

AMERICAN SOCIETY OF CORPORATE SECRETARIES
521 Fifth Avenue
New York, NY 10175
(212) 681-2000 – Fax (212) 681-2005

Comment Letter to the SEC

Re: Ownership Reports and Trading by Officers, Directors and Principal Security Holders
File No. S7-27-04
Comments on Release Nos. 34-49895; 35-27861; IC-26471

August 9, 2004

Jonathan G. Katz, Secretary
United States Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

VIA E-MAIL (rule-comments@sec.gov)

Re: File No. S7-27-04; Ownership Reports and Trading by Officers, Directors and
Principal Security Holders

Dear Mr. Katz:

The American Society of Corporate Secretaries, Inc. (ASCS) is a professional association founded in 1946, serving more than 3,000 issuers. Job responsibilities of our members include working with corporate boards of directors and senior management regarding corporate governance; assuring issuer compliance with securities regulations and listing requirements; and coordinating activities with shareholders such as proxy voting for the annual meeting of shareholders and negotiation of shareholder proposals. The majority of ASCS members are attorneys. This letter is submitted in response to the Commission's request for comment in connection with the release entitled "Ownership Reports and Trading by Officers, Directors and Principal Security Holders."

We welcome and applaud the Commission's proposed rulemaking. The uncertainty regarding the weight to be given to SEC interpretations of its rules under Section 16 as a result of the opinion of the U.S. Court of Appeals for the Third Circuit in *Levy v. Sterling Holding Company, LLC*¹ (*Levy v. Sterling*) has made it extremely difficult to plan legitimate transactions involving Section 16 insiders.

You have requested comment on the proposed amendments to Rule 16b-3. You have asked specifically, whether the proposed amendments would accomplish the goal of clarifying the exemptive scope of Rule 16b-3 as you originally intended the rule to apply and if not, what other language would accomplish this goal more effectively. You have further asked whether the proposed amendment would preclude the restrictive construction applied in the *Levy v. Sterling* opinion.

¹ 314 F.3d 106 (3d Cir. 2002), *cert. denied*, *Sterling Holding Co. v. Levy*, 124 S. Ct. 389 (U.S., Oct. 14, 2003).

While the language that you have proposed should accomplish the aforementioned goal, we have some suggested language that may be more definitive. You have proposed that the introduction to paragraph (d) of Rule 16b-3 read "*Acquisitions from the issuer. Any transaction involving an acquisition from the issuer (other than a Discretionary Transaction), including without limitation a grant or award, shall be exempt if:...*" We would suggest that you remove the phrase "including without limitation a grant or award." Thus, as amended, the introduction would read, "Any transaction involving an acquisition from the issuer (other than a Discretionary Transaction) shall be exempt if:..." This would avoid any argument utilizing the "ejusdem generis" canon of statutory construction, as raised in *Levy v. Sterling*. New paragraph (d) would also thereby be more closely parallel to the language in existing paragraph (e), which is clear, pointed and less subject to misinterpretation.

As for proposed Note (4), we would suggest that the word "specified" be dropped from the final version, as it harkens back to the word "specifically" in *Levy v. Sterling*. You may consider adding a sentence to the end of new Note (4) to Rule 16b-3, stating that "Without limiting the foregoing, a grant or award may be exempt provided the conditions of paragraph (d) or (e) of this section are satisfied; however, a transaction need not have a compensatory element for these paragraphs to be applicable." This incorporates the language proposed above and addresses the compensatory element issue.

In response to your question regarding the application of Note (4) to Rule 16b-3(e) relating to dispositions to the issuer (and as reflected in our suggested changes), we do not believe that it is necessary or appropriate to limit the availability of the exemption to situations in which such a disposition might be "compensatory." In response to one of your further questions, it might, however, be desirable to specify, in accordance with your advice in the interpretive letter to Skadden, Arps, Slate, Meagher & Flom LLP (January 12, 1999) that the exemption covers dispositions in a merger (or similar transaction).

In summary, we commend the Commission for taking these steps to eliminate any possibility of misinterpreting Rules 16b-3 as well as 16b-7. Please do not hesitate to contact us if you have any questions.

Cordially,

Securities Law Committee
of the American Society of Corporate Secretaries

By: Sean E. Dempsey

cc (via email): Pauline A. Candaux
Kathleen A. Gibson
David Smith
Susan Ellen Wolf