

# BOGLE & GATES

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October 8, 1993

Mark Green  
Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Re: Interpretive Advice with Respect to  
Rule 16(b)-3(c)(2)(i)

Ladies and Gentlemen:

In accordance with recent conversations with the Staff of the Division of Corporation Finance, we are writing on behalf of Bioject Medical Technologies Inc. to request interpretive advice with respect to the "Disinterested Administration" provisions under Rule 16(b)-3(c)(2)(i).

The Disinterested Administration provisions under new Rule 16(b)-3, as promulgated in Release No. 34-28869, provide that a director will be considered a "disinterested person" if he or she has not, during the one year prior to service as an administrator, been granted or awarded equity securities pursuant to certain plans of the issuer. In Joseph A. Grundfest (8/10/91) the Staff confirmed that the one year period is a rolling period measured prior to the date of current service as a plan administrator.

We wish to confirm that for purposes of determining whether a director is disinterested, the rolling one year period "looks back" from the date of service to the date the plan administrators approved a grant or award of securities, or otherwise exercised discretion with respect to the grant or award of securities under a discretionary plan to the director in question, even though such grant was made subject to shareholder approval which is not obtained until a later date.

The Staff has taken the position in no-action letters issued with respect to the new six month holding period under Rule 16(b)(3)(c)(1) that grants of equity securities subject to subsequent shareholder approval are not deemed acquired by the recipient until shareholder approval is obtained. See Frederick W. Cook & Co., Inc. (July 3, 1991), and Skadden, Arps, Slate, Meagher & Flom (April 25, 1991).

We believe that the policy considerations underlying the one year period during which directors must not participate in discretionary plans in order to be disinterested differs from that underlying the six month hold period in 16b-3(c)(1), and therefore a different measurement date should be used for determining when the director was granted a derivative security. In Release No. 34-28869, the Staff stated:

"The disinterested administration requirement of Rule 16(b)-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."

We believe this language reflects the Commission's desire to impose sufficient time between a director's receipt of securities under a plan and when the director subsequently exercises discretion with respect to the grant of securities under a plan in order to minimize any pressure on directors "to act in a less than independent fashion." The receipt of shareholder approval does not appear to be relevant with respect to this objective. Consequently, we believe the relevant dates for purposes of determining whether the required one year period has passed should be the dates the directors exercise discretion under the plan, without regard to whether subsequent shareholder approval is required.

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We believe our interpretation is further supported by the anomalous results which would occur if the analysis applied with respect to the six month hold period in 16b-3(c)(1) was extended to the disinterested administration provisions of 16b-3(c)(2)(i). If an option was not considered granted for purposes of the disinterested administration provisions until shareholder approval was obtained, directors who were granted options subject to shareholder approval would continue to be "disinterested," and would continue to be able to make Rule 16b-3 qualified grants from the date the committee granted the option to him or her until shareholder approval is obtained. Further, treating the date shareholder approval was obtained as the grant date would also permit directors who had received options within the previous year to make Rule 16b-3 qualified grants, so long as such grants were made subject to shareholder approval, and approval was not obtained until the rolling one year period had expired.

We do not believe this is the result the Staff intended when it stated, in connection with the six month hold period in Rule 16b-3(c)(1), that the grant date of an option granted subject to shareholder approval is the date such approval is obtained. Consequently, we respectfully request that you confirm the one year period referenced in Rule 16b-3(c)(2)(i) will be determined by reference to the date the directors exercise discretion with respect to option grants in situations where such grants are made subject only to shareholder approval, and no further discretion is to be exercised by the committee with respect to such options.

If you have any questions or comments, or need any further information with respect to these questions, please feel free to contact me at (206) 621-1523. Ten copies of this letter, in addition to this original, are enclosed to facilitate distribution to others in the Division who are reviewing interpretive requests under the new rules under Section 16.

Very truly yours,

BOGLE & GATES

  
Benjamin F. Stephens

Enclosure

BOGLE & GATES