

Manual of Publicly Available Telephone Interpretations

R. SECTION 16 RULES AND FORMS 3, 4 AND 5

1. **** Rule 16a-1 ****

For purposes of the various ownership tests of Rule 16a-1, a limited liability company should be treated consistently either as a general partnership or a corporation, depending on which form of organization it more closely resembles.

2. **** Rule 16a-1(a)(1); Form 3 ****

Following a company's buy-back of its stock, a person who previously owned less than 10% of the company's stock will own more than 10% of the stock without having purchased additional shares. If, before the buy-back, the person is aware that the buy-back will occur and will have this result on his or her holdings, the person should file a Form 3 within 10 days after the buy-back. If the person is unaware of the buy-back and/or its consequences, he or she would not have to file a Form 3 until information in the company's most recent quarterly, annual or current report indicates the amount of securities outstanding following the buy-back.

3. **** Rule 16a-1(c) ****

In connection with termination of employment, an officer was awarded options which would become exercisable (in installments) when the issuer's stock reached and maintained specified price levels for a period of 30 days, conditioned on the terminated officer's continued provision of services as a consultant. These options would be derivative securities subject to Section 16 upon grant because their exercisability would not be subject to conditions (other than the passage of time and continued employment) that are not tied to the market price of an equity security of the issuer. Cf. Certilman Balin Adler & Hyman (April 20, 1992).

4. **** Rule 16a-1(c)(3) ****

The federal state, local and foreign taxes that may be paid through the withholding, tendering back or delivery of previously owned shares may exceed minimum withholding requirements as long as the amount withheld does not exceed the participant's estimated federal state, local and foreign tax obligations which are attributable to the underlying transaction. Such amount may include capital gains tax on the shares that were surrendered or withheld in settlement of the tax-withholding right or in exercise of the derivative security.

5. Rule 16a-1(f)

An Assistant Secretary would not ordinarily be considered an officer of a company under Section 16(a) unless such person performs any of the functions that would make such person an officer as defined in Rule 16a-1(f).

6. **** Rule 16a-2(a) ****

Where Rule 16a-2(a) makes Section 16 applicable to a transaction that occurs prior to the issuer's Section 12 registration, the exemptions provided by the other rules under Section 16 should be available to the same extent as for any other transaction subject to Section 16.

7. **** Rule 16a-3(f)(1); Rule 16b-3(b)(1); Rule 16b-3(f); Form 5 ****

A Discretionary Transaction in a phantom stock account that is exempt pursuant to Rule 16b-3(f) is reportable on Table II of Form 5 (or earlier on Table II of Form 4, at the insider's discretion), on a single line using Code "I."

8. **** Rule 16a-3(j); Form 3 ****

Where a new beneficial owner joins an existing set of beneficial owners who file as a group, the new beneficial owner must file a new Form 3, even if the new owner is not adding any new securities to the group holdings.

9. Rule 16a-9(a)

The Division staff was asked whether Rule 16a-9(a) would exempt the limited partnership's disposition of securities in the following transaction where the limited partnership is subject to Section 16 with respect to the securities distributed: the limited partnership makes a pro rata distribution to its limited partners of portfolio securities which it holds. The Division staff expressed the view that Rule 16a-9(a), which exempts from Sections 16(a) and (b) "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 a class, including a stock dividend in which equity securities of a different issuer are distributed," would not apply. Instead, the scope of Rule 16a-9(a) is limited to persons subject to Section 16 who experience an increase or decrease in the number of securities held as a result of a stock distribution or reverse stock split effected by the distributing party, and is not available to the distributing party.

10. **** Rule 16a-9(a) ****

Rule 16a-9(a) will not exempt a stock dividend payable where there is only one shareholder of the class on which the dividend is paid. This position reflects staff concern that such a transaction would represent a manipulative use of the rule for the purpose of benefiting one shareholder.

11. Rule 16a-9(b)

Rule 16a-9(b) exempts from Section 16 the acquisition of rights, such as shareholder or preemptive rights, pursuant to a pro rata grant to all holders of the same class of equity securities registered under Section 12. Where the distribution of rights is pro rata, the acquisition of rights so distributed is exempt, including an acquisition by a shareholder who is a stand-by purchaser. However, such stand-by purchaser's acquisition of underlying shares pursuant to the exercise of rights not exercised by other shareholders is not exempted by Rule 16a-9(b) because such acquisition is the result of an independently negotiated contract with the issuer that is not available to all shareholders on a pro rata basis.

12. Rule 16a-11

Rule 16a-11 exempts from the liability provisions of Section 16 of the Exchange Act the acquisition of securities by insiders through the reinvestment of dividends pursuant to dividend reinvestment plans. The disposition of such securities, however, is not exempted by the rule. Note, Rule 16a-11 does not exempt from the liability provisions of Section 16(b) the acquisition of securities through additional payments by such insiders allowed by such plans.

13. Rule 16a-11

A dividend reinvestment plan meeting the requirements of Rule 16a-11 is terminated and the stock held by the plan is distributed to participants. Because no effective change in beneficial ownership takes place, pursuant to Rule 16a-13, the distribution of shares to persons covered by Section 16 need not be reported as an acquisition of securities.

14. **** Rule 16a-11 ****

A dividend reinvestment plan that is sponsored by a broker-dealer and available only to customers of that broker-dealer does not provide for "broad-based participation" within the meaning of Rule 16a-11. Accordingly, Rule 16a-11 is not available to exempt dividend or interest reinvestment transactions pursuant to such a plan.

15. **** Rule 16a-13 ****

A limited liability company ("LLC") makes a distribution of portfolio securities to its members. If the members rely on Rule 16a-1(a)(2)(iii) to exclude the portfolio securities from their individual pecuniary interest (where the members do not control the LLC and do not exercise voting or investment control over the portfolio securities), Rule 16a-13 cannot be relied on to exempt (from reporting and profit liability) the distribution of the portfolio securities.

16. Rule 16b-3

By its terms, Rule 16b-3 exempts from Section 16(b) certain transactions by officers and directors occurring in connection with participation in an employee benefit plan. The rule, however, does not exempt similar transactions by persons who are subject to Section 16 solely because they are more than 10% beneficial owners.

17. **** Rule 16b-3(a) ****

Rule 16b-3 exempts issuer equity securities transactions between the issuer (including an employee benefit plan sponsored by the issuer) and an officer or director. Rule 16b-3 will not exempt a transaction between the issuer and (1) an officer's charitable remainder trust, or (2) an investment advisor of which a director is a principal.

18. **** Rule 16b-3(b)(1); Rule 16b-3(f) ****

If, pursuant to the terms of a plan, a transaction to re-balance holdings among accounts other than the issuer equity securities account results in a transfer of assets into or out of an issuer equity securities account, the transaction will be a Discretionary Transaction, subject to Rule 16b-3(f).

19. **** Rule 16b-3(b)(1); Rule 16b-3(f) ****

A rollover of funds into the issuer equity securities fund from a plan maintained by the insider's former employer will not be a Discretionary Transaction subject to Rule 16b-3(f) because it does not involve a reallocation of funds already invested in a plan of the issuer.

An automatic rollover of a phantom stock account upon the issuer's abolition of the plan in which it is maintained into a restricted stock account in another plan of the issuer would not be a Discretionary Transaction.

However, other rollovers or transfers between different plans sponsored by the same issuer may be Discretionary Transactions, and need to be analyzed on a case-by-case basis as to the character of the funds involved and whether the transaction is volitional to the insider.

20. **** Rule 16b-3(b)(1); Rule 16b-3(f) ****

Where there are two issuer equity securities funds (one containing 100% issuer equity securities and the other 50% issuer equity securities), a transfer from the 100% fund to the 50% fund would be a transfer out of an issuer equity securities fund for purposes of measuring the six-month period before the next Discretionary Transaction. Conversely, a transfer from the 50% fund to the 100% fund would be a transfer into an issuer equity securities fund for the same purpose.

But a transfer out of either fund into a non-issuer equity securities fund would be a transfer out, and a transfer into either fund from a non-issuer equity securities fund from a non-issuer equity securities fund would be a transfer into an issuer equity securities fund.

21. **** Rule 16b-3(b)(1); Rule 16b-3(f); Form 5; Rule 16a-3(f)(1) ****

A Discretionary Transaction in a phantom stock account that is exempt pursuant to Rule 16b-3(f) is reportable on Table II of Form 5 (or earlier on Table II of Form 4, at the insider's discretion), on a single line using Code "I."

22. **** Rule 16b-3(b)(2); Rule 16b-3(c) ****

A stand-alone top hat plan that qualifies for an exemption under Section 201(2) of ERISA would not be an Excess Benefit Plan eligible for exemption under Rule 16b-3(c) because such plan would not be operated in conjunction with a Qualified Plan, as defined in Rule 16b-3(b)(4).

23. **** Rule 16b-3(b)(3) ****

The Non-Employee Director standards of this rule are independent of the "outside director" standards of Internal Revenue Code Section 162(m). Accordingly, satisfaction of the Non-Employee Director standards cannot be presumed based on satisfaction of the "outside director" standards.

24. **** Rule 16b-3(b)(3) ****

The relevant date for determining Non-Employee Director status is the date on which approval is obtained, including in circumstances where an award is not deemed to occur until a later date upon the satisfaction of conditions (other than the passage of time and continued employment) that are not tied to the market price of an equity security of the issuer. Cf. Biogen Idec Inc. (Nov. 24, 1993).

25. **** Rule 16b-3(b)(3)(i); Item 404(b)(1) of Regulation S-K ****

The issuer's director is chief executive officer of a company that in the ordinary course of business borrows money from the issuer, which is a bank. The issuer discloses this indebtedness and the interest to be paid thereon pursuant to S-K Item 404(c)(4), consistent with Instruction 3 to Item 404(c). Counsel inquired whether interest payments on the loan also required disclosure under Item 404(b)(1) of Regulation S-K as payments for property or services. Rule 16b-3(b)(3)(i)(D) provides that a business relationship for which disclosure would be required under Item 404(b) would disqualify the director from service as a "Non-Employee Director." The staff took the view that Item 404(b) disclosure would not be required because Instruction 1 to Item 404 states that no information need be given in response to any paragraph of Item 404 as to any transaction reported in response to any other paragraph of Item 404. Accordingly, the director would not be precluded from service as a "Non-Employee Director," as defined in Rule 16b-3(b)(3)(i).

26. **** Rule 16b-3(b)(3)(i)(A) ****

This rule disqualifies for service as a Non-Employee Director any director who currently is an officer of or otherwise currently employed by the issuer, its parent or subsidiary. For this purpose, "subsidiary" would be defined pursuant to the broad standards of Rule 12b-2, i.e., as an affiliate controlled directly or indirectly through one or more intermediaries.

27. **** Rule 16b-3(b)(3)(i)(B) ****

A director will not be disqualified for service as a Non-Employee Director by virtue of receiving compensation from the issuer for services rendered "in any capacity other than as a director" where the director receives a higher director's fee in consideration for service as chairman of the board.

28. **** Rule 16b-3(b)(3)(i)(B) ****

Paragraph (B) provides that a Non-Employee Director may not receive compensation from the issuer, its parent or subsidiary, for services in any capacity other than as a director, except for an amount that does not exceed the dollar amount for which disclosure is required under Item 404(a) of Regulation S-K. The "services" in question refer to current services or services recently provided. Accordingly, a director's receipt from the issuer of a pension that is paid as a result of the director's prior service as an employee of the issuer would not trigger disqualification under paragraph (B), without regard to amount. In contrast, a director's receipt of a severance payment, in excess of the referenced amount, would trigger disqualification because it relates to recent service.

29. **** Rule 16b-3(b)(3)(i)(D) ****

This rule provides that a director may not serve as a Non-Employee Director if the director is engaged in a business relationship for which disclosure would be required pursuant to Item 404(b) of Regulation S-K. Where a director is a lawyer or investment banker to the issuer, such relationship in all cases will preclude the director's service as Non-Employee Director because the relationship is disclosable under Item 404(b) without regard to the percentage of revenues involved.

30. **** Rule 16b-3(b)(3)(i)(D); Item 404(b)(2) of Regulation S-K ****

The president-director of a publicly-held corporation is also the sole owner of a small private company. The publicly-held corporation rented an airplane from the small company for \$2,000, an amount which represented a large portion of that company's revenues. Although disclosure of the rental transaction would not be required under Item 404(a) of Regulation S-K, because it is below the \$60,000 exclusion, it would be required under item 404(b)(2) of Regulation S-K if the \$2,000 represented more than 5% of the small company's consolidated gross revenues. As long as the transaction remains in effect and disclosable under Item 404(b)(2), the director will be precluded from service as a Non-Employee Director pursuant to Rule 16b-3(b)(3)(i)(D).

31. **** Rule 16b-3(b)(5) ****

For purposes of determining whether a plan is a Stock Purchase Plan, as defined by this rule, satisfaction of the coverage and participation requirements of Internal Revenue Code Section 410 will be measured by reference to employees eligible to participate, rather than employees actually participating.

32. **** Rule 16b-3(b)(5); Rule 16b-3(c) ****

An Internal Revenue Code Section 423 plan permits a lump sum purchase at the end of the purchase period as an alternative to payroll deductions. However, a participant must enroll at the beginning of a purchase period and elect at that time whether to use payroll deductions or the lump sum payment. Such a plan would be a Stock Purchase Plan, as defined by Rule 16b-3(b)(5) and purchases under either form of payment would be exempt under Rule 16b-3(c).

33. **** Rule 16b-3(c) ****

A routine disposition of shares to fund an administrative fee assessment under a Tax-Conditioned Plan would be exempt without further condition.

34. **** Rule 16b-3(c) ****

A sale into the open market from a Stock Purchase Plan will not be exempt pursuant to Rule 16b-3(c), and will not be a Discretionary Transaction (as defined in Rule 16b-3(b)(1)) eligible for exemption pursuant to Rule 16b-3(f). Such transactions will not be eligible for exemption from Section 16(b) pursuant to Rule 16b-3.

35. **** Rule 16b-3(c) ****

A plan may be bifurcated so that it is eligible in part for exemption under Rule 16b-3(c) only if it works entirely as a Tax-Conditioned Plan with respect to a segregable class of participants and entirely as a non-Tax-Conditioned Plan as to a different class of participants.

36. **** Rule 16b-3(c); Rule 16b-3(b)(2) ****

A stand-alone top hat plan that qualifies for an exemption under Section 201(2) of ERISA would not be an Excess Benefit Plan eligible for exemption under Rule 16b-3(c) because such plan would not be operated in conjunction with a Qualified Plan, as defined in Rule 16b-3(b)(4).

37. **** Rule 16b-3(c); Rule 16b-3(b)(5) ****

An Internal Revenue Code Section 423 plan permits a lump sum purchase at the end of the purchase period as an alternative to payroll deductions. However, a participant must enroll at the beginning of a purchase period and elect at that time whether to use payroll deductions or the lump sum payment. Such a plan would be a Stock Purchase Plan, as defined by Rule 16b-3(b)(5) and purchases under either form of payment would be exempt under Rule 16b-3(c).

38. **** Rule 16b-3(c); Rule 16b-3(d) ****

A cash-only security issued before 8/15/96 in reliance on the former Rule 16a-1(c)(3) exclusion from the definition of "derivative security" will be amended so that subsequent transactions pursuant to the security will not be consistent with the conditions of former Rule 16a-1(c)(3). Such an amendment would effect a cancellation of the old security, and the grant of a new security that will need to comply with Rule 16b-3(c) or Rule 16b-3(d) to be exempt.

39. **** Rule 16b-3(d), Note 3 ****

An amendment to a material term of a security acquired pursuant to the full board, Non-Employee Director or shareholder approval conditions of Rule 16b-3(d) would require further approval pursuant to any one of those approval conditions in order for the specific approval conditions of Note 3 to be satisfied. This is required because allowing a material term to be changed without subsequent approval would vitiate the specific approval requirement of the rule.

Such further approval is required whether or not the amendment would result in the cancellation and regrant of the security. For example, an amendment to accelerate vesting (which pursuant to Foster Pepper & Shefelman (12/20/91) does not effect a cancellation and regrant) would require further approval.

40. **** Rule 16b-3(d), Note 3 ****

Initial approval of a plan will satisfy the specificity requirement where the specific terms and conditions of each acquisition are fixed in advance, such as a formula plan. Plans that satisfy the staff interpretations of 1991 Rule 16b-3(c)(2)(ii) will be considered formula plans for this purpose. However, such a plan need not provide that the plan be amended no more frequently than once in any six-month period, as specifically required by this former Rule, so long as the plan is not subject to frequent amendment in practice.

41. **** Rule 16b-3(d); Rule 16b-3(c) ****

A cash-only security issued before 8/15/96 in reliance on the former Rule 16a-1(c)(3) exclusion from the definition of "derivative security" will be amended so that subsequent transactions pursuant to the security will not be consistent with the conditions of former Rule 16a-1(c)(3). Such an amendment would effect a cancellation of the old security, and the grant of a new security that will need to comply with Rule 16b-3(c) or Rule 16b-3(d) to be exempt.

42. **** Rule 16b-3(d); Rule 16b-3(e); Rule 16b-3(f), Note 3 ****

A deferred compensation plan allows deferrals to either a phantom stock account or a cash account (which is credited with interest at the market rate). No transfers between the phantom stock account and the cash account are permitted, except that if a participant elects a payout in installments, the participant may make a one-time election (effective simultaneously with

commencement of payouts) to transfer all or part of the phantom stock account balance to the cash account.

Because of this transfer feature, pursuant to ABA (12/20/96) Q. 4(c), the plan is treated as a multi-fund deferral plan, rather than as a single-fund deferral plan. Generally, a transfer pursuant to this feature would be a Discretionary Transaction, eligible for exemption under Rule 16b-3(f). However, where such a transaction is not a Discretionary Transaction (for example, where it is in connection with the participant's death, disability or retirement, as provided by Rule 16b-3(b)(1)), it is eligible for exemption under Rule 16b-3(e). In that case, if the participant irrevocably elects to make such a transfer at the time he or she elects to defer funds, the approval requirement of Rule 16b-3(e) and Note 3 may be satisfied by approval of the plan. Cf. ABA (12/20/96) Q. 4(b). However, if the election is made at a later point, approval of the individual transaction is necessary.

43. **** Rule 16b-3(d) (Transition) ****

Prior to mandatory effectiveness of current Rule 16b-3, in reliance on 1991 Rule 16b-3(c)(2)(i) ("Disinterested Administration"), grants of performance units that are not deemed to occur until the performance conditions are met (consistent with Certilman (4/20/92)) were authorized. At such time, the compensation committee authorizing the grants did not comply with the compositional requirements of current Rule 16b-3(d)(1) ("composed solely of two or more Non-Employee Directors").

At the time the grants occur (upon satisfaction of the performance conditions subsequent to mandatory effectiveness of current Rule 16b-3), the grants will be deemed to occur on an exempt basis, provided that all applicable conditions of 1991 Rule 16b-3 (including the 1991 Rule 16b-3(c)(1) six-month holding period) are satisfied.

44. **** Rule 16b-3(d) ****

Under a plan that is otherwise a formula plan, participants have the right following a change in control (as objectively defined in the plan) to elect to receive benefits in the form of cash or stock. However, the decision as to whether payment is made in cash or stock is made by the issuer's compensation committee. Although issuer discretion is limited to the form of payment (rather than the amount), this issuer discretion must be exercised by the full board, the committee of Non-Employee Directors, or shareholders. Alternatively, any securities received by insiders must be held for six months.

45. **** Rule 16b-3(d); Rule 16b-3(e), Note 3 ****

Approval of a grant which by its terms provides for automatic reloads would satisfy specificity of approval requirements under Rule 16b-3(d) for the reload grants, unless the automatic reload feature permitted the reload grants to be withheld by the issuer on a discretionary basis. The same result applies under Rule 16b-3(e) where the automatic feature is a tax- or exercise-withholding right.

46. **** Rule 16b-3(d)(3) ****

The six-month holding period will remain satisfied if during the six months the insider transfers the securities to a family trust, provided that the insider retains a pecuniary interest in the securities so transferred. In contrast, an outright transfer to a family member during the six months (either by gift or for consideration) will result in failure to satisfy the six-month holding period.

47. **** Rule 16b-3(d)(3); Rule 16b-3(e) ****

A company grants options in reliance on the six-month holding period of Rule 16b-3(d)(3). Shortly thereafter, the company authorizes tax-withholding rights with respect to the same options pursuant to Non-Employee Director approval under Rule 16b-3(e). This bifurcated procedure should work, provided that the withholding rights are not exercised before conclusion of the six-month holding period for the related option grant.

48. **** Rule 16b-3(e), Note 3 ****

Board approval of a buy-back plan providing for the issuer to buy back option shares at any time at fair market value would not satisfy the approval requirement of Rule 16b-3(e) because the resultant open-ended buy-back transactions would not have been approved with sufficient specificity.

49. **** Rule 16b-3(e), Note 3; Rule 16b-3(d) ****

Approval of a grant which by its terms provides for automatic reloads would satisfy specificity of approval requirements under Rule 16b-3(d) for the reload grants, unless the automatic reload feature permitted the reload grants to be withheld by the issuer on a discretionary basis. The same result applies under Rule 16b-3(e) where the automatic feature is a tax- or exercise-withholding right.

50. **** Rule 16b-3(e) ****

Because cashless exercises through a broker do not involve a transaction with the issuer or the issuer's plan, the dispositions that takes place pursuant to these transactions are not eligible for exemption pursuant to Rule 16b-3(e).

51. **** Rule 16b-3(e); Rule 16b-3(d)(3) ****

A company grants options in reliance on the six-month holding period of Rule 16b-3(d)(3). Shortly thereafter, the company authorizes tax-withholding rights with respect to the same options pursuant to Non-Employee Director approval under Rule 16b-3(e). This bifurcated procedure should work, provided that the withholding rights are not exercised before conclusion of the six-month holding period for the related option grant.

52. **** Rule 16b-3(e); Rule 16b-3(f), Note 3; Rule 16b-3(d) ****

A deferred compensation plan allows deferrals to either a phantom stock account or a cash account (which is credited with interest at the market rate). No transfers between the phantom stock account and the cash account are permitted, except that if a participant elects a payout in installments, the participant may make a one-time election (effective simultaneously with commencement of payouts) to transfer all or part of the phantom stock account balance to the cash account.

Because of this transfer feature, pursuant to ABA (12/20/96) Q. 4(c), the plan is treated as a multi-fund deferral plan, rather than as a single-fund deferral plan. Generally, a transfer pursuant to this feature would be a Discretionary Transaction, eligible for exemption under Rule 16b-3(f). However, where such a transaction is not a Discretionary Transaction (for example, where it is in connection with the participant's death, disability or retirement, as provided by Rule 16b-3(b)(1)), it is eligible for exemption under Rule 16b-3(e). In that case, if the participant

irrevocably elects to make such a transfer at the time he or she elects to defer funds, the approval requirement of Rule 16b-3(e) and Note 3 may be satisfied by approval of the plan. Cf. ABA (12/20/96) Q. 4(b). However, if the election is made at a later point, approval of the individual transaction is necessary.

53. **** Rule 16b-3(f) ****

Consistent with ABA (12/20/96) Q. 4(b), an insider elects to defer salary into a phantom stock account, and at the same time makes an election to receive the ultimate cash payout at a fixed date more than six months following the election. The payout election will not be subject to the conditions applicable to Discretionary Transactions under Rule 16b-3(f).

54. **** Rule 16b-3(f) ****

If an election to effect a Discretionary Transaction is revocable until a specified date, such specified date should be used as the date of the election for purposes of measuring the six-month period before election of the next "opposite way" Discretionary Transaction eligible for exemption under Rule 16b-3(f).

55. **** Rule 16b-3(f) (Transition) ****

For purposes of exempting the first Discretionary Transaction after conversion to 1996 Rule 16b-3, the six-month period of Rule 16b-3(f) should be measured from the date of the election effecting the last transaction under former Rule 16b-3 that would satisfy the 1996 Rule 16b-3(b)(1) definition of Discretionary Transaction.

56. **** Rule 16b-3(f); Rule 16b-3(b)(1) ****

If, pursuant to the terms of a plan, a transaction to re-balance holdings among accounts other than the issuer equity securities account results in a transfer of assets into or out of an issuer equity securities account, the transaction will be a Discretionary Transaction, subject to Rule 16b-3(f).

57. **** Rule 16b-3(f); Rule 16b-3(b)(1) ****

A rollover of funds into the issuer equity securities fund from a plan maintained by the insider's former employer will not be a Discretionary Transaction subject to Rule 16b-3(f) because it does not involve a reallocation of funds already invested in a plan of the issuer.

An automatic rollover of a phantom stock account upon the issuer's abolition of the plan in which it is maintained into a restricted stock account in another plan of the issuer would not be a Discretionary Transaction.

However, other rollovers or transfers between different plans sponsored by the same issuer may be Discretionary Transactions, and need to be analyzed on a case-by-case basis as to the character of the funds involved and whether the transaction is volitional to the insider.

58. **** Rule 16b-3(f); Rule 16b-3(b)(1) ****

Where there are two issuer equity securities funds (one containing 100% issuer equity securities and the other 50% issuer equity securities), a transfer from the 100% fund to the 50% fund would

be a transfer out of an issuer equity securities fund for purposes of measuring the six-month period before the next Discretionary Transaction. Conversely, a transfer from the 50% fund to the 100% fund would be a transfer into an issuer equity securities fund for the same purpose.

But a transfer out of either fund into a non-issuer equity securities fund would be a transfer out, and a transfer into either fund from a non-issuer equity securities fund from a non-issuer equity securities fund would be a transfer into an issuer equity securities fund.

59. **** Rule 16b-3(f), Note 3; Rule 16b-3(d); Rule 16b-3(e) ****

A deferred compensation plan allows deferrals to either a phantom stock account or a cash account (which is credited with interest at the market rate). No transfers between the phantom stock account and the cash account are permitted, except that if a participant elects a payout in installments, the participant may make a one-time election (effective simultaneously with commencement of payouts) to transfer all or part of the phantom stock account balance to the cash account.

Because of this transfer feature, pursuant to ABA (12/20/96) Q. 4(c), the plan is treated as a multi-fund deferral plan, rather than as a single-fund deferral plan. Generally, a transfer pursuant to this feature would be a Discretionary Transaction, eligible for exemption under Rule 16b-3(f). However, where such a transaction is not a Discretionary Transaction (for example, where it is in connection with the participant's death, disability or retirement, as provided by Rule 16b-3(b)(1)), it is eligible for exemption under Rule 16b-3(e). In that case, if the participant irrevocably elects to make such a transfer at the time he or she elects to defer funds, the approval requirement of Rule 16b-3(e) and Note 3 may be satisfied by approval of the plan. Cf. ABA (12/20/96) Q. 4(b). However, if the election is made at a later point, approval of the individual transaction is necessary.

60. **** Rule 16b-3(f); Form 5; Rule 16a-3(f)(1); Rule 16b-3(b)(1) ****

A Discretionary Transaction in a phantom stock account that is exempt pursuant to Rule 16b-3(f) is reportable on Table II of Form 5 (or earlier on Table II of Form 4, at the insider's discretion), on a single line using Code "I."

61. **** Rule 16b-6(b) ****

Rule 16b-6(b) would not be available to exempt the cash settlement of phantom stock because the deemed sale of the underlying stock following exercise of the phantom stock is outside the exemptive scope of Rule 16b-6(b). In contrast, Rule 16b-6(b) would be available to exempt the stock settlement of phantom stock because such transaction involves only the exercise of a derivative security.

62. Rule 16c-4

This rule provides that establishing or increasing a put equivalent position will be exempt from the Section 16(c) prohibition against short sales so long as the amount of securities underlying the put equivalent position does not exceed the amount of underlying securities otherwise owned. The insider had issued DECS (put equivalents) backed by issuer common stock. The insider proposed to sell all its issuer common stock in excess of the minimum amount deliverable in settlement of the DECS at maturity, and asked the Division staff to concur that the insider would continue to satisfy Rule 16c-4 following such sale. The Division staff did not agree because if a price decline occurred prior to maturity the insider would need to deliver a greater number of shares, at which point the insider would be short (in violation of Section 16(c)) and would be

benefited by a stock decline so that it could go into the market and cover. Rule 16c-4 is construed to apply during the entire lifetime of the put equivalent so that at any such time the insider would have no net benefit resulting from a price decline in the issuer's shares.

63. **** Form 3; Rule 16a-1(a)(1) ****

Following a company's buy-back of its stock, a person who previously owned less than 10% of the company's stock will own more than 10% of the stock without having purchased additional shares. If, before the buy-back, the person is aware that the buy-back will occur and will have this result on his or her holdings, the person should file a Form 3 within 10 days after the buy-back. If the person is unaware of the buy-back and/or its consequences, he or she would not have to file a Form 3 until information in the company's most recent quarterly, annual or current report indicates the amount of securities outstanding following the buy-back.

64. **** Form 3; Rule 16a-3(j) ****

Where a new beneficial owner joins an existing set of beneficial owners who file as a group, the new beneficial owner must file a new Form 3, even if the new owner is not adding any new securities to the group holdings.

65. Form 3; Form 4; Section 16(a)

In connection with a bank holding company formation, wherein jurisdiction of a Section 12(g) entity passes from a banking agency to the SEC, officers, directors and ten percent shareholders are not required to file either a Form 3 or Form 4 with the Commission to reflect the transaction establishing the holding company.

66. Form 4

An officer of a company whose securities are registered under Section 12(g) of the Exchange Act need not file a Form 4 report solely to indicate the officer's resignation.

67. Form 4; Form 3; Section 16(a)

In connection with a bank holding company formation, wherein jurisdiction of a Section 12(g) entity passes from a banking agency to the SEC, officers, directors and ten percent shareholders are not required to file either a Form 3 or Form 4 with the Commission to reflect the transaction establishing the holding company.

68. **** Form 4; Form 5 ****

Phantom stock is a derivative security reportable on Table II of Forms 4 and 5. Accordingly, in reporting an open market purchase of common stock, an insider would not need to update phantom stock holdings.

69. **** Form 4; Form 5 ****

Insiders may rely in good faith on the last plan statement in reporting holdings pursuant to 401(k) plans and other plans eligible for the Rule 16b-3(c) exemption.

70. **** Form 5 ****
- Discretionary Transactions must be reported individually, rather than on an aggregate basis, even when they are "same way" rather than "opposite way."
71. **** Form 5 ****
- An insider should not report January transactions that are reportable on a Form 4 on the insider's Form 5 otherwise due in February. Reporting the Form 4 transactions on a Form 5 could potentially hide transactions subject to Section 16(b) short-swing profit recovery.
72. **** Form 5; Rule 16a-3(f)(1); Rule 16b-3(b)(1); Rule 16b-3(f) ****
- A Discretionary Transaction in a phantom stock account that is exempt pursuant to Rule 16b-3(f) is reportable on Table II of Form 5 (or earlier on Table II of Form 4, at the insider's discretion), on a single line using Code "I."
73. **** Form 5; Form 4 ****
- Phantom stock is a derivative security reportable on Table II of Forms 4 and 5. Accordingly, in reporting an open market purchase of common stock, an insider would not need to update phantom stock holdings.
74. **** Form 5; Form 4 ****
- Insiders may rely in good faith on the last plan statement in reporting holdings pursuant to 401(k) plans and other plans eligible for the Rule 16b-3(c) exemption.