) and report in Table I the holdings of the underlying security. Report acquisitions or dispositions and holdings of derivative securities that are both equity securities and convertible or exchangeable for other equity securities (*e.g.*, convertible preferred securities) only on Table II.

(ii) The title of a derivative security and the title of the equity security underlying the derivative security should be shown separately in the appropriate columns in Table II. The "puts" and "calls" reported in Table II include, in addition to separate puts and calls, any combination of the two, such as spreads and straddles. In reporting an option in Table II, state whether it represents a right to buy, a right to sell, an obligation to buy, or an obligation to sell the equity securities subject to the option.

(iii) Describe in the appropriate columns in Table II characteristics of derivative securities, including title, exercise or conversion price, date exercisable, expiration date, and the title and amount of securities underlying the derivative security. If the transaction reported is a purchase or sale of a derivative security, the purchase or sale price of the derivative security shall be reported in column 8. If the transaction is the exercise or conversion of a derivative security, leave column 8 blank and report the exercise or conversion price of the derivative security in column 2.

(iv) Securities constituting components of a unit shall be reported separately on the applicable table (*e.g.*, if a unit has a non-derivative security component and a derivative security component, the non-derivative security component shall be reported in Table I and the derivative security component shall be reported in Table II). The relationship between individual securities comprising the unit shall be indicated in the space provided for explanation of responses. When securities are purchased or sold as a unit, state the purchase or sale price per unit and other required information regarding the unit securities.

5. Price of Securities

(a) Prices of securities shall be reported in U.S. dollars and on a per share basis, not an aggregate basis, except that the aggregate price of debt shall be stated. Amounts reported shall exclude brokerage commissions and other costs of execution.

(b) If consideration other than cash was paid for the security, describe the consideration, including the value of the consideration in the space provided for explanation of responses.

6. Additional Information

If space provided in the line items of this Form or space provided for additional comments is insufficient, attach another Form (or copy of the Form) completed as appropriate. Each Form attached as a continuation must include information required in Items 1, 4 and 6 of the Form. The number of pages comprising the report (Form plus attachment) shall be indicated at the bottom of each report page (*e.g.*, 1 of 3, 2 of 3, 3 of 3). If additional information is not reported in this manner, the Commission will assume no additional information was provided.

7. Signature

(a) If the Form is filed for an individual, it shall be signed by that person or specifically on behalf of the individual by a person authorized to sign for the individual. If signed on behalf of the individual by another person, the authority of such person to sign the Form shall be confirmed to the Commission in writing in an attachment to the Form or as soon as practicable in an amendment by the individual for whom the Form is filed, unless such a confirmation still in effect is on file with the Commission. The confirming statement need only indicate that the reporting person authorizes and designates the named person or persons to file the Form on the reporting person's behalf, and state the duration of the authorization.

(b) If the Form is filed for a corporation, partnership, trust, or other entity, the capacity in which the

individual signed shall be set forth (*e.g.*, John Smith, Secretary, on behalf of X Corporation).

8. Transaction Codes

Use the codes listed below to indicate in Table I, Column 3 and Table II, Column 4 the character of the transaction reported. Use the code that most appropriately describes the transaction. If the transaction is not specifically listed, use transaction Code "J" and describe the nature of the transaction in the space for explanation of responses.

General Transaction Codes

P—Open market or private purchase of non-derivative or derivative security

S—Open market or private sale of non-derivative or derivative security

Employee Benefit Plan Transaction Codes

A—Grant or award transaction pursuant to Rule 16b–3(c)

M—Exercise of in-the-money or at-the-money derivative security acquired pursuant to Rule 16b–3 plan

B—Participant-directed transaction in ongoing acquisition plan pursuant to Rule 16b–3(d)(2) (except for intra-plan transfers specified in Code I)

N—Participant-directed transaction pursuant to Rule 16b–3(d)(1)

F—Payment of option exercise price or tax liability by delivering or withholding securities incident to exercise of a derivative security issued in accordance with Rule 16b–3

I—Intra-plan transfer in accordance with Rule 16b–3(d)(2)(ii) resulting in an acquisition or disposition of issuer securities

T—Acquisition or disposition transaction under an employee benefit plan other than pursuant to Rule 16b–3

Derivative Securities Codes

E—Expiration of short derivative position

H—Expiration (or cancellation) of long derivative position

C—Conversion of derivative security

O—Exercise of out-of the-money derivative security

X—Exercise of in-the-money or at-the-money derivative security

Other Section 16(b) Exempt Transactions and Small Acquisition Codes (except for employee benefit plan codes above)

G—Bona fide gift

R—Acquisition pursuant to reinvestment of dividends or interest (DRIPS)

W—Acquisition or disposition by will or laws of descent and distribution

L—Small acquisition under Rule 16a–6

Z—Deposit into or withdrawal from voting trust

Other Transaction Codes

J—Other acquisition or disposition (describe transaction)

Q—Transfer pursuant to a qualified domestic relations order

U—Disposition pursuant to a tender of shares in a change of control transaction

Form 3 or Form 4 Holdings or Transactions Not Previously Reported

To indicate that a holding should have been reported previously on Form 3, place a "3" in Table I, column 3 or Table II, column 4, as appropriate. Indicate in the space provided for explanation of responses the event triggering the Form 3 filing obligation. To indicate that a transaction should have been reported previously on Form 4, place a "4" next to the transaction code reported in Table I, column 3 or Table II, column 4 (*e.g.*, an open market purchase of a non-derivative security that should have been reported previously on Form 4 should be designated as "P4"). In addition, the appropriate box on the front page of the Form should be checked.

U.S. SECURITIES AND EXCHANGE COMMISSION, WASHINGTON, DC 20549

ANNUAL STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP

[Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(f) of the Investment Company Act of 1940]

1. Name and Address of Reporting Person

(Last) (First) (Middle)

(Street)

(City) (State) (Zip)

2. Issuer Name and Ticker or Trading Symbol

3. IRS or Social Security Number of Reporting Person (Voluntary)

4. Statement for (Month/Year)

5. If Amendment, Date of Original (Month/Year)

6. Relationship of Reporting Person to Issuer (Check all applicable)
___ Director ___ Officer (give title below) ___10% Owner ___ Other (specify below)

TABLE I.—NON-DERIVATIVE SECURITIES, ACQUIRED, DISPOSED OF, OR BENEFICIALLY OWNED

1. Title of Security (Instruction 3)	2. Transaction Date (Month/ Day/Year)	3. Transaction Code (Instruction 8)	4. Securities Acquired (A) or Disposed of (D) (Instructions 3, 4, and 5)			5. Amount of Securities Beneficially Owned at End of Issuer's Fiscal Year (Instructions 3 and 4)	6. Ownership Form: Direct (D) or Indirect (I) (Instruction 4)	7. Nature of Indirect Beneficial Ownership (Instruction 4)
			Amount	(A) or (D)	Price			

TABLE II.—DERIVATIVE SECURITIES ACQUIRED, DISPOSED OF, OR BENEFICIALLY OWNED (E.G. PUTS, CALLS, WARRANTS, OPTIONS, CONVERTIBLE SECURITIES)

1. Title of Derivative Security (Instruction 3)	2. Conversion or Exercise Price of Derivative Security	3. Transaction Date (Month/ Day/Year)	4. Transaction Code (Instruction 8)	5. Number of Derivative Securities Acquired (A) or Disposed of (D) (Instructions 3 and 4)		6. Date Exercisable and Expiration Date (Month/Day/Year)		7. Title and Amount of Underlying Securities (Instructions 3 and 4)		8. Price of Derivative Security	9. Number of Derivative Securities Beneficially Owned at End of Year (Instruction 4)	10. Ownership Form of Derivative Security: Direct (D) Indirect (I) (Instruction 4)	11. Nature of Indirect Beneficial Ownership (Instruction 4)
				(A)	(D)	Date Exercisable	Expiration Date	Title	Amount or Number of Shares				

Explanation of Responses:

Signature of Reporting Person _____ Date _____

Note: File three copies of this Form, one of which must be manually signed. If space provided is insufficient, *see* Instruction 6 for procedure.

** Intentional misstatements or omissions of facts constitute Federal Criminal Violations. *See* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).

Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.

(Print or Type Responses)

FORM 5

[ ] Check box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. *See* Instruction 1(b).

[ ] Form 3 holdings reported

[ ] Form 4 transactions reported

OMB APPROVAL

OMB Number: 3235-0362

Expires: February 1, 1994

Estimated average burden hours per response 1.0

By the Commission.

Dated: February 8, 1991.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-3518 Filed 2-20-91; 8:45 am]

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