SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 240 and 249

[Release Nos. 34–37260; 35–26524; IC–21997; File No. S7–21–94]

RIN 3235–AF66

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

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting amendments to its rules and forms 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 (''Exchange Act'') and related provisions of the Investment Company Act of 1940 (''Investment Company Act'') and the Public Utility Holding Company Act of 1935. The revised rules are intended to streamline the Section 16 regulatory scheme, particularly with respect to transactions between an issuer and its officers and directors; simplify the reporting system; broaden exemptions from short-swing profit recovery where consistent with the statutory purposes; and codify several staff interpretive positions.

DATES: *Effective date*: August 15, 1996. The phase-in period for Rule 16b–3 is extended until November 1, 1996 pursuant to Release No. 34–37261. For a discussion of transition provisions, *see* Section VII.

FOR FURTHER INFORMATION CONTACT: Anne M. Krauskopf, Special Counsel, Office of Chief Counsel, or Elizabeth M. Murphy, Special Counsel, Office of Disclosure Policy, at (202) 942–2900, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC. 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to Rules 16a–1, 16a–2, 16a–3, 16a–4, 16a–6, 16a–8, 16a–9, 16b–3, and 16b–6 [1] promulgated under section 16 [2] of the Exchange Act.[3] The Commission also is amending Rule 16b–2 [4] and redesignating it as Rule 16a–11,[5] and adopting new Rules 16a–12 and 16a–13.[6] Finally, the Commission is adopting revisions to Item 405 of Regulation S–K [7] and Regulation S–B,[8] as well as to Forms 3, 4, and 5.[9]

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I. Executive Summary and Background

In February 1991, 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 adopted comprehensive changes to the beneficial ownership and short-swing profit recovery rules and forms applicable to insiders [10] pursuant to section 16.[11] While many aspects of the new section 16 rules were favorably received, unanticipated practical difficulties arose in implementing the new rules, particularly with respect to thrift and similar employee benefit plans. In particular, issuers and insiders stated that the application of current Rule 16b–3 to these plans is cumbersome, presents significant record-keeping problems and discourages insiders from participation in plan funds holding employer securities.

In order to address these concerns, in 1994 the Commission proposed further rule changes designed to streamline the Section 16 regulatory scheme adopted in 1991. The proposals were designed to facilitate the operation of employee benefit plans; broaden exemptions from Section 16(b) [12] short-swing profit recovery where consistent with statutory purposes; and codify several staff interpretive positions.[13] Comment also was solicited on various suggested

[1] 17 CFR 240.16a–1, 16a–2, 16a–3, 16a–4, 16a–6, 16a–8, 16a–9, 16b–3, and 16b–6. Throughout this release, the term ''current Rule or Form'' refers to the regulation as in effect before today's amendments, while ''new Rule or Form'' refers to the regulations as amended or adopted in this release.

[2] 15 U.S.C. 78p.

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

[4] 17 CFR 240.16b–2.

[5] 17 CFR 240.16a–11.

[6] 17 CFR 240.16a–12 and 16a–13.

[7] 17 CFR 229.405.

[8] 17 CFR 228.405.

[9] 17 CFR 249.103, 104 and 105.

[10] The term ''insider,'' as used in this release, refers to officers and directors of issuers with a class of equity securities registered pursuant to section 12 of the Exchange Act, and holders of more than ten percent of a class of equity securities so registered. 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)).

[11] Release No. 34–28869 (February 8, 1991) [56 FR 7242] (''Adopting Release''). The rules generally became effective on May 1, 1991, except for the phase-in period for compliance with the substantive conditions of new Rule 16b–3. The phase-in period previously was extended until September 1, 1996 or such different date as may be set in further rulemaking (Release 34–36063 (August 7, 1995) (60 FR 40994) (''1995 Phase-in Release'')). It is being further extended to November 1, 1996 to accommodate the transition to the new rules. Issuers may use new Rule 16b–3 for transactions on or after the August 15, 1996 effective date, but are not required to use the new rule until the end of the phase-in period. *See* Section VII, below.

Following the Adopting Release, the Commission issued two other releases relating to the revised rules; one set forth the Commission's views regarding shareholder approval for amendments to employee benefit plans under Rule 16b–3, as well as certain technical amendments (Release No. 34–29131 (April 26, 1991) (56 FR 19925)), while the other adopted a technical amendment to Form 4 (Release No. 34–28869B (April 10, 1991) (56 FR 14467)).

[12] 15 U.S.C. 78p(b).

[13] Release No. 34–34514 (August 10, 1994) (59 FR 42449) (''1994 Release'').

modifications to the section 16(a)[14] reporting requirements.

A follow-up release[15] solicited further comment on the treatment of compensatory cash-only instruments based on the value of the issuer's equity securities. Such instruments currently are not subject to Section 16 if they meet specified conditions. The Commission requested comment as to whether the current exclusion is appropriate in light of the fact that equity-based securities provide identical opportunities for profit predicated on the underlying stock price movement, whether settled exclusively in cash or stock, and whether, from the perspective of shareholders and analysts, cash-only instruments have the same section 16(a) informational value as instruments that may be settled in stock.

Finally, additional rule proposals were published in 1995[16] to provide a broader exemption from short-swing profit recovery for transactions between an issuer and its directors or officers, whether or not in the context of employee benefit plans; broaden the exemption for transactions in dividend and interest reinvestment plans; and revise the section 16(a) reporting scheme.

The 1995 proposals presented a simplified, flexible approach based on the premise that transactions between an issuer and its officers and directors are intended to provide a benefit or other form of compensation to reward service or to incentivize performance. Generally, these transactions do not appear to present the same opportunities for insider profit on the basis of non-public information as do market transactions by officers and directors. Typically, where the issuer, rather than the trading markets, is on the other side of an officer or director's transaction in the issuer's equity securities, any profit obtained is not at the expense of uninformed shareholders and other market participants of the type contemplated by the statute.[17] Based on its experience with the Section 16 rules, the Commission is persuaded that transactions between the issuer and its officers and directors that are pursuant to plans meeting the administrative requirements and nondiscrimination standards of the Internal Revenue Code[18] and the Employee Retirement Income Security Act of 1974 (''ERISA''),[19] or that satisfy other objective gate-keeping conditions, are not vehicles for the speculative abuse that section 16(b) was designed to prevent. Accordingly, these transactions are exempted by new Rule 16b–3 as adopted.[20]

As a corollary to this approach, it was proposed that cash-only instruments would be subject to section 16 to the same extent as other instruments that embody the opportunity for profit based on price movement in the issuer's stock. These instruments would be eligible for exemption from section 16(b), but reportable under section 16(a), to the same extent as other issuer equity securities in transactions between an issuer and its officers and directors. The Commission has determined to adopt this proposal as an integral part of its revised approach to transactions between an issuer and its officers and directors.

As a further corollary to the 1995 proposal, the Commission indicated that it contemplated simplifying the reporting system. Certain routine transactions were proposed to be exempted from reporting, while other transactions exempt pursuant to Rule 16b–3 would be reported on Form 4 within ten days after the end of the month in which the transaction occurred. The Commission has determined to revise the reporting system so that most transactions exempt pursuant to new Rule 16b–3 will be reported on an annual basis on Form 5, and to eliminate the class of transactions currently reportable on the earlier of the next required Form 4 or Form 5 by requiring that option exercises be reported on Form 4 and small acquisitions on Form 5. A number of exempt transactions of a routine nature, such as acquisitions pursuant to tax-conditioned plans and dividend and interest reinvestment plans, will not be required to be reported at all.[21]

Eighty-nine letters of comment were received in response to the 1994 Release and the Cash-only Release, and 38 letters were received in response to the 1995 Release.[22] In general, the commenters expressed strong support for the tenor of the proposals, with most preferring the 1995 version of Rule 16b–3 to the 1994 version. These commenters thought that the revisions would alleviate many of the practical issues and uncertainties that have arisen since adoption of the comprehensive section 16 amendments in 1991. Many commenters suggested modifications to the proposals, some of which are addressed in this Release, as discussed throughout.

The rules adopted today essentially implement the 1995 proposals, as well as the elements of the 1994 proposals not addressed in 1995.[23] Changes from the proposals are discussed in the release below. Highlights of changes from the current rules are as follows:

A. Transactions Between an Issuer and its Directors or Officers

- Generally, transactions between an issuer (including an employee benefit plan sponsored by an issuer) and its directors or officers will be exempt from section 16(b) if they satisfy the applicable conditions of new Rule 16b–3, as set forth below:
- Routine transactions pursuant to specified tax-conditioned plans (such as thrift plans, stock purchase plans and excess benefit plans) will be exempt from section 16(b) without further condition.
- Fund-switching transactions or volitional cash withdrawals from an issuer equity securities fund will be exempt if the election to engage in the transaction is at least six months after the last election to engage in such a transaction that was opposite-way (*i.e.*, a previous acquisition if the transaction to be exempted is a disposition, and vice versa).
- Other acquisitions by an officer or director from the issuer, including grants, awards and participant-directed transactions, will be exempt upon satisfaction of any one of three alternative conditions:
- Approval of the transaction by the board of directors of the issuer or a committee of two or more Non-Employee Directors;

[14] 15 U.S.C. 78p(a).

[15] Release No. 34–34681 (September 16, 1994) (59 FR 48579) (''Cash-only Release'').

[16] Release No. 34–36356 (October 11, 1995) (60 FR 53832), as corrected in Release No. 34–36356A (October 29, 1995) (60 FR 54823), (together, the ''1995 Release'').

[17] An insider's breach of fiduciary duty to profit from self-dealing transactions with the company is a concern of state corporate law. Generally, states have created potent deterrents to insider self-dealing and other breaches of fiduciary duty. *See* 3 Fletcher Cyc. Corp. § 837.60 (Perm. ed. 1994); D. Block, S. Radin and N. Barton, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors* 124–37 (4th ed. 1993). There are also potential liability considerations under Rule 10b–5 [17 CFR 240.10b–5].

[18] 26 U.S.C. *et seq.* (1986) (''Internal Revenue Code'').

[19] 29 U.S.C. 1001 *et seq.* (1986).

[20] *See* Section II, below.

[21] *See* Section IV, below.

[22] These comment letters, together with two Summaries of Comments prepared by Commission staff, are available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington DC 20549. Persons seeking these materials should make reference to File No. S7–21–94.

[23] Pursuant to Release 33–7300 issued today, the Commission also is rescinding Rules 16b–1(c) and 16b–4 and amending Rule 16a–3(i) to permit typed signatures, consistent with the recommendations of the Task Force on Disclosure Simplification.

• Approval or ratification of the transaction by the holders of the majority of the issuer's securities; or

• Satisfaction of a six-month holding period following the date of acquisition.

• Other dispositions by an officer or director to the issuer will be exempt if approved by the board of directors of the issuer, a committee of two or more ''Non-Employee Directors,'' as defined, or the holders of the majority of the issuer's securities.

B. Derivative Securities

• The current section 16 exclusion from the definition of ''derivative securities'' for instruments based on the value of the issuer's equity securities but settled exclusively in cash [24] is rescinded. However, these instruments are eligible for exemption pursuant to new Rule 16b–3.

• Options granted to an underwriter in a registered public offering to satisfy over-allotments are expressly excluded from the definition of ''derivative security.'' [25]

• Rights to withhold or surrender a security in satisfaction of the exercise price of a derivative security, or in satisfaction of the tax-withholding consequences applicable to the receipt, exercise or vesting of an issuer equity security (including a derivative security) are excluded from the definition of ''derivative security.'' [26]

C. Reporting

• A number of transactions exempt from Section 16(b) that currently must be reported on Form 5 no longer will be required to be reported at all, among them:

• Exempt transactions pursuant to tax-conditioned plans (other than fund-switching transactions and volitional cash withdrawals from an issuer equity securities fund);

• Transactions pursuant to dividend or interest reinvestment plans [27] and domestic relations orders; [28]

• Transactions that change only the form of beneficial ownership; [29]

• Certain transactions by a person who has ceased to be an insider; [30] and

• Expirations or cancellations of certain derivative securities. [31]

• Exercises and conversions of derivative securities, including employee stock options, whether or not exempt from Section 16(b), will be reported on Form 4.

• All other exempt transactions and small acquisitions [32] will be reported annually on Form 5, with earlier reporting on Form 4 permitted.

• Reporting will be permitted on a joint basis when more than one person subject to Section 16 is deemed to be a beneficial owner of the same issuer equity securities. [33]

• A trust will be subject to Section 16 only if the trust is the beneficial owner of more than ten percent of a class of issuer equity securities registered pursuant to Section 12 of the Act. [34]

• Item 405 of Regulations S–K and S–B [35] is revised to clarify the nature of the issuer's obligation to review insiders' filings in order to determine whether there are any delinquent reports that require disclosure. Item 405 disclosure will be required to be placed under a separate caption.

• Insiders' obligation to report equity swap transactions is reiterated and clarified, and a new reporting code is added for equity swaps.

D. Other Issues

• The exemption for the reinvestment of dividends and interest pursuant to dividend and interest reinvestment plans [36] is revised to eliminate the requirement that the plan be made available on the same terms to all holders of the class of securities.

• A new exemption is provided for transactions pursuant to domestic relations orders. [37]

• The exemption for stock splits, stock dividends and pro rata rights [38] is expanded to exempt stock dividends paid in the securities of a different issuer, such as spinoff distributions.

• A transaction that occurs after a person ceases to be an officer or director will be subject to section 16 only if it is not otherwise exempt from section 16(b) and is executed within six months of an opposite-way transaction subject to section 16(b) that occurred while the person was an officer or director. [39]

II. Transactions Between an Issuer and Its Directors or Officers

A. General Approach

The amendments to Rule 16b–3 adopted today implement the approach set forth in the 1995 proposal to align better the regulatory requirements under the rule with the statutory goals underlying section 16. [40] Moreover, since benefit plans and compensation payments and programs vary widely in design and purpose, the Commission is convinced that a ''one size fits all'' regulatory scheme is impractical. The proliferation of unique plan features over the last decade has led to legal uncertainty regarding the application of Rule 16b–3 to these innovations. Rather than react to present plan developments, the Commission intends to provide greater regulatory flexibility to accommodate future developments.

New Rule 16b–3 exempts from short-swing profit recovery any acquisitions and dispositions of issuer equity securities (including those that occur upon the exercise or conversion of a derivative security, whether in- or out-of-the-money) [41] between an officer or director and the issuer, subject to simplified conditions. [42] A transaction with an employee benefit plan sponsored by the issuer will be treated the same as a transaction with the issuer. [43] However, unlike the current

[24] Current Rule 16a–1(c)(3).

[25] New Rule 16a–1(c)(7), which will codify the interpretive positions set forth in *Video Technology (Overseas) Limited/Davis Polk & Wardwell* (June 17, 1992) and *Davis Polk & Wardwell* (July 16, 1992).

[26] New Rule 16a–1(c)(3) (proposed as Rule 16a–1(c)(8)).

[27] New Rule 16a–11 (current Rule 16b–2).

[28] New Rule 16a–12.

[29] New Rule 16a–13.

[30] New Rule 16a–2(b).

[31] New Rule 16a–4(d).

[32] These transactions, which do not exceed $10,000 in the aggregate, are eligible for deferred reporting pursuant to current and new Rule 16a–6.

[33] New Rule 16a–3(j).

[34] Current Rule 16a–8(a)(1)(ii), which makes a trust subject to Section 16 if the trustee otherwise is subject to section 16 and exercises or shares investment control of issuer securities held by the trust and the trustee or a member of the trustee's immediate family has a pecuniary interest in such issuer securities, is rescinded. Other obligations applicable to trusts, trustees, beneficiaries and settlors pursuant to current Rule 16a–8 are not affected by this change.

[35] 17 CFR 229.405 and 228.405.

[36] New Rule 16a–11 (current Rule 16b–2).

[37] New Rule 16a–12.

[38] Current and new Rule 16a–9.

[39] New Rule 16a–2(b).

[40] *See* Section I, above.

[41] As indicated in Note (1) to new Rule 16b–3, the exercise or conversion of a derivative security that does not satisfy the conditions of this rule will continue to be eligible for exemption from section 16(b) pursuant to Rule 16b–6(b) [17 CFR 240.16b–6(b)]. Similarly, a note is added to new Rule 16b–6(b) as a reminder that exercises or conversions also may be exempted by new Rule 16b–3.

[42] Like current Rule 16b–3, new Rule 16b–3 does not provide an exemption for persons who are subject to section 16 solely because they beneficially own greater than ten percent of a class of an issuer's equity securities. Officers and directors owe certain fiduciary duties to a corporation. *See* n. 17, above. Such duties, which act as an independent constraint on self-dealing, may not extend to ten percent holders. The lack of other constraints argues against making new Rule 16b–3 available to ten percent holders. However, new Rule 16b–3 is available to such a person who is also subject to section 16 by virtue of being an officer or director with respect to transactions with the issuer.

[43] New Rule 16b–3(a). Although some transactions between officers or directors and issuer-sponsored employee benefit plans technically are not transactions with the issuer, such transactions should be within the scope of an exemption premised on the nature of insiders' transactions with issuers. Employee benefit plans are the most common vehicle by which issuers provide for securities-based compensation of employees, including officers and directors, that

rule, a transaction need not be pursuant to an employee benefit plan or any compensatory program to be exempt, nor need it specifically have a compensatory element.

A transaction will be exempt if it satisfies the appropriate conditions set forth among four alternative categories: Tax-Conditioned and Related Plans; Discretionary Transactions; Grants, Awards and Other Acquisitions from the Issuer; and Dispositions to the Issuer.[44] New Rule 16b–3 eliminates many of the conditions of current Rule 16b–3, such as general written plan conditions,[45] the prohibition against transfer of derivative securities, shareholder approval as a general condition for plan exemption, the six-month holding period as a general condition for the exemption of grant and award transactions, the disinterested administration or formula plan requirements regarding grant transactions, and the window period requirement for fund-switching transactions and stock appreciation right exercises.

B. Tax-Conditioned Plans

The exemption for transactions pursuant to tax-conditioned plans[46] is adopted substantially as proposed in 1995. This exemption is premised on the view that an adequate safeguard against speculative abuse is provided when a plan satisfies certain conditions imposed by the Internal Revenue Code and ERISA.[47] Accordingly, any acquisition or disposition of issuer equity securities, except as discussed below, will be exempt without further condition if made pursuant to a plan that satisfies the definition of a ''Qualified Plan,''[48] an ''Excess Benefit Plan,''[49] or a ''Stock Purchase Plan.''[50] Thus, for example, routine acquisitions pursuant to thrift and stock purchase plans generally will be exempt under this provision. The tax code coverage and participation requirements provide readily accessible, objective standards for designing an exempt plan.

While most transactions pursuant to tax-conditioned plans may rely on this exemption, fund-switching and cash withdrawal transactions arising solely from an insider's volitional investment decision, defined as ''Discretionary Transactions,'' instead must satisfy a timing requirement.[51]

As proposed, the exemption for tax-conditioned plans would have exempted without further condition any acquisition pursuant to a plan or transaction that satisfied the conditions applicable to performance-based compensation imposed by section 162(m) of the Internal Revenue Code and the regulations thereunder.[52] Commenters expressed divergent views on whether this basis for exemption would be useful. The Commission is not adopting the section 162(m) provision, since it appears unnecessary in view of the expanded availability of the exemption for grants, awards and other acquisitions.[53]

C. Discretionary Transactions

Many contributory employee benefit plans permit a participant to choose one of several funds in which to invest (*e.g.*, an issuer stock fund, a bond fund, or a money market fund). Plan participants typically are given the opportunity to engage in ''fund-switching'' transactions, permitting the transfer of assets from one fund to another, at periodic intervals. Plan participants also commonly have the right to withdraw their investments in cash from a fund containing equity securities of the issuer. Fund-switching transactions involving an issuer equity securities fund and cash distributions from these funds[54] may present opportunities for abuse because the investment decision is similar to that involved in a market transaction. Moreover, the plan may buy and sell issuer equity securities in the market in order to effect these transactions, so that the real party on the other side of the transaction is not the issuer but instead a market participant.

In order to foreclose opportunities for abuse, the 1995 proposal contemplated that such transactions in a tax-conditioned plan would be exempt only if effected pursuant to an election made at least six months following the date of the most recent prior such election. As adopted, this provision has been made applicable to these transactions pursuant to *any* plan, whether or not tax-conditioned,[55] given that it is the nature of the transaction, without regard to the type of plan, that presents an opportunity for abuse. Accordingly, these transactions are defined separately as ''Discretionary Transactions,''[56] and the exemption is placed in a separate paragraph rather than included with the exemption for tax-conditioned plans.

As favored by many commenters, the six month condition will apply only to ''opposite way'' transactions; *i.e.*, elections that effect acquisitions and dispositions must be six months apart, but prior ''same-way'' elections within the preceding six months do not render the exemption unavailable.[57] The six month condition will apply if a prior election by the officer or director effecting an ''opposite way''

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otherwise would be satisfied through direct compensation from the issuer.

[44] In addition to the conditions for exemption, as discussed below, Note (2) has been added to new Rule 16b–3 to reference the reporting rules applicable to transactions exempted by the new rule. *See* Section IV, below.

[45] Because a plan no longer will be required to set forth in writing either the price at which securities may be offered and the amount of securities to be awarded, or the method by which such price and amount are to be determined, the manner in which shares are counted no longer will present interpretive issues. As noted at n. 69 to the 1994 Release, interpretive letters regarding this subject for purposes of the requirements of current Rule 16b–3(a)(1) no longer are required to be followed.

[46] New Rule 16b–3(c).

[47] The rule does not require the plan to be tax-qualified, but instead either to satisfy specified conditions applicable to tax-qualified plans, or, in certain circumstances, to be operated in connection with a plan that satisfies those conditions.

[48] New Rule 16b–3(b)(4). The definition of ''Qualified Plan'' is adopted as proposed, *i.e.*, an employee benefit plan that satisfies the coverage and participation requirements of Sections 410 and 401(a)(26) of the Internal Revenue Code of 1986, or any successor provisions thereof.

[49] New Rule 16b–3(b)(2). The definition of ''Excess Benefit Plan'' has been revised to eliminate references to specific I.R.C. Sections so as to ensure that plans qualifying for an exemption under section 201(2) of ERISA would be covered by the exemption. The revised definition requires that such a plan be operated in conjunction with a Qualified Plan, and provide only the benefits and contributions that would be provided under the Qualified Plan but for any benefit or contribution limitations set forth in the Internal Revenue Code. As was proposed, the amended rule does not require transactions pursuant to an Excess Benefit Plan to be in tandem with transactions in the related Qualified Plan to be eligible for exemption.

[50] New Rule 16b–3(b)(5). The definition of ''Stock Purchase Plan'' has been revised to indicate that satisfaction of the coverage and participation standards of Section 410 of the Internal Revenue Code is an alternative to satisfaction of Internal Revenue Code Sections 423(b)(3) and 423(b)(5), rather than an additional requirement. The purpose of including this alternative standard is to make the exemption available to stock purchase plans that do not satisfy the standards of Internal Revenue Code Section 423, but nevertheless are operated in a broad-based manner.

[51] *See* Section II.C, below.

[52] Internal Revenue Code Section 162(m) and Regulation § 1.162–27(e), which set forth the conditions pursuant to which an issuer may deduct compensation in excess of $1 million paid to its chief executive officer and four other most highly compensated officers for whom disclosure is required to be reported in Exchange Act filings.

[53] *See* Section II.D, below.

[54] No exemption has been provided in new Rule 16b–3 for a withdrawal in kind of issuer equity securities because such a transaction would be a change in form of beneficial ownership from indirect to direct, which will be exempt from Section 16 pursuant to new Rule 16a–13. *See* Section IV.B, below.

[55] New Rule 16b-3(f).

[56] New Rule 16b-3(b)(1).

[57] Because it is anticipated that the actual date on which such a plan transaction occurs may be outside the control of an insider participant, the rule is premised on a six-month interval between the date of subsequent ''opposite way'' elections. The rule does not require that such an election be made six months in advance of the related transaction.

Discretionary Transaction was made pursuant to *any* plan of the issuer in which the officer or director participates. Some commenters favored an exemption premised on transactions taking place during a window period. The Commission, however, prefers a more simple approach that is more consistent with the statutory purpose.

The definition of ''Discretionary Transaction'' excludes a number of transactions that are primarily for retirement planning.[58] Transactions resulting from an election to receive, or to defer the receipt of, securities and/or cash in connection with death, disability, retirement or termination of employment,[59] as well as transactions that effect a diversification or distribution which the Internal Revenue Code requires an employee benefit plan to make available to a participant,[60] need not comply with the six-month condition.[61] Thus, these transactions are eligible for exemption pursuant to other applicable provisions of the amended rule (most likely the exemption for tax-conditioned plans). Although such transactions have an element of volition, the insider's opportunity to speculate in the context of a death, disability, retirement or termination of employment would seem well circumscribed, as is also the case with regard to the specified diversification and distribution elections.

D. Grants, Awards and Other Acquisitions From the Issuer

1. General; Participant-Directed Acquisitions

Plans that authorize ''grant and award'' transactions provide issuer equity securities to participants on a basis that does not require either the contribution of assets or the exercise of investment discretion by the participants. For example, awards of bonus stock pursuant to a salary-based formula and grants of options or restricted stock are grant and award transactions. In contrast, a ''participant-directed transaction'' requires the participant to exercise investment discretion as to either the timing of the transaction or the assets into which the investment is made. For example, the exercise of an option and a participant's election pursuant to a thrift plan to invest either the employee or the employer contribution in issuer equity securities are participant-directed transactions.

Both the current and the new rules provide a specific exemption for the grant or award of issuer equity securities. The new rule makes the exemption more readily available, since only one of three alternative conditions need be satisfied.[62] Commenters responded favorably to this proposal. They expressed concern, however, that some participant-directed transactions (such as deferrals of bonuses into phantom stock and other deferred compensation programs) that are exempt under the current rule [63] would lack an exemption under the new rule.

The 1995 proposal was intended to permit such transactions, which ordinarily do not present opportunities for abuse, an opportunity for exemption.

Accordingly, as adopted, the proposed grant and award exemption has been retitled ''Grants, Awards and Other Acquisitions from the Issuer'' to make it clear that participant-directed acquisitions that are not pursuant to tax-conditioned plans may rely on this exemption.[64] However, if a participant-directed transaction is a ''Discretionary Transaction,'' as defined in the new rule, it must instead satisfy the conditions designed specifically for Discretionary Transactions in order to be exempt.[65]

2. Alternative Conditions

The new rule provides three alternative bases for exempting the acquisition of issuer equity securities (including derivative securities). The first two conditions exempt an acquisition that is either: (i) Approved in advance by the board of directors or a committee of the board composed solely of two or more ''Non-Employee Directors;'' [66] or (ii) approved in advance, or subsequently ratified not later than the date of the next annual meeting of shareholders, by shareholders.[67] If a transaction has satisfied more than one of the alternative approval conditions specified in the new rule (for example, if board approval is followed by shareholder approval) the issuer may rely on any condition that provides the basis for the exemption.

Alternatively, an acquisition that does not satisfy any of the approval conditions will be exempt if the securities acquired are held by the insider for six months following the date of acquisition, or in the case of a derivative security, at least six months elapse between the date of acquisition of the derivative security and the date of disposition of the underlying security.[68] The six-month holding period for dividend equivalent rights (''DERs'') and shares purchased pursuant to the automatic reinvestment of dividends will be deemed to commence on the date of acquisition of the shares on which the DERs or dividends are paid.[69]

Commenters who addressed this segment of the 1995 proposal favorably noted both its simplicity and flexibility. The Commission is persuaded that satisfaction of any of the three conditions is a sufficient basis to exempt an acquisition of issuer equity securities from the issuer.

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[58] The items enumerated are the same as those in the rule as proposed, although they were not set forth in a separate definition.

[59] Such transactions are exempted by current Rule 16b-3(d)(1)(ii).

[60] Such transactions include diversification elections and distributions provided for by Internal Revenue Code Section 401(a)(28), and distributions required by Internal Revenue Code Section 401(a)(9).

[61] A loan funded by the disposition of issuer equity securities will be considered a cash distribution involving a volitional disposition of an issuer equity security unless the insider continues to bear the risk of loss with respect to such issuer equity securities during the term of the loan. Involuntary distributions of cash for the purpose of satisfying the limitations on employee elective contributions and employer matching contributions imposed by the Internal Revenue Code will be exempt without condition because such transactions do not occur at the insider's volition.

[62] New Rule 16b–3(d).

[63] Many such transactions are now exempt pursuant to the six month advance election provided by current Rule 16b–3(d)(1)(i).

[64] Participant-directed dispositions are eligible for the ''Dispositions to the Issuer'' exemption, discussed in Section II.E, below.

[65] *See* Section II.C, above.

[66] New Rule 16b–3(d)(1).

[67] New Rule 16b–3(d)(2). Like current Rule 16b–3(b), this standard would require the affirmative vote of the holders of the majority of the issuer's securities 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 is incorporated, or the written consent of the majority of the issuer's securities entitled to vote, solicited in compliance with Section 14 of the Securities Exchange Act (15 U.S.C. 78n).

[68] New Rule 16b–3(d)(3). The 1995 Release solicited comment as to whether a grant or award that satisfies any of the three alternative conditions should be exempt only if the officer or director to whom the grant is made had not disposed of issuer equity securities on a non-exempt basis during the previous six months at a price higher than that at which the grant is made. New Rule 16b–3(d), as adopted, does not require satisfaction of this condition with respect to any acquisition.

[69] This position is consistent with the amendment to current Rule 16b–3(c)(1) proposed in 1994, which would have reversed current interpretation providing that the six-month holding period is deemed to commence on the date the dividend or DER is granted or allocated to the participant. *See Hewitt Associates* (Apr. 30, 1991) Q. 2(b); and *Davis Polk & Wardwell* (Aug. 23, 1991). Under new Rule 16b–3, DERs and shares purchased pursuant to the receipt of dividends will need to satisfy a six-month holding period only if the securities on which the dividends or DERs are paid rely on a six-month holding period as the basis for exemption. Moreover, *pro rata* dividends paid in stock with respect to all securities of a class will continue to be exempt pursuant to Rule 16a–9.

3. Scope of Approval Required

When the rule requires ''Non-Employee Director,'' [70] full board or shareholder approval, the Commission intends that the approval relate to specific transactions rather than the plan in its entirety. However, approval of a plan pursuant to which the specific terms and conditions of each acquisition are fixed in advance, such as a formula plan,[71] will satisfy this condition, and the exemption also will be available for a plan with an appendix providing for specific grants to specific individuals. Note (3) has been added to the new rule, making the specific nature of the approval required clear.

The note also provides that where the terms of a subsequent transaction are provided for at the time a transaction is initially approved, the subsequent transaction will not require further specific approval. If the terms of an award as approved provide for a subsequent participant-directed election, that election will be exempt without further condition if effected pursuant to those terms. For example, if an award of restricted stock as approved permits an insider awardee to defer receipt pursuant to a related deferred compensation plan, the insider's election to defer will be exempt without further condition. In the same manner, the acquisition of underlying issuer equity securities that occurs upon the exercise or conversion of a derivative security will be exempt, provided that the exercise is pursuant to terms provided in the derivative security originally approved in its acquisition.[72] Similarly, if an award as originally approved specifically provided for the automatic grant of reload options, each resultant grant of reload options pursuant to those terms will not require subsequent approval.

[70] This term is defined in new Rule 16b–3(b)(3). *See* Section II.D.4, below.

[71] A plan that constitutes a ''formula plan'' under staff interpretations of current Rule 16b–3(c)(2)(ii) will be considered a formula plan for this purpose.

[72] The disposition of the derivative security that occurs upon exercise similarly will be exempt pursuant to new Rule 16b–3(e). *See* Section II.E, below.

A derivative security that did not satisfy the Non-Employee Director committee, board of directors or shareholder approval conditions (such as a derivative security issued in reliance on the six-month holding period of new Rule 16b–3(d)(3) or a derivative security acquired other than directly from the issuer) could be exercised or converted and the underlying issuer equity securities acquired on an exempt basis pursuant to Rule 16b–6(b), if the conditions of that rule are met (fixed exercise price and exercise not out-of-the-money unless necessary to comport with the sequential exercise provisions of Internal Revenue Code Section 422A).

4. Non-Employee Director Definition

With respect to committee approval as a basis for exemption, ''Non-Employee Director'' as proposed in 1995 was defined as a director who is not currently an officer of, or otherwise employed by or a consultant to, the issuer, its parent or its subsidiary. The 1995 Release further elaborated that, for this purpose, ''consultant'' would include attorneys, accountants or others who indirectly receive compensation from the issuer through firms that provide services to the issuer.

However, commenters criticized the ''Non-Employee Director'' definition to the extent that it would prohibit any consulting arrangement with the issuer. These commenters cited definitional uncertainty, the special expertise provided by retired senior executives and other consultants, and the absence of problems stemming from such persons' service as disinterested directors under the current rules [73] as reasons for not imposing an absolute ban on consulting arrangements.

The Commission is persuaded that the reasoning supporting these comments justifies permitting directors with limited consulting relationships with the issuer to serve as Non-Employee Directors. Under the rule as adopted,[74] a ''Non-Employee Director'' will be a director who is not currently an officer or otherwise employed by the issuer, or a parent or subsidiary of the issuer; does not receive compensation directly or indirectly from the issuer, its parent or subsidiary for services rendered as a consultant or in any capacity other than as a director, except for an amount for which disclosure would not be required pursuant to Item 404(a) of Regulation S–K;[75] does not possess an interest in any other transaction for which disclosure would be required pursuant to Item 404(a) of Regulation S–K; and is not engaged in a business relationship for which disclosure would be required pursuant to Item 404(b) of Regulation S–K. [76] With respect to a closed-end investment company, a ''Non-Employee Director'' [77] will be a director who is not an ''interested person'' of the issuer, as that term is defined in section 2(a)(19) of the Investment Company Act.[78]

Although the new rule would not prohibit Non-Employee Directors or the full board from awarding themselves grants of issuer equity securities, such grants would be subject to state laws governing corporate self-dealing. [79] The Commission believes that traditional state law fiduciary duties facilitate compliance with the underlying purposes of section 16 by creating effective prophylactics against possible insider trading abuses.

E. Dispositions to the Issuer

Both as proposed in 1995 and as adopted, the new rule exempts any transaction involving a disposition of issuer equity securities to the issuer, provided that such disposition is approved in advance by the board of directors, a committee of Non-Employee Directors, or the shareholders.[80] However, if a disposition is a Discretionary Transaction, as defined in the new rule, it must instead satisfy the conditions specifically applicable to Discretionary Transactions to be exempt.[81]

The 1994 Release proposed amendments to current Rule 16b-3(f) to exempt exercise withholding rights and the surrender or withholding of issuer equity securities in satisfaction of a tax-withholding obligation. These proposed amendments are not adopted because the same transactions will be exempted pursuant to the broad scope of the new rule.[82] For example, the new rule will exempt dispositions of issuer equity securities to the issuer pursuant to: (1) The right to have securities withheld, or to deliver securities already owned, either in payment of the exercise price of an option or to satisfy the tax withholding consequences of an option exercise or the vesting of restricted securities, (2) 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, or (3) the election to receive, and the receipt of, cash in complete or partial settlement of a stock appreciation right. Additionally, the new rule will give the issuer the

[73] Current Rule 16b–3(c)(2)(i).

[74] New Rule 16b–3(b)(3)(i).

[75] 17 CFR 229.404(a). This item generally requires disclosure of related party transactions where the amount involved exceeds $60,000. For purposes of the definition of ''Non-Employee Director,'' each test that refers to S–K Item 404 will be measured by reference to the Regulation S–K disclosure Item, whether the disclosure requirements applicable to the issuer are governed by Regulation S–K or S–B.

[76] 17 CFR 229.404(b). This item generally requires disclosure of business relationships with the registrant where the amount involved exceeds greater than five percent of the consolidated gross revenue of either the registrant or the other entity.

[77] New Rule 16b–3(b)(3)(ii).

[78] 15 U.S.C. 80a–2(a)(19).

[79] *See* n. 17, above.

[80] New Rule 16b-3(e).

[81] *See* Section II.C, above.

[82] Like most other exempt transactions, these transactions will be reportable on Form 5. *See* Section IV.C, below. However, where the surrender or withholding transaction is in connection with the exercise or conversion of a derivative security, it should be reported on the same Form 4 as the exercise or conversion. *See* Section IV.D, below.

flexibility to redeem its equity securities from insiders in connection with non-exempt replacement grants, and in discrete compensatory situations such as individual buy-backs in connection with estate planning.

The exemption, which was favorably received by commenters, is adopted substantially as proposed.[83] A note has been added to the new rule to clarify that if the terms of a subsequent transaction are provided for in the transaction as initially approved, the subsequent transaction does not require further specific approval.[84] For example, the exemption will apply to the disposition to the issuer of a derivative security upon its exercise or conversion, if such exercise is pursuant to the terms provided in the derivative security as initially approved in its acquisition.

In the context of a merger, the new rule will exempt the disposition of issuer equity securities (including derivative securities) solely to the issuer, provided the conditions of the rule are satisfied.[85] Dispositions of such securities to parties other than the issuer, such as an acquiror, are not covered by the rule and consequently would not be eligible for exemption under the rule. The specific terms of the disposition, including price, will require prior approval of either the full board, the committee of Non-Employee Directors or shareholders. If shareholder approval is solicited and is to be the condition relied upon for exemption, the proxy card and proxy statement both should provide that a vote to approve the merger also shall constitute a vote to approve insiders' exempt dispositions of issuer equity securities to the issuer.[86]

[83] The 1995 Release solicited comment as to whether a disposition that satisfies either condition should be exempt only if the officer or director making the disposition had not acquired issuer equity securities on a non-exempt basis during the previous six months at a price lower than that at which the disposition was made. New Rule 16b-3(e), as adopted, does not require satisfaction of this condition with respect to any disposition.

[84] Note (3) to new Rule 16b–3. *See* Section II.D.3, above.

[85] If such securities were acquired in reliance on new Rule 16b-3(d)(3), the six-month holding period will need to be satisfied prior to such disposition in order for the acquisition to be exempt.

[86] Any such proxy statement should describe the security holdings of each officer and director as to which approval of an exempt disposition is solicited. *See* Item 5 of Schedule 14A (17 CFR 240.14a-101), which requires, in a solicitation made on behalf of the registrant, a brief description by security holdings of any direct or indirect substantial interest in any matter to be acted upon of each person who has been a director or executive officer of the registrant at any time since the beginning of the last fiscal year, unless such interest gives rise to a benefit that is shared on a *pro rata* basis by all other holders of the same class. *See also* Item 3 of Schedule 14C (17 CFR 240.14c-101).

III. Derivative Securities

A. Compensatory Cash-Only Instruments

The proposal to apply Section 16 and the rules thereunder to compensatory instruments that can be redeemed or exercised solely for cash (''cash-only instruments'') elicited divergent views. Cash-only instruments provide performance-based cash compensation to employees, using stock price as a measure of company performance. Although such instruments do not provide employees with an equity interest in the employer that may be traded in securities markets, they do provide the equivalent opportunity to profit based on an increase in market price.

Currently, a cash-only instrument whose value is derived from the market value of an issuer equity security[87] is excluded from the definition of derivative security if it: (i) Is awarded pursuant to an employee benefit plan that satisfies specified provisions of Rule 16b-3,[88] 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.[89] The 1994 Release included a proposed modification of the derivative security definition that would have excluded all cash-only instruments issued in the context of an employer-employee compensation arrangement, including compensation arrangements between a company and its non-employee directors. As discussed above,[90] the subsequent Cash-Only Release solicited comment as to whether the existing exclusion for cash-only instruments is overly broad in light of the purposes of Section 16.

Most commenters responding to the Cash-Only Release favored an unconditional exemption for cash-only instruments, stressing that such instruments are not transferable and hence do not give rise to market transactions. However, the 1995 Release indicated that, as a corollary to broadening the Rule 16b-3 exemption, the Commission contemplated rescinding the exclusion for cash-only instruments. Such instruments thus would be on a par with stock options and other instruments settled in stock, and would be both reportable and eligible for exemption under Rule 16b-3 to the same extent. This approach is consistent with the purpose of the 1995 proposals to eliminate bias toward compensation paid in cash by exempting from the short-swing profit recovery provisions of section 16(b) virtually all compensatory transactions between an issuer and its officers and directors. Commenters addressing this aspect of the 1995 proposals divided in their views; some indicated that the exclusion should be eliminated because the insider retains the same opportunity to profit as presented by an equity-settled instrument, while most favored retention of the exclusion because transactions in these instruments do not affect securities markets.

As an integral aspect of the 1995 approach, the Commission has determined to rescind Rule 16a-1(c)(3) as contemplated. The Commission believes that because the opportunity for profit based on price movement in the underlying stock embodied in a cash-only instrument is the same as for an instrument settled in stock, cash-only instruments should be subject to Section 16 to the same extent as other issuer equity securities. However, the Commission also recognizes that cash-only instruments generally are not traded in market transactions by insiders. Accordingly, transactions in these instruments are made eligible for exemption on the same basis as other transactions in issuer equity securities between an issuer and its officers and directors.

This change renders uniform the application of a simplified set of rules applying to all compensatory instruments that provide an opportunity to profit based on issuer equity performance. It is anticipated that, by eliminating the more burdensome aspects of Rule 16b-3 and bringing cash-only instruments within its scope, the rules adopted today will reduce the regulatory complexity and uncertainty that has discouraged the use of equity as compensation. Accordingly, although transactions in cash-only instruments will be reportable following effectiveness of the amended rules,[91] such instruments will be eligible, and should usually qualify, for exemption from section 16(b) pursuant to new Rule 16b-3.[92] Commenters' concerns

[87] An instrument whose value is not derived from the value of an issuer equity security is not currently and, under the rules as adopted, will not be subject to section 16.

[88] Current Rule 16a-1(c)(3)(i), which references the provisions of Rules 16b-3(a)(1) (written plan requirements), 16b-3(a)(2) (transferability restriction) and 16b-3(c)(2) (disinterested administration or formula plan).

[89] Current Rule 16b-3(c)(3)(ii).

[90] *See* Section I, above.

[91] *See* the discussion of reporting at Section VII.A, below, concerning the transition to the new rules.

[92] Most of these instruments are acquired from the issuer and meet the other conditions of the new Rule. Of course, the acquisition of a cash-only instrument from a party other than the issuer would not be within the scope of the Rule.

regarding the lack of an exemption for participant-directed transactions in cash-only instruments, such as the deferral of salary or fees into phantom stock, have been addressed by expanding the proposed exemption for grants and awards to cover participant-directed acquisitions of issuer equity securities.[93]

B. Over-Allotment Options

Over-allotment options (sometimes referred to as ''Green Shoe options'') facilitate public offerings and do not lend themselves to the speculative abuse Section 16 was designed to prevent. Accordingly, in 1994 the Commission proposed codification of staff interpretive relief[94] that would specifically exclude from the definition of ''derivative security'' options granted to an underwriter in a registered public offering for the purpose of satisfying over-allotments.

In response, some commenters suggested that the exclusion should not be limited to over-allotment options granted in registered public offerings, as proposed. Other commenters differed in their responses to the request for comment as to whether the exclusion should be limited specifically to those over-allotment options that comply with the National Association of Securities Dealers (''NASD'') regulation stating that it is ''unfair and unreasonable'' for an over-allotment option in connection with a firm commitment undertaking to exceed 15 percent of the amount of securities offered, exclusive of the over-allotment option.[95] However, given that the primary need for the exclusion relates to over-allotment options granted in registered public offerings, which as a practical matter generally are subject to the NASD regulation, the rule is adopted in the form proposed,[96] without a specific requirement for compliance with the NASD regulation.

C. Surrender and Withholding Rights in Connection With Exercise or Tax Withholding

As discussed above,[97] the exercise of a right to surrender or withhold securities in connection with the exercise of a derivative security or satisfaction of a tax obligation will be an exempt disposition of issuer equity securities to the issuer. Whether such a right, when granted, constitutes a derivative security is a separate issue.

Currently, the right to withhold securities in satisfaction of a tax obligation is treated as a derivative security separate from the equity or derivative security to which it relates.[98] However, this right, as well as the right to have securities withheld in satisfaction of an exercise price, properly may be viewed as an integral feature of the related security.[99] Accordingly, the 1994 Release proposed a new rule that would exclude from the definition of ''derivative security'' these withholding rights, as well as rights to surrender previously owned securities in satisfaction of either an exercise price or a tax obligation incurred upon the exercise of derivative securities or the vesting of restricted shares.

Commenters suggested that the proposed rule's reference to ''restricted shares'' circumscribed too narrowly the class of securities, other than derivative securities, to which withholding and surrender rights apply. Commenters indicated that the receipt of a security also could be a taxable event. In response to these comments, the rule as adopted[100] has been broadened to exempt also withholding and surrender rights that apply to ''equity securities'' rather than only ''restricted shares,'' and that arise with respect to the receipt as well as the exercise or vesting of a derivative or equity security. With respect to a tax-withholding right, the exclusion from the definition of ''derivative security'' is not limited to the insider's marginal tax rate with respect to the underlying transaction. However, the amount withheld must be applied to the tax obligation generated by the underlying transaction.

D. Value Derived from Market Price of an Equity Security

In the 1994 Release the Commission proposed an amendment to the definition of ''derivative security''[101] to codify the staff interpretive position that an instrument is not within the scope of Section 16 if it includes a material non-market price based condition (such as return on equity) to exercise or settlement.[102] Although the Commission endorses the application of this analysis to date, the Commission also recognizes the advantage in retaining the interpretive role of the staff to modify or develop further this analysis as may be appropriate with respect to new instruments that may be developed in the future. Accordingly, the proposed amendment is not adopted, and questions regarding this analysis should continue to be addressed to the staff. For purposes of this interpretive analysis, a condition will be considered ''material'' only if it possesses substance independent of the passage of time or continued employment.

Most importantly, the Commission believes that under the new rule much of the incentive to characterize these instruments one way or the other will evaporate. In almost all cases, they will be exempt from Section 16(b) because they will be able to satisfy easily one of the simplified approval conditions. Consequently, the only effect of a particular characterization is on the need for and timing of any reporting under section 16(a). The Commission does not believe that relief generally will be needed for this purpose.

IV. Revisions to Reporting System

A. Overall Approach

In the 1994 Release, the Commission stated that it was reconsidering its approach to the reporting of transactions pursuant to the Section 16 regulatory scheme. The release, without endorsing a specific proposal, solicited comment on five alternative proposals seeking to simplify reporting through the following three different basic approaches: (1) Deleting or substantially reducing the reporting of exempt transactions; (2)

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[93] *See* Section II.D.1, above.

[94] *See Video Technology (Overseas) Limited/Davis Polk & Wardwell* (June 17, 1992), and *Davis Polk & Wardwell* (July 16, 1992). Absent this relief, an over-allotment option written by an insider could be characterized as the establishment of a put equivalent position and deemed sale of the underlying stock. Subsequent expiration of the unexercised option arguably could constitute a purchase of the underlying security, matchable with the over-allotment option grant or other sales by the insider within a six-month period.

[95] Paragraph (c)(6)(B)(ix) of Article III, Section 44 of the NASD Rules of Fair Practice (the Corporate Financing Rule).

[96] New Rule 16a-1(c)(7).

[97] *See* Section II.E, above.

[98] As an alternative to separate reporting, a tax withholding right currently may be noted as a feature of the equity or derivative security to which it relates. *See The Clorox Company* (Mar. 27, 1992). An insider's failure to report such right does not give rise to a disclosure obligation under Item 405 of Regulation S–B or Regulation S–K. *See Skadden, Arps, Slate, Meagher & Flom* (June 8, 1992).

[99] *Cf. Xerox Corporation* (Jul. 7, 1992) (the staff reached this conclusion with respect to a mandatory tax withholding feature).

[100] New Rule 16a-1(c)(3) (proposed as Rule 16a-1(c)(8)).

[101] Proposed Rule 16a-1(c)(9).

[102] This is an interpretation of current Rule 16a-1(c), which requires a derivative security to have ''an exercise or conversion privilege at a price related to an equity security, or * * * a value derived from the value of an equity security.'' *See General Mills, Inc.* (Jan. 31, 1992); and *Certilman Balin Adler & Hyman* (Apr. 20, 1992). *See also Boston Edison Company* (Mar. 19, 1992); *Merrill Lynch & Co.* (Aug. 28, 1992) Q. 4. (Registrant discretion to adjust the applicable performance measure, as to either duration or level of performance, excludes a performance unit from being a derivative security.)

reducing the flexibility currently provided insiders with respect to use of Form 4 or 5 to report a number of exempt transactions; and (3) requiring issuer annual reporting of insider holdings and information as to transactions during the fiscal year.

These varied approaches highlighted several questions as to what extent, if at all, investors need information with respect to exempt transactions and whether investors need a reconciliation of insiders' equity holdings from year to year. The 1994 Release also requested comment on whether exercises and conversions of derivative securities exempt from section 16(b), as well as small acquisitions, should continue to be reported on an insider's next required Form 4 or 5, whichever is earlier.

As a corollary to the amendments to Rule 16b-3 proposed in 1995, the 1995 Release requested comment on an additional reporting approach. Pursuant to the scheme contemplated by the 1995 Release, several types of transactions, such as routine acquisitions in broad-based employer plans, would not need to be reported at all. The remaining transactions, including grants and awards exempt under Rule 16b–3, generally would be reported on a Form 4 no later than ten days following the end of the month in which the transaction occurred. Exempt option exercises either would have remained reportable on an insider's next required Form 4 or 5, or would have been reported on Form 4.

The approach selected by the Commission is based on the 1995 approach, but includes elements from the 1994 Release. As outlined in Sections IV.B through D below, the revisions simplify the reporting framework by providing that several types of transactions exempt from section 16(b) no longer will be required to be reported at all. Transactions exempt from short-swing profit recovery that still must be reported will be reported on Form 5, and non-exempt transactions will be reported on Form 4, except that exercises and conversions of derivative securities (whether or not exempt) will be reported on Form 4, and small acquisitions will be reported on Form 5. There no longer will be a category of transactions reported on a ''next required Form 4 or Form 5, whichever is earlier'' basis, which commenters have criticized as being confusing and possibly leading to inadvertent late filings. The Commission believes that this new approach simplifies insiders' reporting obligations without adversely affecting the timing and amount of information that is significant to investors.

The 1994 Release solicited comment on whether the Commission should eliminate the ''total holdings'' column in Forms 4 and 5 or simplify the data provided by insiders to reconcile their total holdings. Alternatively, commenters were asked to consider whether a new column should be added to Forms 4 and 5 requiring insiders to reconcile their current holdings with those reported in a previous filing, particularly if exempt transactions no longer were to be reported.

Although several commenters supported elimination of the total holdings columns, they are being retained. Form 4 disclosure of total holdings assists users of Section 16 information in evaluating the significance of a transaction to a particular insider, and Form 5 total holdings provide a useful reconciliation of changes in holdings resulting from exempt and other types of transactions permitted to be reported on a deferred basis.

The Commission also has decided not to impose any new reconciliation requirements on insiders. Instead, as currently, the requirement to report total holdings on Forms 4 and 5 will remain limited to the class of securities to which a transaction is reported, and changes in holdings associated with transactions eligible for deferred reporting on Form 5 will not have to be reflected in the month-end total holdings reported on Form 4, unless the transaction voluntarily has been reported earlier on Form 4.[103]

Also in keeping with current practice, insiders will reflect changes in holdings resulting from transactions that are exempt from section 16 reporting in the holdings column of the next otherwise required Form 4 or 5 filed to report a transaction involving the same class of securities. Insiders may choose, but are not required, to include footnote disclosure indicating the date and nature of transactions not required to be reported. To the extent that information about a transaction not required to be reported under the revised rules is not readily available, the insider should provide a ''best estimate'' of the change in holdings resulting from the transaction.[104] The purpose of the best estimate is not indirectly to require insiders to report transactions exempt from Section 16(a), but rather, to provide users of section 16 information with holdings information that is as accurate as reasonably possible.[105]

In a separate effort to facilitate the filing of Section 16(a) reports and encourage the speedy dissemination of information considered valuable by many members of the investment community, the Commission has expanded the capacity of the EDGAR system to accommodate the electronic filing of those reports.[106] Insiders have been able to electronically file their section 16 reports on a voluntary basis since December 18, 1995.[107]

B. Transactions No Longer Reported at All

- ''Spinoff'' or other dividend transactions in which equity securities of a different issuer are distributed to insiders of an issuer[108]
- Acquisitions pursuant to a dividend or interest reinvestment plan[109]
- Transactions in a tax-conditioned plan,[110] except for discretionary intra-plan transfers and cash distributions[111]

[103] Instruction 4(a)(i) to Form 4.

[104] There may not be sufficient information available concerning certain types of transactions that are not required to be reported under the revised rules, *e.g.*, periodic purchases in tax-conditioned employee benefit plans, to establish a best estimate regarding changes in holdings. In those cases, the holdings column will not be updated until the information becomes available.

[105] When accurate information concerning holdings that were estimated by an insider becomes available, it should be reflected on the next otherwise required Form 4 or 5 that references the same class of securities. Modifications in holdings information to reflect variances in actual holdings from estimated holdings will not trigger the disclosure requirements of Item 405 of Regulations S–K and S–B.

[106] *See* Release Nos. 33–7231 (October 5, 1995) (FR) and 33–7241 (November 13, 1995) (60 FR 57682). At the same time, the EDGAR system was expanded to accommodate the electronic filing of reports pursuant to Rule 144 [17 CFR 230.144] under the Securities Act (15 U.S.C. 77a *et seq.*).

[107] Instruction 3 to Form 3 and Instruction 2 to Forms 4 and 5 have been amended to add a reference to electronic filing.

[108] New Rule 16a-9(a). The current exemption for stock splits and dividends has been expanded to include specifically a stock dividend in which equity securities of a different issuer are distributed. *See* Section V.C, below.

[109] New Rule 16a-11. *See* Section V.A, below.

[110] New Rules 16a–3(f)(1)(i)(B) and 16b–3(c). Current Instruction 4(a)(ii) to Form 5 sets forth information regarding the reporting of transactions and holdings in ongoing securities acquisition plans. Among other things, it states that transactions and holdings may be reported as of the most recent date for which information is available, and that acquisitions may be reported on an aggregate basis. The 1994 Release proposed amendments to Instructions 4(a) (ii) and (iv) to Form 5 and the Note to Instruction 4(a)(ii) to Form 4 to codify interpretations regarding aggregated reporting. Because these acquisitions no longer are required to be reported under the revised rules, the proposed amendments are not adopted. Further, current Instruction 4(a)(ii) to Form 5 is rescinded since the transactions addressed will not be reported under the revised rules.

[111] Defined as ''Discretionary Transactions'' pursuant to new Rule 16b–3(b)(1). *See* Section II.C, above. These transactions will continue to be reported on Form 5, as discussed in Section IV.C below.

- Post-termination transactions by a former officer or director that are exempt from section 16(b) or that do not occur within six months of an opposite non-exempt transaction [112]
- Acquisitions or dispositions of securities pursuant to a domestic relations order meeting certain conditions of the Internal Revenue Code [113]
- Transactions reflecting a mere change in form of beneficial ownership [114]
- Exempt cancellations or expirations of a long derivative security where no value is received [115]

The above are transactions that must be reported under current rules, but will not be reported under the revised rules.[116] In addition to providing a means for enforcing section 16(b) short-swing profit liability, section 16(a) reporting serves the separate purpose of informing the market of transactions that reflect insiders' views of their companies' prospects. Because the transactions listed above generally do not provide investors meaningful information consistent with this purpose, the Commission deems it appropriate to relieve insiders from unnecessary burdens by exempting these transactions from reporting. There was nearly unanimous support among the commenters for these revisions, which are adopted substantially as proposed.

The revised rules provide a specific exemption from section 16 for changes in the form of beneficial ownership (but not in the extent of an insider's pecuniary interest in the subject securities).[117] Although commenters generally supported the proposal to add a new transaction code to Form 5 to facilitate the reporting of these transactions, several commenters suggested eliminating any reporting requirement regarding changes in the form of beneficial stock ownership. Since these transactions do not reflect any change in an insider's pecuniary interest in an issuer's equity securities, reporting seems to serve little purpose, and the Commission has determined that they should be exempt from reporting.[118]

C. Transactions To Be Reported on Form 5

- Transactions exempt from section 16(b), except for: (1) Transactions listed in Section IV.B above that are not required to be reported at all pursuant to the changes being adopted; and (2) exempt exercises and conversions of derivative securities [119]
- Small acquisitions [120]

A substantial number of commenters supported an alternative reporting approach described in the 1994 Release involving elimination of the requirement to report transactions exempt from section 16(b) liability, and many also supported the elimination of Form 5. In contrast, however, a number of commenters thought that the requirement to report exempt transactions should be retained, and indicated that Form 5 is a useful document.

As discussed above, the Commission is eliminating the reporting of several classes of exempt transactions, including non-volitional transactions in tax-conditioned plans. The Commission expects that elimination of reporting of these routine plan transactions will greatly alleviate insiders' burden of reporting exempt transactions without resulting in any significant loss of information that users of Section 16 information find valuable.

The Commission believes, however, that the reporting of other types of exempt transactions, such as option grants and other acquisitions and dispositions of securities in plans that are not tax-conditioned, may provide the marketplace with useful information. These transactions typically are less automatic and may reflect insiders' views of their companies' prospects. The Commission also believes that continued annual reporting of these transactions on Form 5 is appropriate.

In view of the change discussed above concerning the treatment of cash-only instruments that derive value from the market value of equity securities of the issuer,[121] transactions involving such instruments will be reported on Form 4 or 5, depending on whether they are exempt. It is anticipated that most of these will be exempt pursuant to new Rule 16b–3 and thus reportable on Form 5.

Pursuant to the reporting scheme contemplated by the 1995 Release, exempt grants, awards and dispositions of securities in plans that are not tax-conditioned, as well as intra-plan transfers and cash distributions in tax-conditioned plans, would have been reported on Form 4 no later than ten days after the close of the month in which the transaction occurred. The Commission has determined to require reporting of these transactions on Form 5 rather than Form 4, in view of the remarks of many commenters who felt that the accelerated reporting of exempt transactions on Form 4 would prove unworkable as the result of the necessary plan information not being available in sufficient time to meet Form 4 filing deadlines. Further, while some commenters expressed a preference for reporting transactions on Form 4 rather than waiting until year-end to file a Form 5 and possibly overlooking a transaction, others expressed a need for flexibility and indicated that annual reporting is preferable. Those who prefer voluntarily to report exempt transactions on Form 4, of course, may continue to do so, as is currently permitted.

The 1995 Release also proposed elimination of the requirement that gifts be reported. Since some commenters find gift activity to be a useful indication of an insider's view of the company's prospects (for example, where a large charitable gift effects a significant disposition) the requirement to report gifts on Form 5 is retained.

Small acquisitions, which currently are reported on a next required Form 4 or Form 5 basis, will be reported on Form 5.[122] The 1994 Release solicited

[112] New Rule 16a–2(b).

[113] New Rule 16a–12. *See* Section V.B below for further discussion of this new rule, which expands the existing exemption relating to Qualified Domestic Relations Orders.

[114] New Rule 16a–13.

[115] New Rule 16a–4(d).

[116] Under the current and revised requirements, stock splits, stock dividends with respect to the same issuer and the acquisition of certain pro rata rights do not have to be reported pursuant to Rule 16a–9. Further, transactions by odd-lot dealers in odd-lots are exempt from current and revised reporting requirements pursuant to Rule 16a–5. Cash-only instruments also are not now reported since they are excluded from the definition of ''derivative securities'' under current Rule 16a–1(c)(3) if they meet certain conditions, but they will be reported under the new rules.

[117] New Rule 16a–13. For example, distributions of equity securities from an employee benefit plan to an insider participant would be a mere change in the form of beneficial ownership from indirect to direct where the securities previously had been attributed to the insider.

[118] Accordingly, the proposed transaction code is not adopted. The new rule makes it clear that exercises and conversions of derivative securities and the deposit or withdrawal of shares into or from a voting trust are not to be regarded as mere changes in the form of beneficial ownership, and will continue to be reported. If a deposit or withdrawal of shares into or from a voting trust satisfies the conditions of Rule 16b–8 (17 CFR 240.16b–8), the transaction is exempt from section 16(b).

[119] New Rule 16a–3(f)(1)(i).

[120] New Rule 16a–6.

[121] *See* Section III.A, above.

[122] New Rule 16a–6, like the current rule, provides only a deferral, not an exemption, from reporting. All small acquisitions, unless otherwise exempt, must be reported on Form 5. As is currently the case, if an acquisition no longer qualifies for the reporting deferral in paragraph (a) of Rule 16a–6, all such acquisitions that have not yet been reported will continue to be reported on Form 4 within ten days after the close of the calendar month in which the conditions of that

Continued

comment as to whether reporting could be made more convenient for insiders, consistent with the informational needs of the investing public, by permitting small acquisitions to be reported solely on Form 5, and the majority of commenters favored this approach.[123]

Additionally, as proposed in the 1994 Release, the small acquisitions reporting rule is revised to exclude from the $10,000 threshold acquisitions occurring within the prior six months of the current acquisition that were exempted by rule from Section 16(b), or previously reported on Form 4 or 5. The revised rule also clarifies, as proposed, that the current acquisition cannot be disregarded in calculating the $10,000 threshold. All the commenters remarking on these clarifications supported them.

D. Transactions to be Reported on Form 4

- Transactions not exempt from Section 16(b), except for small acquisitions [124]
- Exercises or conversions of a derivative security, whether or not exempt from Section 16(b) [125]

Transactions not exempt from short-swing profit recovery that currently are reported on Form 4 generally will continue to be reported on Form 4, including non-exempt exercises and conversions of derivative securities. In addition, as a change from the current system, exercises and conversions of derivative securities exempt from short-swing profit recovery under either new Rule 16b–3 or Rule 16b–6(b) always will be reported on Form 4,[126] since the Commission is eliminating the current method of reporting these transactions on a next Form 4 or Form 5 basis. Reporting of these transactions has been shifted to Form 4 rather than Form 5 due to concerns expressed by commenters that the timing of option exercises represents an important indication of insiders' views of their companies' prospects.

E. Joint and Group Reporting

Currently, when 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 and file separate reports. To reduce this duplicative reporting, the Commission is adopting rules that permit such persons to file their reports either separately or jointly, as proposed in the 1994 Release.[127]

Under the new reporting scheme, where persons in a group have reporting obligations, the filing of collective reports on behalf of all group members is permitted.[128] Such joint and group filings, and any amendments, may be submitted by any designated constituent beneficial owner. Required information must be given for each beneficial owner, and such filings must be signed by, or on behalf of, each beneficial owner by an authorized person, with statements confirming the delegation of signature authority attached to the filing.

Beneficial owners making a joint or group filing may authorize one of the beneficial owners or a third party to sign on their behalf, provided that confirming statements are attached to the filing, or are provided by amendment as soon as practicable, with respect to each owner delegating signature authority, unless such a confirmation still in effect is on file with the Commission.[129] Of course, to the extent a sufficiently broad power of attorney previously was filed, such as with a Schedule 13D, that power of attorney may be incorporated by reference in a Section 16(a) filing. Each beneficial owner will retain individual liability for compliance with the filing requirements, including the obligation to assure that the filing is timely and accurately made.[130]

Comment was solicited in the 1994 Release as to whether, in the alternative, authority to make a group Section 16 filing could be presumed based on the filing of a group Schedule 13D, such that all group members thereby would be deemed to have granted authority to any group member to file a Section 16 form. The commenters rejected the creation of such a presumption under any circumstances other than a sufficiently broad power of attorney, *i.e.*, one that specifically authorizes the beneficial owner to file Section 16 reports on his or her behalf. One of the commenters noted that a Schedule 13D group member could file Section 16 reports on behalf of another group member who may not even be aware that he or she has become subject to Section 16, or who may file duplicative reports. Therefore, authority to make a group Section 16 filing will not be presumed based upon the filing of a group Schedule 13D.

F. Trust Transactions

Under the revised rules, and as proposed in the 1994 Release, a trust is subject to section 16 only if it beneficially owns more than ten percent of a class of registered equity securities of an issuer.[131] The Commission has rescinded the provision imposing section 16 reporting obligations on a trust that does not own more than ten percent of an issuer's securities if it has an insider trustee with investment control over the issuer's securities held by the trust, and the trustee or a member of the trustee's immediate family has a pecuniary interest in the securities.[132] Since the primary effect of the current dual reporting standard is to create duplicative reporting obligations, particularly with respect to family trusts, the imposition of independent Section 16 obligations on the trusts does not appear necessary.

There will continue to be some instances where a trust and a trust beneficiary that both are subject to Section 16 must report separately with respect to the same transaction because they share investment control. The 1994 Release proposed adding a new note to the reporting rules to provide that transactions attributed to a trust beneficiary may be reported by the trustee on behalf of the beneficiary. A

paragraph no longer are met. *See* Rule 16a–6(b) (17 CFR 240.16a–6(b)).

[123] As discussed below, exempt exercises and conversions of derivative securities will be reported on Form 4 under the revised rules.

[124] New Rule 16a–3(g)(1).

[125] *Id.*

[126] If a derivative security is exercised or converted before its exempt grant otherwise must be reported, the grant should be reported at the same time as the exercise or conversion.

[127] New Rules 16a–3(j) and 16a–1(a)(3) reflect this change. Forms 3, 4 and 5 and the Instructions thereto also are modified to permit joint and group filings. In response to a commenter's request for clarification, the revised instructions to the forms indicate that, for their convenience, joint filers may reflect transactions in separately owned securities either in an individually filed or jointly filed report.

[128] Joint and group filings can be used, for example, by parents and subsidiaries, trusts and trust beneficiaries, partnerships, or Schedule 13D groups (17 CFR 240.13d–101). The group itself is not a reporting person for section 16 purposes, but under the revised rules, group members may choose to file collective reports to satisfy their individual filing obligations. A group member is not required to report transactions by another group member, however, unless he or she has or shares a pecuniary interest in the securities held by such other member.

[129] Currently, General Instruction 7 to Forms 3, 4 and 5 permits a form filed for an individual to be signed on behalf of the individual by an authorized person. This instruction remains the same. General Instruction 5 to Form 3 and General Instruction 4 to Forms 4 and 5 are amended to specify the means of reporting pecuniary interest of multiple beneficial owners. A corresponding amendment also has been made to General Instruction 6 to each Form.

[130] *Cf. In the Matter of Bettina Bancroft*, Release No. 34–32033, AP 3–7999 (Mar. 23, 1993).

[131] New Rule 16a–8(a)(1). *See Proskauer Rose Goetz & Mendelsohn* (Apr. 29, 1991) (a trust that holds more than ten percent of a class of equity securities registered under section 12 is the beneficial owner of those securities for purposes of section 16).

[132] Current Rule 16a–8(a)(1)(ii) (17 CFR 240.16a–8(a)(1)(ii)). A conforming amendment to Rule 16a–2(d)(2) (17 CFR 16a–2(d)(2)) reflects the rescission of Rule 16a–8(a)(1)(ii).

commenter objected to the proposed note on grounds that a trustee should not report on behalf of a trust beneficiary unless formally authorized to do so. Therefore, the note has been modified to indicate that, as currently, a trustee may file a separate report on behalf of a beneficiary if a statement confirming the delegation of signature authority is filed with the Commission.[133] The trustee also may file a consolidated report on behalf of the trust and one or more trust beneficiaries if authorized to do so by the beneficiaries. Regardless of whether the trustee reports on behalf of a beneficiary or the beneficiary personally files reports, the beneficiary subject to a reporting requirement retains individual liability for compliance with that requirement.

G. Compliance With the Reporting Requirements

Under the revised rules, as proposed, registrants will be required to set off any disclosure required by Item 405 of Regulation S–K or S–B of insider non-compliance with Section 16(a) reporting obligations under an appropriate and discrete caption.[134] In response to commenters' remarks, this new caption will read ''Section 16(a) Beneficial Ownership Reporting Compliance'' rather than ''Section 16(a) Reporting Delinquencies,'' as proposed in the 1994 Release. The new caption should enable interested parties readily to locate this disclosure, which often consists of only a sentence or two, and prevent the information from being buried among unrelated disclosure.

In addition, Item 405 is revised to clarify the nature of the issuer's obligation to review insiders' filings in order to determine whether there are any delinquent reports that must be disclosed. The issuer is entitled to rely on the Forms 3, 4 and 5 furnished to it, as well as written representations by the insider that no Form 5 is required.

New language has been added, as proposed, to make it clear that the issuer is obligated to consider the absence of certain forms.[135] The absence of a Form 3 is an indication that disclosure is required. Similarly, the absence of a Form 5 is an indication that disclosure is required, unless the issuer has received a written representation that no Form 5 is required, or otherwise knows that no such filing is required.[136] While some commenters objected to this clarification on grounds that it would place an inappropriate burden of investigation on issuers to determine that a form is not required, the Commission views it merely as a codification of previous Commission guidance concerning issuers' obligations.

The 1994 Release solicited comment on whether Item 405 should require issuers to include in their filings an affirmative statement that no section 16(a) delinquencies were required to be reported, if such was the case. It had been suggested that an affirmative statement requirement would prevent issuers from overlooking the Item 405 disclosure requirement. Since most of the commenters addressing the issue opposed an affirmative statement requirement, and there is little evidence that issuers are overlooking Item 405 disclosure, the Commission is not adopting such a requirement.

Finally, as noted in the 1994 Release, the Commission is aware of and encourages the practice of many issuers to assist their officers and directors in complying with their section 16(a) reporting obligations. [137] Since the use of powers of attorney is permitted, it is also possible for an issuer to coordinate the filing of its officers' and directors' reports by having the corporate secretary or other agent obtain powers of attorney from these reporting persons, collect information every month about their transactions subject to Section 16, and file required reports by the due date.[138]

H. Equity Swaps

The 1994 Release contained a section analyzing Section 16 issues relating to equity swaps, and soliciting comments upon the analysis and related issues.[139] Equity swaps are individually negotiated contracts in which the specific terms may vary from agreement to agreement. For instance, an equity swap may take the form of an agreement in which one party holding shares of equity securities agrees to pay, or ''swap,'' the return [140] on those securities in exchange for the return on an equity index, basket of equities, or an interest rate-based cash flow. Generally, commenters agreed that the Commission's analysis of equity swaps as involving the economic equivalent of tandem stock appreciation and depreciation rights reflects economic reality. Some, however, suggested simplified approaches to analysis and reporting.

The Commission reiterates that Section 16 consequences arise from an equity swap transaction where either party to the transaction is a Section 16 insider with respect to a security to which the swap agreement relates.[141] The Commission agrees with commenters, however, that any manner of reporting an equity swap, or an instrument with similar characteristics, that provides an adequate description is appropriate. The specific method of reporting described in the 1994 Release is not the only acceptable method. However, there are certain items of information that must be set forth for an adequate presentation. To provide an adequate description, an insider must report the entry into and termination of the equity swap, as well as any interim events to the extent such events change the insider's call or put equivalent position.[142] To be adequate, each report must provide the following information: (1) The date of the transaction; (2) the term; (3) the number of underlying shares; (4) the exercise price (*i.e.*, the dollar value locked in); (5) the non-

[133] Note to new Rule 16a–8(b)(3).

[134] New Item 405(a)(1) of Regulations S–K and S–B. Additionally, a technical amendment has been made to Item 405 of Regulation S–B to correct the reference to Rule 16a–3(d) (17 CFR 240.16a–(d)) by replacing it with a reference to Rule 16a–3(e) (17 CFR 240.16a–3(e)).

[135] New Item 405(a)(2) of Regulations S–K and S–B. This obligation was set forth in the 1991 Adopting Release, n. 231 and surrounding text.

[136] A ''safe harbor'' from disclosure is available for an issuer who receives a written representation and keeps it for two years. *See* Item 405(b)(2).

[137] On February 14, 1996, the Commission included in the SEC News Digest and posted on the Commission's Internet Web Site an announcement encouraging the electronic filing of Forms 3, 4 and 5 (as well as Form 144) and providing guidance on how companies that choose to do so may assist filers in the electronic filing process.

[138] Of course, insiders giving powers of attorney would still retain individual liability for compliance. *See* n. 130, above.

[139] *See* Section III.G of the 1994 Release for the Commission's detailed analysis.

[140] For purposes of this analysis, ''return'' may include dividends paid on the equity instrument, as well as the change in market value.

[141] This analysis addresses solely the application of Section 16 to equity swaps to the extent that they are engaged in by insiders. The discussion does not analyze the status of these transactions or the parties thereto under any other provision of the federal securities laws.

However, as stated in the 1994 Release, no Section 16 consequences would flow from an equity swap to the extent that the equity swap relates solely to 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, that are deemed not to confer beneficial ownership for purposes of section 16 pursuant to Rule 16a–1(a)(5)(iii) (17 CFR 240.16a–1(a)(5)(iii)) and/or are excluded from the definition of ''derivative securities'' pursuant to current Rule 16a–1(c)(4).

[142] *See* 1994 Release n. 106, which stated that to the extent settlement of the parties' obligations occurs on an interim basis during the term of the swap the insider's section 16 obligations would arise with respect to each settlement, commenters expressed concern over the need to report interim events. As noted above and consistent with the section 16 reporting scheme in general, such events need be reported only to the extent that they cause a change in an insider's call or put equivalent position.

exempt disposition (acquisition) of shares at the outset of the term; (6) the non-exempt acquisition (disposition) of shares at the end of the term (and at such earlier dates, if any, where events under the equity swap cause a change in a call or put equivalent position); (7) the total number of shares held after the transaction; and (8) any other material terms.[143]

Some commenters suggested that equity swaps in general or certain aspects of them should be regarded as excluded or exempt from Section 16. The Commission is not persuaded, however, that any exclusion or exemption currently is available or that equity swaps should be so excluded or exempted.

Numerous issues are raised under the federal securities laws by equity swaps and other instruments that shift some or all of the economic interests and risks of an equity security. Since record and beneficial ownership does not necessarily reflect who holds the voting, investment or income interests of a security, it may be appropriate in areas other than Section 16 to assure that the regulatory structure reflects the economic realities of these transactions. The Commission is continuing to consider the legal and disclosure issues raised by these arrangements under the federal securities laws, including Schedule 13D reporting, Rule 144,[144] Rule 144A, Regulation S,[145] and disclosure of security holdings and executive compensation.[146]

I. Changes in Forms and Reporting Codes

As proposed in the 1994 Release, when an insider exercises an option acquired pursuant to a Rule 16b-3 plan and immediately sells a portion of the shares to pay the exercise price under a cashless exercise program, the insider will be able to reflect the sale of the portion of shares necessary to satisfy the exercise price by using the transaction code for payment of an option exercise price by delivery or withholding of securities,[147] rather than the general sale of security code,[148] provided that the sale is to the issuer. Commenters agreed that it was appropriate to use the same code for these transactions since they all constitute cashless exercises.

A new transaction code also has been included in Forms 4 and 5 to be used for transactions in equity swaps and instruments with similar characteristics.[149] This will be in addition to whatever other codes are used to describe the transaction.[150] The new code will assist the Commission and users of Section 16 information in identifying these transactions.

Additionally, the Instructions to Forms 3, 4 and 5 are revised to state that the forms may be submitted to the Commission in electronic format at the option of the reporting person.[151] The Instructions also are modified to indicate that insiders may attach a page of 8½ by 11 inch white paper to reflect additional comments to the forms, if the space provided on the forms is insufficient.[152] The current rules require insiders to reflect supplemental information on additional copies of the forms.

Several transaction codes have been modified or deleted from the Instructions to Forms 4 and 5 in accordance with the revisions.[153] Finally, Forms 3, 4 and 5 have been revised to accommodate joint and group filing.[154]

V. Additional Exemptions and Revisions

A. Dividend or Interest Reinvestment Plans

Current Rule 16b–2 exempts from the short-swing profit recovery provisions of section 16(b) the acquisition of issuer equity securities resulting from reinvestment of dividends or interest on securities of the same class, if made pursuant to a plan, available on the same terms to all holders of that class of securities, providing for regular reinvestment of dividends or interest. Concerns have been expressed that the requirement that the plan be made available to all holders of the class (the ''all-holders requirement'') can impose significant burdens, such as the outlay of significant sums to comply with laws governing securities offerings in foreign jurisdictions, on companies that wish to allow for insider participation.

Accordingly, in 1995 the Commission proposed to modify this requirement, noting that such a stringent participation requirement did not appear necessary to preclude the opportunity for speculative abuse by insiders. The rule was proposed to be amended to exempt acquisitions resulting from reinvestment of dividends or interest on securities of the same class if made pursuant to a plan that meets three conditions: First, it must provide for the regular reinvestment of dividends or interest. Second, the plan must be broad-based and not discriminate in favor of employees of the issuer.[155] Third, the plan must operate on substantially the same terms for all plan participants.[156]

Commenters agreed that the proposed modification is appropriate and serves the goal of reducing administrative burdens while protecting against possible speculative abuse by officers and directors. Commenters noted particularly that the ''all-holders'' provision is not essential to eliminate abuse, and that modification of this provision would substantially reduce the costs imposed by the requirement that such plans be made available to

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[143] New Code K is added to Forms 4 and 5 for reporting equity swaps and instruments with similar characteristics. *See* Section IV.I, below.

[144] *See* Release No. 33–7187 (June 27, 1995) (60 FR 35645).

[145] *See* Release No. 33–7190 (June 27, 1995) (60 FR 35663).

[146] *See* the Commission's *Report of the Task Force on Disclosure Simplification*, Part III.A.3.b.

[147] Transaction code ''F.'' The sale of shares to pay the exercise price of an option under a cashless exercise program is exempt from Section 16(b) if the issuer is the purchaser, but not if the shares are sold on the open market by a broker or other third party. Code ''F'' may be used to reflect only exempt transactions. The amendments clarify that code ''F'' also should be used to report the withholding of securities incident to satisfaction of tax liability incurred upon the receipt, exercise or vesting of a security.

[148] Transaction code ''S.''

[149] New transaction code ''K'' and General Instruction 8 to Forms 4 and 5.

[150] For example, an equity swap transaction reported as a disposition will be reported as S/K, using the codes for ''sale'' and ''equity swap.''

[151] General Instruction 3(a) to Form 3, and General Instruction 2(a) to Forms 4 and 5.

[152] General Instruction 6 to Forms 3, 4 and 5. Specified information must be included at the top of the page so that the filing can be identified if the page is detached.

[153] Transaction codes ''A,'' ''F,'' ''H,'' ''I,'' and ''M'' have been modified and codes ''B,'' ''N,'' ''Q,'' ''R'' and ''T'' have been deleted.

[154] Item 1 of the forms has been revised to explain how the names and addresses of more than one reporting person should be indicated, and a new Item 7 has been added to the forms to indicate whether the form is being filed by one or more reporting persons.

[155] This standard would be evaluated by reference to all shareholders of the class. For example, the requirement would not be satisfied merely by making the plan available to all employees of the issuer.

[156] Consistent with current interpretation, the rule as amended would exempt only the reinvestment of dividends or interest. Additional securities acquired through voluntary cash contributions to such plans will not be exempt pursuant to this rule, but may be exempt under new Rule 16b–3, assuming other conditions are met. *See* Release No. 34–28869, n. 89. The amended rule also continues to exempt the acquisition of issuer equity securities pursuant to a dividend reinvestment feature of an employee benefit plan so long as the company maintains a separate dividend reinvestment plan that satisfies the conditions of the rule. *See Simpson Thacher & Bartlett* (Jun. 19, 1991) and Release No. 34–18114, Q. 76. Finally, consistent with current interpretations, the amended rule will continue to be available to exempt the reinvestment of dividends in the securities of a publicly traded parent or subsidiary, and will exempt the reinvestment of all *pro rata* distributions to security holders, not just dividends and interest. *See Middle South Utilities, Inc.* (Aug. 21, 1982) and *Investment Company Institute* (Sept. 18, 1992).

odd-lot holders and shareholders domiciled abroad. The amendment is adopted as proposed, with minor clarifying changes.[157]

B. New Exemption for Domestic Relations Orders

The current rules limit the exemption for the disposition of securities pursuant to a qualified domestic relations order (''QDRO''), as defined in the Internal Revenue Code or Title I of ERISA, and the rules thereunder, to employee plan securities.[158] Since such dispositions are unlikely to be influenced by access to inside information, this limitation appears unnecessary. Accordingly, the 1994 proposal included a general exemption for such dispositions.

By interpretation, the current exemption has been construed to permit the transfer of securities, issued under a plan that is not subject to Section 401(a) of the Internal Revenue Code, pursuant to a ''domestic relations order'' that satisfies certain conditions of the Internal Revenue Code,[159] but does not satisfy QDRO standards.[160] Comment was requested as to whether the proposed exemption should require satisfaction of the QDRO standards in all circumstances, or whether satisfaction of the Internal Revenue Code ''domestic relations order'' standards would suffice.

Commenters who addressed this proposal supported it overwhelmingly, noting that these dispositions are unlikely to give rise to the types of abuse of inside information that the section 16 rules are designed to prevent and that satisfaction of the ''domestic relations order'' standards should suffice. Commenters also suggested that the rule should exempt acquisitions as well as dispositions. The Commission is persuaded that the likelihood of abuse is equally remote whether the transaction is an acquisition or disposition, so long as the ''domestic relations order'' standards are satisfied. The rule as adopted reflects these modifications.[161]

C. Exemption for Stock Dividend Transactions

The Commission proposed in 1994 to expand the exemption for stock splits and stock dividends to include specifically a stock dividend in which equity securities of a different issuer are distributed. The primary application of this exemption would be to ''spinoff'' transactions, in which assets previously owned by the issuer are distributed *pro rata to shareholders in the form of equity securities of another issuer.*

The Division has interpreted the current rule to apply to stock splits or stock dividends involving the issuance, on a *pro rata* basis, of a different class of equity securities of the same issuer.[162] Commenters addressing this proposal expressed support, noting that this type of dividend involves the distribution of an ownership interest already held indirectly through the distributing entity, and thus involves a change in the form of ownership from indirect through the distributing entity to direct by the recipient. Commenters also noted that since there is no purchase or sale, there is no significant opportunity for abuse. The proposal is adopted substantially as proposed, with minor technical revisions.[163]

VI. 1995 Solicitation of Comment Regarding the On-Going Merit of the Short-Swing Profit Recovery Provisions of Section 16

The 1995 Release solicited comment as to whether the Commission should recommend that Congress rescind the short-swing profit recovery provisions of section 16(b). Commenters were asked to address whether insider trading and market manipulation would be deterred adequately by Rule 10b–5, as interpreted by case law, and whether state laws establishing a fiduciary duty on the part of officers and directors would protect adequately the interests of public company shareholders.

Although the majority of commenters addressing this issue favored the legislative rescission of section 16(b), the Commission is of the view that the short-swing profit recovery provisions continue to fulfill a useful and effective role in maintaining investor confidence in the integrity of United States securities markets and accordingly should be retained. Instead, the Commission has attempted to craft the amended rules in a manner that retains the market protections provided by section 16(b) while curtailing compliance costs, thereby striking an appropriate balance between benefits and costs.

VII. Transition to New Rules

A. General Application

All of the rules adopted today, except for new Rule 16b–3, become effective August 15, 1996 (the ''Effective Date''). Accordingly, the section 16 treatment of all transactions effected on or after the Effective Date will be governed by the new rules. As discussed below, a phase-in period until November 1, 1996 is provided for new Rule 16b–3. Of course, to the extent that the new rules codify current interpretive positions,[164] those positions continue to be valid before the Effective Date. Trusts currently subject to section 16 that will be relieved of section 16 obligations under the new rules will not be subject to any post-termination reporting obligations or required to file a final Form 4 or Form 5. The amendments to Item 405 of Regulations S–K and S–B will apply to documents containing Item 405 disclosure that are filed after the Effective Date. The new Forms should be used for filings made on and after the Effective Date.

Cash-only instruments excludable from the definition of ''derivative security'' under current Rule 16a–1(c)(3) originally issued before the Effective Date will remain exempt from the reporting requirements of section 16(a) after the Effective Date. With respect to such cash-only securities, a transaction on or after the Effective Date that is consistent with the conditions of the exclusion pursuant to which the security was issued also will not to be subject to Section 16.[165]

Transactions not exempt from section 16(b) under the current rules that are conducted prior to the Effective Date will continue to be matchable with non-exempt transactions conducted after the Effective Date for short-swing profit recovery purposes.

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[157] New Rule 16a-11. The rule has been renumbered as a Section 16(a) rule, since reporting of these transactions no longer will be required, as discussed above.

[158] Current Rule 16b–3(f)(3).

[159] I.R.C. Sections 414(p)(1)(A) and (B). Among other things, the order must create or recognize an alternate payee's right to receive all or a portion of the benefits payable to a participant under a plan; relate to the provisions of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of the participant; and be made pursuant to a state domestic relations law (including a community property law).

[160] The order need not satisfy, among other things, conditions applicable to payments made after the participant's earliest retirement age, and requirements to treat the former spouse as surviving spouse for purposes of determining survivor benefits. *See Premark International, Inc.* (Mar. 6, 1992), which further provides that the plan may permit such transfers consistent with the transferability restriction of current Rule 16b–3(a)(2).

[161] New Rule 16a–12, which replaces current Rule 16b–3(f)(3). This amendment was proposed in the 1994 Release as proposed Rule 16b–5(b), but instead is adopted as a section 16(a) rule since reporting of these transactions no longer will be required, as discussed above.

[162] *See Emergent Group, Inc.* (Apr. 6, 1992).

[163] New Rule 16a–9(a).

[164] *E.g.,* new Rule 16a–1(c)(7) and Item 405(a)(2) of Regulations S–K and S–B.

[165] Post-Effective Date transactions in cash-only securities that were originally issued prior to May 1, 1991 will continue not to be subject to section 16 to the extent provided in *Cravath, Swaine & Moore* (Oct. 22, 1991).

B. New Rule 16b–3

In extending the phase-in date for current Rule 16b–3, the Commission stated that this period would continue until September 1, 1996.[166] However, given the timing of the adoption of new Rule 16b–3, the Commission is extending the phase-in date until November 1, 1996.[167] While new Rule 16b–3 will become available for issuers that wish to use it on August 15, 1996, current and former Rule 16b–3[168] will remain available for transactions effected prior to November 1, 1996. When an issuer adopts a plan that complies with new Rule 16b–3 or converts one of its existing plans to the new rule, all plans must be converted,[169] provided that any transaction between an issuer and its officers or directors that occurs outside the scope of a formal plan or pursuant to a plan that permits only the issuance of cash-only instruments may rely on new Rule 16b–3 without triggering this conversion requirement. Current and former Rule 16b–3 may not continue to be relied on by issuers and insiders after November 1, 1996. Transactions exempt under current and former Rule 16b–3 should be reported as provided by the new rules during the phase-in period.[170]

As stated above, the new Forms should be used for filings made on and after the Effective Date. Since the new transaction codes are keyed to transactions exempted by new Rule 16b–3, insiders reporting transactions under the former or current rule may either use the new code most analogous to the transaction or code ''J'' (for ''other'' transactions) with an explanatory footnote.

VIII. Cost-Benefit Analysis

The amendments adopted herein are expected to decrease significantly the compliance burden imposed on persons subject to Section 16 and attendant costs without undercutting the statutory objectives of disclosing information concerning insider trading and discouraging speculative short-term insider trading.

The simplified treatment of transactions between an issuer and its officers and directors, whether or not pursuant to a formal employee benefit plan, will constitute the most important reduction in compliance burden. With respect to these transactions, the conditions that must be met for an exemption to be available have been substantially simplified. The amended rules also will simplify issuers' administration of dividend and interest reinvestment plans, and expand the exemption for stock splits and stock dividends to include stock dividends in which securities of a different issuer are distributed.

The rules also will reduce compliance costs by: providing that many transactions no longer need be reported at all; permitting joint and group reporting where more than one person is deemed to be a beneficial owner of the same securities; providing that section 16 applies to a trust only if the trust beneficially owns more than ten percent of a class of registered equity securities; and limiting officers' and directors' post-termination reporting obligations. Where the amendments may increase compliance costs, such as by requiring reporting with respect to transactions in cash-only securities and by accelerating the reporting of option exercises, such costs should be outweighed by the benefit of having additional information available to the public on an accelerated basis, as well as the ease of compliance with a simplified reporting scheme. The amendments also will eliminate regulatory complexity and uncertainty that discourages the use of equity as compensation.

IX. Summary of Final Regulatory Flexibility Analysis

The Commission has prepared a final regulatory flexibility analysis in accordance with 5 U.S.C. 604 regarding the adoption of new Rules 16a–11, 16a–12 and 16a–13, and the changes to Rules 16a–1, 16a–2, 16a–3, 16a–4, 16a–6, 16a–8, 16a–9, 16b–3 and 16b–6, Forms 3, 4 and 5, and Item 405 of Regulations S–B and S–K. A summary of the corresponding Initial Regulatory Flexibility Analysis was included in the 1994 Release and the 1995 Release. A copy of the final regulatory flexibility analysis may be obtained by contacting Anne M. Krauskopf, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549 at (202) 942–2900.

As more fully discussed in the analysis, since 1994 the Commission has been engaged in rulemaking to modify the Rules under Section 16, particularly to alleviate unanticipated practical difficulties that arose since adoption of the 1991 amendments, simplify section 16 requirements applicable to employee benefit plans, and codify several staff interpretive positions. The amendments to Rule 16b–3 adopted today will significantly expand the exemption as it applies to broad-based non-discriminatory plans, will impose different conditions applicable to grants, awards and other acquisitions from the issuer, and will provide new exemptions for the disposition of issuer equity securities to the issuer.

Other rule amendments will modify the section 16(a) reporting system to provide that most exempt transactions and small acquisitions will be reported annually on Form 5, with earlier reporting on Form 4 permitted. Exercises and conversions of derivative securities, whether or not exempt from section 16(b), will be reported on Form 4. However, routine transactions pursuant to tax-conditioned plans, dividend or interest reinvestment plan transactions, transactions pursuant to domestic relations orders and transactions that change only the form of beneficial ownership will be exempt from reporting. The exemption for reinvestment transactions pursuant to dividend and interest reinvestment plans is amended to replace the requirement that such a plan must be available to all holders of the class of securities with a condition that the plan require both wide participation and equal treatment of all participants.

No significant issues were raised by public comment in response to the initial regulatory flexibility analysis.

The amendments adopted today primarily will affect individuals who are corporate insiders, the majority of whom may fall within the definition of ''small business'' under the Exchange Act. To the extent that these persons are affected, it is expected that the proposals will reduce their compliance burdens associated with section 16.

It is expected that the amendments adopted today will result in a material decrease in reporting and compliance requirements since they will streamline the requirements applicable to employee benefit plans. Although exercises and conversions of derivative securities will be reported earlier than previously required, and certain types of cash-only instruments will become

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[166] *See* the 1995 Phase-in Release.

[167] *See* Release No. 34–37261, issued today.

[168] Former Rules 16a–8(b) and 16a–8(g)(3) also remain available for purposes of providing an exemption from Section 16(b). *See* the 1991 Adopting Release at Section VII.C.

[169] Following conversion of an existing plan to new Rule 16b–3, the amendment of outstanding derivative securities to permit their transfer will not be deemed a cancellation of such securities and a grant of new securities for Section 16 purposes. *Compare Time Warner* (Dec. 18, 1992) Q.3 and *Jesse M. Brill* (Mar. 25, 1994) Q.4, where following amendment outstanding options no longer were exempt pursuant to current and former Rule 16b–3, respectively.

[170] The new reporting exemption for tax-conditioned plans will not be available until new Rule 16b–3 is used because that reporting exemption applies only to transactions exempted by new Rule 16b–3(c).

reportable, many other transactions no longer will be reported at all, and the overall reporting scheme will be simplified as a result.

The amendments adopted today will benefit corporate insiders by simplifying the section 16 rules and eliminating unnecessary requirements. Separate requirements for small issuers are inappropriate because most of the corporate insiders subject to the section 16 rules are individuals who meet the small business definition. The use of performance rather than design standards for small issuers is inconsistent with the Commission's mandate of investor protection. Other proposals to further reduce the compliance requirements were considered but rejected on grounds that they would be inconsistent with the section 16 statutory objectives.

X. Statutory Basis

The amendments to Regulation S–B, Regulation S–K, and the section 16 rules and forms are adopted by the Commission pursuant to Exchange Act sections 3(a)(11),[171] 3(a)(12),[172] 3(b),[173] 9(b),[174] 10(a),[175] 12(h),[176] 13(a),[177] 14,[178] 16, and 23(a). As the Section 16 rules and forms relate to the Investment Company Act and the Public Utility Holding Company Act, they also are adopted pursuant to Investment Company Act sections 30 [179] and 38,[180] and Public Utility Holding Company Act Sections 17 [181] and 20,[182] respectively.

List of Subjects in 17 CFR 228, 229, 240, and 249

Reporting, Recordkeeping requirements, and Securities.

Text of the Amendments

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

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The authority citation for part 228 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78w, 78*ll*, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

2. By amending § 228.405 by revising the reference to ''Rule 16a–3(d)'' in paragraph (a) to read ''Rule 16a–3(e)'' and by revising paragraphs (a)(1) and (a)(2) before the Note to read as follows:

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

* * * * *

(a) * * *

(1) Under the caption ''Section 16(a) Beneficial Ownership Reporting Compliance,'' 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 (''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. A known failure to file would include, but not be limited to, a failure to file a Form 3, which is required of all reporting persons, and a failure to file a Form 5 in the absence of the written representation referred to in paragraph (b)(2)(i) of this section, unless the registrant otherwise knows that no Form 5 is required.

* * * * *

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

3. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

4. By amending § 229.405 by revising paragraphs (a)(1) and (a)(2) before the Note to read as follows:

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

* * * * *

(a) * * *

(1) Under the caption ''Section 16(a) Beneficial Ownership Reporting Compliance,'' 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. A known failure to file would include, but not be limited to, a failure to file a Form 3, which is required of all reporting persons, and a failure to file a Form 5 in the absence of the written representation referred to in paragraph (b)(2)(i) of this section, unless the registrant otherwise knows that no Form 5 is required.

* * * * *

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

5. The authority citation for part 240 continues to read in part as follows:

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

* * * * *

6. By amending § 240.16a–1 by revising paragraphs (a)(3) and (c)(3), removing the word ''or'' at the end of paragraph (c)(5), replacing the period at the end of paragraph (c)(6) with a semi-colon followed by the word ''or'', and adding paragraph (c)(7) to read as follows:

§ 240.16a–1 Definition of terms.

* * * * *

(a) * * *

(3) Where more than one person subject to section 16 of the Act is deemed to be a beneficial owner of the same equity securities, all such persons must report as beneficial owners of the securities, either separately or jointly, as provided in § 240.16a–3(j). In such cases, the amount of short-swing profit recoverable shall not be increased above

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[171] 15 U.S.C. 78c(a)(11).
[172] 15 U.S.C. 78c(a)(12).
[173] 15 U.S.C. 78c(b).
[174] 15 U.S.C. 78i(b).
[175] 15 U.S.C. 78j(a).
[176] 15 U.S.C. 78*l*(h).
[177] 15 U.S.C. 78m(a).
[178] 15 U.S.C. 78n.
[179] 15 U.S.C. 80a–29.
[180] 15 U.S.C. 80a–37.
[181] 15 U.S.C. 79q.
[182] 15 U.S.C. 79t.

the amount recoverable if there were only one beneficial owner.

* * * * *

(c) * * *

(3) Rights or obligations to surrender a security, or have a security withheld, upon the receipt or exercise of a derivative security or the receipt or vesting of equity securities, in order to satisfy the exercise price or the tax withholding consequences of receipt, exercise or vesting;

* * * * *

(7) Options granted to an underwriter in a registered public offering for the purpose of satisfying over-allotments in such offering.

* * * * *

7. By amending § 240.16a–2 by revising paragraphs (b) and (d)(2) to read as follows:

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

* * * * *

(b) A transaction(s) following the cessation of director or officer status shall be subject to section 16 of the Act only if:

(1) Executed within a period of less than six months of an opposite transaction subject to section 16(b) of the Act that occurred while that person was a director or officer; and

(2) Not otherwise exempted from section 16(b) of the Act pursuant to the provisions of this chapter.

Note to Paragraph (b): For purposes of this paragraph, an acquisition and a disposition each shall be an opposite transaction with respect to the other.

* * * * *

(d)(1) * * *

(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.

8. By amending § 240.16a–3 by revising paragraph (f)(1)(i), redesignating paragraphs (f)(1)(ii) and (f)(1)(iii) as (f)(1)(iii) and (f)(1)(iv), adding paragraph (f)(1)(ii), revising paragraph (g), and adding paragraph (j) to read as follows:

§ 240.16a–3 Reporting transactions and holdings.

* * * * *

(f)(1) * * *

(i) All transactions during the most recent fiscal year that were exempt from section 16(b) of the Act, except:

(A) Exercises and conversions of derivative securities exempt under either § 240.16b–3 or § 240.16b–6(b) (these are required to be reported on Form 4);

(B) Transactions exempt from section 16(b) of the Act pursuant to § 240.16b–3(c), which shall be exempt from section 16(a) of the Act; and

(C) Transactions exempt from section 16(a) of the Act pursuant to another rule;

(ii) Transactions that constituted small acquisitions pursuant to § 240.16a–6(a);

* * * * *

(g) (1) A Form 4 shall be filed to report all transactions not exempt from section 16(b) of the Act and all exercises and conversions of derivative securities, regardless of whether exempt from section 16(b) of the Act.

(2) At the option of the reporting person, transactions that are reportable on Form 5 may be reported on Form 4, provided that the Form 4 is filed no later than the due date of the Form 5 with respect to the fiscal year in which the transaction occurred.

* * * * *

(j) Where more than one person subject to section 16 of the Act is deemed to be a beneficial owner of the same equity securities, all such persons must report as beneficial owners of the securities, either separately or jointly. Where persons in a group are deemed to be beneficial owners of equity securities pursuant to § 240.16a–1(a)(1) due to the aggregation of holdings, a single Form 3, 4 or 5 may be filed on behalf of all persons in the group. Joint and group filings must include all required information for each beneficial owner, and such filings must be signed by each beneficial owner, or on behalf of such owner by an authorized person.

9. By amending § 240.16a–4 by revising paragraphs (b), (c) and (d) and the Note to read as follows:

§ 240.16a–4 Derivative securities.

* * * * *

(b) The exercise or conversion of a call equivalent position shall be reported on Form 4 and treated for reporting purposes as:

(1) A purchase of the underlying security; and

(2) A closing of the derivative security position.

(c) The exercise or conversion of a put equivalent position shall be reported on Form 4 and treated for reporting purposes as:

(1) A sale of the underlying security; and

(2) A closing of the derivative security position.

(d) The disposition or closing of a long derivative security position, as a result of cancellation or expiration, shall be exempt from section 16(a) of the Act if exempt from section 16(b) of the Act pursuant to § 240.16b–6(d).

Note to § 240.16a–4: A purchase or sale resulting from an exercise or conversion of a derivative security may be exempt from section 16(b) of the Act pursuant to § 240.16b–3 or § 240.16b–6(b).

10. By amending § 240.16a–6 by revising paragraph (a) and removing paragraph (c) to read as follows:

§ 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 on Form 5, subject to the following conditions:

(1) Such acquisition, when aggregated with other acquisitions of securities of the same class (including securities underlying derivative securities, but excluding acquisitions exempted by rule from section 16(b) or previously reported on Form 4 or Form 5) within the prior six months, does not exceed a total of $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.

* * * * *

11. By amending § 240.16a–8 by revising paragraph (a)(1) and adding a note at the end of paragraph (b)(3) to read as follows:

§ 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 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'').

* * * * *

(b) *Trust holdings and transactions.* * * *

(3) *Beneficiaries.* * * *

Note to Paragraph (b)(3): Transactions and holdings attributed to a trust beneficiary may be reported by the trustee on behalf of the beneficiary, provided that the report is signed by the beneficiary or other authorized person. Where the transactions and holdings are attributed both to the trustee and trust beneficiary, a joint report may be filed in accordance with § 240.16a–3(j).

* * * * *

12. By amending § 240.16a–9 by revising paragraph (a) to read as follows:

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

* * * * *

(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 a class, including a stock dividend in which equity securities of a different issuer are distributed; and

* * * * *

13. By adding § 240.16a–11 to read as follows:

§ 240.16a–11 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 of the Act if the acquisition is made pursuant to a plan providing for the regular reinvestment of dividends or interest and the plan provides for broad-based participation, does not discriminate in favor of employees of the issuer, and operates on substantially the same terms for all plan participants.

14. By adding § 240.16a–12 to read as follows:

§ 240.16a–12 Domestic relations orders.

The acquisition or disposition of equity securities pursuant to a domestic relations order, as defined in the Internal Revenue Code or Title I of the Employee Retirement Income Security Act, or the rules thereunder, shall be exempt from section 16 of the Act.

15. By adding § 240.16a–13 to read as follows:

§ 240.16a–13 Change in form of beneficial ownership.

A transaction, other than the exercise or conversion of a derivative security or deposit into or withdrawal from a voting trust, that effects only a change in the form of beneficial ownership without changing a person's pecuniary interest in the subject equity securities shall be exempt from section 16 of the Act.

§ 240.16b–2 [Removed and reserved]

16. By removing and reserving § 240.16b–2.

17. By revising § 240.16b–3 to read as follows:

§ 240.16b–3 Transactions between an issuer and its officers or directors.

(a) *General.* A transaction between the issuer (including an employee benefit plan sponsored by the issuer) and an officer or director of the issuer that involves issuer equity securities shall be exempt from section 16(b) of the Act if the transaction satisfies the applicable conditions set forth in this section.

(b) *Definitions.*

(1) A *Discretionary Transaction* shall mean a transaction pursuant to an employee benefit plan that:

(i) Is at the volition of a plan participant;

(ii) Is not made in connection with the participant's death, disability, retirement or termination of employment;

(iii) Is not required to be made available to a plan participant pursuant to a provision of the Internal Revenue Code; and

(iv) Results in either an intra-plan transfer involving an issuer equity securities fund, or a cash distribution funded by a volitional disposition of an issuer equity security.

(2) An *Excess Benefit Plan* shall mean an employee benefit plan that is operated in conjunction with a Qualified Plan, and provides only the benefits or contributions that would be provided under a Qualified Plan but for any benefit or contribution limitations set forth in the Internal Revenue Code of 1986, or any successor provisions thereof.

(3) (i) A *Non-Employee Director* shall mean a director who:

(A) Is not currently an officer (as defined in § 240.16a-1(f)) of the issuer or a parent or subsidiary of the issuer, or otherwise currently employed by the issuer or a parent or subsidiary of the issuer;

(B) Does not receive compensation, either directly or indirectly, from the issuer or a parent or subsidiary of the issuer, for services rendered as a consultant or in any capacity other than as a director, except for an amount that does not exceed the dollar amount for which disclosure would be required pursuant to § 229.404(a) of this chapter;

(C) Does not possess an interest in any other transaction for which disclosure would be required pursuant to § 229.404(a) of this chapter; and

(D) Is not engaged in a business relationship for which disclosure would be required pursuant to § 229.404(b) of this chapter.

(ii) Notwithstanding paragraph (b)(3)(i) of this section, a *Non-Employee Director* of a closed-end investment company shall mean a director who is not an ''interested person'' of the issuer, as that term is defined in Section 2(a)(19) of the Investment Company Act of 1940.

(4) A *Qualified Plan* shall mean an employee benefit plan that satisfies the coverage and participation requirements of sections 410 and 401(a)(26) of the Internal Revenue Code of 1986, or any successor provisions thereof.

(5) A *Stock Purchase Plan* shall mean an employee benefit plan that satisfies the coverage and participation requirements of sections 423(b)(3) and 423(b)(5), or section 410, of the Internal Revenue Code of 1986, or any successor provisions thereof.

(c) *Tax-conditioned plans.* Any transaction (other than a Discretionary Transaction) pursuant to a Qualified Plan, an Excess Benefit Plan, or a Stock Purchase Plan shall be exempt without condition.

(d) *Grants, awards and other acquisitions from the issuer.* Any transaction involving a grant, award or other acquisition from the issuer (other than a Discretionary Transaction) shall be exempt if:

(1) The transaction is approved by the board of directors of the issuer, or a committee of the board of directors that is composed solely of two or more Non-Employee Directors;

(2) The transaction is approved or ratified, in compliance with section 14 of the Act, by either: 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 is incorporated; or the written consent of the holders of a majority of the securities of the issuer entitled to vote; *provided that* such ratification occurs no later than the date of the next annual meeting of shareholders; or

(3) The issuer equity securities so acquired are held by the officer or director for a period of six months following the date of such acquisition, *provided that* this condition shall be satisfied with respect to a derivative security if 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.

(e) *Dispositions to the issuer.* Any transaction involving the disposition to the issuer of issuer equity securities (other than a Discretionary Transaction) shall be exempt, *provided that* the terms of such disposition are approved in advance in the manner prescribed by either paragraph (d)(1) or paragraph (d)(2) of this section.

(f) *Discretionary Transactions.* A Discretionary Transaction shall be exempt only if effected pursuant to an election made at least six months following the date of the most recent election, with respect to any plan of the issuer, that effected a Discretionary Transaction that was:

(1) An acquisition, if the transaction to be exempted would be a disposition; or

(2) A disposition, if the transaction to be exempted would be an acquisition.

Notes to § 240.16b–3

Note (1): The exercise or conversion of a derivative security that does not satisfy the conditions of this section is eligible for exemption from section 16(b) of the Act to the extent that the conditions of § 240.16b–6(b) are satisfied.

Note (2): Section 16(a) reporting requirements applicable to transactions exempt pursuant to this section are set forth in § 240.16a–3(f) and (g) and § 240.16a–4.

Note (3): The approval conditions of paragraphs (d)(1), (d)(2) and (e) of this section require the approval of each specific transaction, and are not satisfied by approval of a plan in its entirety except for the approval of a plan pursuant to which the terms and conditions of each transaction are fixed in advance, such as a formula plan. Where the terms of a subsequent transaction (such as the exercise price of an option, or the provision of an exercise or tax withholding right) are provided for in a transaction as initially approved pursuant to paragraphs (d)(1), (d)(2) or (e), such subsequent transaction shall not require further specific approval.

18. By amending § 240.16b–6 by adding a note following paragraph (b) to read as follows:

§ 240.16b–6 Derivative securities.

* * * * *

Note to Paragraph (b): The exercise or conversion of a derivative security that does not satisfy the conditions of this section is eligible for exemption from section 16(b) of the Act to the extent that the conditions of § 240.16b–3 are satisfied.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

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

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

* * * * *

20. By amending Form 3 (referenced in § 249.103) and the General Instructions thereto by adding a sentence at the end of paragraph (a) to General Instruction 3 after the note, adding paragraph (b)(v) to General Instruction 5, by revising General Instruction 6, and by revising Item 1 and adding Item 7 to the information preceding Table I to read as follows:

Note: The text of Form 3 does not and this amendment will not appear in the Code of Federal Regulations.

Form 3 Initial Statement of Beneficial Ownership of Securities

* * * * *

General Instructions

* * * * *

3. Where Form Must be Filed

(a) * * * Alternatively, this Form is permitted to be submitted to the Commission in electronic format at the option of the reporting person pursuant to § 232.101(b)(4) of this chapter.

* * * * *

5. Holdings Required to be Reported

* * * * *

(b) Beneficial Ownership Reported (Pecuniary Interest)

* * * * *

(v) Where more than one person beneficially owns the same equity securities, such owners may file Form 3 individually or jointly. Joint and group filings may be made by any designated beneficial owner. Holdings of securities owned separately by any joint or group filer are permitted to be included in the joint filing. Indicate only the name and address of the designated filer in Item 1 of Form 3 and attach a listing of the names and IRS or social security numbers (or addresses in lieu thereof) of each other reporting person. Joint and group filings must include all required information for each beneficial owner, and such filings must be signed by each beneficial owner, or on behalf of such owner by an authorized person. If the space provided for signatures is insufficient, attach a signature page. Submit any attached listing of names or signatures on another Form 3, copy of Form 3 or separate page of 8½ by 11 inch white paper, indicate the number of pages comprising the report (Form plus attachments) at the bottom of each report page (*e.g.*, 1 of 3, 2 of 3, 3 of 3), and include the name of the designated filer and information required by Items 2 and 4 of the Form on the attachment.

* * * * *

6. Additional Information

If the space provided in the line items of this Form or space provided for additional comments is insufficient, attach another Form 3, copy of Form 3 or a separate page of 8½ by 11 inch white paper to Form 3, completed as appropriate to include the additional comments. Each attached page must include information required in Items 1, 2 and 4 of the Form. The number of pages comprising the report (Form plus attachments) 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 provided in this manner, it will be assumed that no additional information was provided.

* * * * *

1. Name and Address of Reporting Person*

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

* If the Form is filed by more than one Reporting Person, *see* Instruction 5(b)(v).

* * * * *

7. Individual or Joint/Group Filing

(Check applicable line)

_____ Form filed by One Reporting Person
_____ Form Filed by More than One Reporting Person

* * * * *

21. By amending Form 4 (referenced in § 249.104) and the General Instructions thereto by adding a sentence at the end of paragraph (a) of General Instruction 2 after the note; by revising paragraph (a)(i) of General Instruction 4; by revising the Note following General Instruction 4(a)(ii) and adding paragraph (b)(v) to General Instruction 4; by revising General Instruction 6; in General Instruction 8 by adding a sentence at the end of the paragraph appearing under the ''Transaction Codes'' caption and revising the Transaction Codes; and by revising Item 1 and adding Item 7 to the information preceding Table I to read as follows:

Note: The text of Form 4 does not and this amendment will not appear in the Code of Federal Regulations.

Form 4 Statement of Changes in Beneficial Ownership of Securities

* * * * *

General Instructions

* * * * *

2. Where Form Must be Filed

(a) * * * Alternatively, this Form is permitted to be submitted to the Commission in electronic format at the option of the reporting person pursuant to § 232.101(b)(4) of this chapter.

* * * * *

4. Transactions and Holdings Required to be Reported

* * * * *

(a) General Requirements

(i) Report, in accordance with Rule 16a–3(g), all transactions not exempt from section 16(b) of the Act and all exercises and conversions of derivative securities, regardless of whether exempt from section 16(b) of the Act, resulting in a change of beneficial ownership in the issuer's securities. Every transaction shall be reported even though acquisitions and dispositions during the month are equal. Report total beneficial ownership as of the end of the month for each class of securities in which a transaction was reported.

Note: * * *

(ii) * * *

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. (*See* Instruction 8 for the code for voluntarily reported transactions.)

(b) Beneficial Ownership Reported (Pecuniary Interest)

* * * * *

(v) Where more than one beneficial owner of the same equity securities must report transactions on Form 4, such owners may file Form 4 individually or jointly. Joint and group filings may be made by any designated beneficial owner. Transactions with respect to securities owned separately by any joint or group filer are permitted to be included in the joint filing. Indicate only the name and address of the designated filer in Item 1 of

Form 4 and attach a listing of the names and IRS or social security numbers (or addresses in lieu thereof) of each other reporting person. Joint and group filings must include all required information for each beneficial owner, and such filings must be signed by each beneficial owner, or on behalf of such owner by an authorized person. If the space provided for signatures is insufficient, attach a signature page. Submit any attached listing of names or signatures on another Form 4, copy of Form 4 or separate page of 8½ by 11 inch white paper, indicate the number of pages comprising the report (Form plus attachments) at the bottom of each report page (*e.g.*, 1 of 3, 2 of 3, 3 of 3), and include the name of the designated filer and information required by Items 2 and 4 of the Form on the attachment.

* * * * *

6. Additional Information

If the space provided in the line items of this Form or space provided for additional comments is insufficient, attach another Form 4, copy of Form 4 or a separate page of 8½ by 11 inch white paper to Form 4, completed as appropriate to include the additional comments. Each attached page must include information required in Items 1, 2 and 4 of the Form. The number of pages comprising the report (Form plus attachments) 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 provided in this manner, it will be assumed that no additional information was provided.

* * * * *

8. Transaction Codes

* * * If a transaction involves an equity swap or instrument with similar characteristics, use transaction Code ''K'' in addition to the code(s) that most appropriately describes the transaction, *e.g.*, ''S/K'' or ''P/K.''

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

Rule 16b–3 Transaction Codes

A—Grant, award or other acquisition pursuant to Rule 16b–3(d)
D—Disposition to the issuer of issuer equity securities pursuant to Rule 16b–3(e)
F—Payment of exercise price or tax liability by delivering or withholding securities incident to the receipt, exercise, or vesting of a security issued in accordance with Rule 16b–3
I—Discretionary transaction in accordance with Rule 16b–3(f) resulting in acquisition or disposition of issuer securities
M—Exercise or conversion of derivative security exempted pursuant to Rule 16b–3

Derivative Securities Codes (Except for transactions exempted pursuant to Rule 16b–3)

C—Conversion of derivative security
E—Expiration of short derivative position
H—Expiration (or cancellation) of long derivative position with value received
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 Transaction and Small Acquisition Codes (except for Rule 16b–3 codes above)

G—Bona fide gift
L—Small acquisition under Rule 16a–6
W—Acquisition or disposition by will or the laws of descent and distribution
Z—Deposit into or withdrawal from voting trust

Other Transaction Codes

J—Other acquisition or disposition (describe transaction)
K—Transaction in equity swap or instrument with similar characteristics
U—Disposition pursuant to a tender of shares in a change of control transaction

* * * * *

1. Name and Address of Reporting Person*

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

*If the Form is filed by more than one Reporting Person, *see* Instruction 4(b)(v).

* * * * *

7. Individual or Joint/Group Filing

(Check applicable line)

_____Form filed by One Reporting Person
_____Form Filed by More than One Reporting Person

* * * * *

22. By amending Form 5 (referenced in § 249.105) and the General Instructions thereto by adding a sentence at the end of paragraph (a) of General Instruction 2 after the note; by revising General Instruction 4(a)(i)(A); by removing General Instruction 4(a)(ii); by redesignating paragraphs (a)(iii) and (a)(iv) of General Instruction 4 as paragraphs (a)(ii) and (a)(iii); by revising newly designated paragraph 4(a)(iii) and adding paragraph (b)(v) to General Instruction 4; by revising General Instruction 6; in General Instruction 8 by adding a sentence at the end of the paragraph appearing under the ''Transaction Codes'' caption and revising the Transaction Codes; by revising the last paragraph in the General Instructions, following the Transaction Codes, and caption thereto; and by revising Item 1 and adding Item 7 to the information preceding Table I to read as follows:

Note: The text of Form 5 does not and this amendment will not appear in the Code of Federal Regulations.

Form 5 Annual Statement of Beneficial Ownership of Securities

* * * * *

General Instructions

* * * * *

2. Where Form Must be Filed

(a) * * * Alternatively, this Form is permitted to be submitted to the Commission in electronic format at the option of the reporting person pursuant to § 232.101(b)(4) of this chapter.

* * * * *

4. Transactions and Holdings Required to be Reported

(a) General Requirements

* * * * *

(i) * * *

(A) any transaction during the issuer's most recent fiscal year that was exempt from section 16(b) of the Act, except: (1) any exercise or conversion of derivative securities exempt under either § 240.16b–3 or § 240.16b–6(b) (these are required to be reported on Form 4); (2) any transaction exempt from section 16(b) of the Act pursuant to Rule 16b–3(c) of this section, which is exempt from section 16(a) of the Act; and (3) any transaction exempt from section 16 of the Act pursuant to another section 16(a) rule;

* * * * *

(iii) Every transaction shall be reported even though acquisitions and dispositions with respect to a class of securities are equal. 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)

* * * * *

(v) Where more than one beneficial owner of the same equity securities must report on Form 5, such owners may file Form 5 individually or jointly. Joint and group filings may be made by any designated beneficial owner. Transactions and holdings with respect to securities owned separately by any joint or group filer are permitted to be included in the joint filing. Indicate only the name and address of the designated filer in Item 1 of Form 5 and attach a listing of the names and IRS or social security numbers (or addresses in lieu thereof) of each other reporting person. Joint and group filings must include all required information for each beneficial owner, and such filings must be signed by each beneficial owner, or on behalf of such owner by an authorized person. If the space provided for signatures is insufficient, attach a signature page. Submit any attached listing of names or signatures on another Form 5, copy of Form 5 or separate page of 8½ by 11 inch white paper, indicate the number of pages comprising the report (Form plus attachments) at the bottom of each report page (*e.g.*, 1 of 3, 2 of 3, 3 of 3), and include the name of the designated filer and information required by Items 2 and 4 of the Form on the attachment.

* * * * *

6. Additional Information

If the space provided in the line items of this Form or space provided for additional comments is insufficient, attach another Form 5, copy of Form 5 or a separate page of 8½ by 11 inch white paper to Form 5, completed as appropriate to include the additional comments. Each attached page must include information required in Items 1, 2 and 4 of the Form. The number of pages comprising the report (Form plus attachments) 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 provided in this manner, it will be assumed that no additional information was provided.

* * * * *

8. Transaction Codes

* * * If a transaction involves an equity swap or instrument with similar characteristics, use transaction Code ''K'' in addition to the code(s) that most appropriately describes the transaction, *e.g.*, ''S/K'' or ''P/K.''

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

Rule 16b-3 Transaction Codes

A—Grant, award or other acquisition pursuant to Rule 16b-3(d)
D—Disposition to the issuer of issuer equity securities pursuant to Rule 16b-3(e)
F—Payment of exercise price or tax liability by delivering or withholding securities incident to the receipt, exercise or vesting of a security issued in accordance with Rule 16b-3
I—Discretionary transaction in accordance with Rule 16b-3(f) resulting in acquisition or disposition of issuer securities
M—Exercise or conversion of derivative security exempted pursuant to Rule 16b-3

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C—Conversion of derivative security
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Other Section 16(b) Exempt Transaction and Small Acquisition Codes (except for Rule 16b-3 codes above)

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L—Small acquisition under Rule 16a–6
W—Acquisition or disposition by will or the laws of descent and distribution
Z—Deposit into or withdrawal from voting trust

Other Transaction Codes

J—Other acquisition or disposition (describe transaction)
K—Transaction in equity swap or instrument with similar characteristics
U—Disposition pursuant to a tender of shares in a change of control transaction

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''). To indicate that a transaction should have been reported on a previous Form 5, place a ''5'' in Table I, column 3 or Table II, column 4, as appropriate. In addition, the appropriate box on the front page of the Form should be checked.

* * * * *

1. Name and Address of Reporting Person*

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

* If the Form is filed by more than one Reporting Person, *see* Instruction 4(b)(v).

* * * * *

7. Individual or Joint/Group Filing

(Check applicable line)

_____Form Filed by One Reporting Person
_____Form Filed by More than One Reporting Person

* * * * *

Dated: May 31, 1996.
By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 96–14184 Filed 6–13–96; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release Nos. 34–37261; 35–26525; IC–21998]

RIN 3235–AB14

Employee Benefit Plan Exemptive Rules Under Section 16 of the Securities Exchange Act of 1934

AGENCY: Securities and Exchange Commission.

ACTION: Extension of phase-in period for rule 16b–3.

SUMMARY: The Commission today is extending the phase-in period for compliance with the substantive conditions of new Rule 16b–3 regarding employee benefit plan transactions under the Securities Exchange Act of 1934.

DATES: Effective June 14, 1996. The phase-in period for compliance with new § 240.16b–3, which previously has been extended to September 1, 1996, is extended until November 1, 1996.

FOR FURTHER INFORMATION CONTACT: Anne M. Krauskopf, Office of the Chief Counsel, Division of Corporation Finance, at (202) 942–2900.

SUPPLEMENTARY INFORMATION: On February 8, 1991, the Commission adopted comprehensive revisions to the rules under section 16[1] of the Securities Exchange Act of 1934 (''Exchange Act'').[2] The new regulatory scheme generally became effective on May 1, 1991, but a 16 month phase-in period was provided with respect to specified rules affecting employee benefit plans, in order to give registrants ample time to review the rule changes and amend their plans accordingly.[3] The Adopting Release provided that registrants could continue to rely on the exemptions from section 16(b) of the Exchange Act[4] afforded by former Rules 16a–8(b),[5] 16a–8(g)(3),[6] and 16b–3[7] after May 1, 1991, but would be required to adopt the substantive conditions of new Rule 16b–3[8] by September 1, 1992.[9]

The Rule 16b–3 phase-in period was extended until September 1, 1996, or such different date as set by the Commission, pending completion of further rulemaking under section 16 with regard to employee benefit plans.[10] The amendments to the rules under section 16 adopted today, which become effective August 15, 1996, complete this rulemaking effort.[11] While new Rule 16b–3 becomes available for issuers that wish to use it on August 15, 1996, the phase-in period for Rule 16b–3 is extended until November 1, 1996.[12]

[1] 15 U.S.C. 78p (1988).

[2] 15 U.S.C. 78a *et seq.* (1988).

[3] Exchange Act Release No. 28869 (February 8, 1991) (56 FR 7242) (''Adopting Release''). *See* Section VII of the Adopting Release for transition provisions generally and Section VII.C for transition provisions relating to employee benefit plans.

[4] 15 U.S.C. 78p(b).

[5] 17 CFR 240.16a–8(b).

[6] 17 CFR 240.16a–8(g)(3).

[7] 17 CFR 240.16b–3 (1990).

[8] 17 CFR 240.16b–3 (1991).

[9] The phase-in period applies only to the exemption from section 16(b), not to the revised reporting requirements under section 16(a) that became effective on May 1, 1991 and the further revisions adopted today.

[10] Exchange Act Release No. 36063 (August 7, 1995) (60 FR 40994).

[11] Exchange Act Release No. 34–37260, Section VII.

[12] When an issuer adopts a plan that complies with new Rule 16b–3 or converts one of its existing plans to the new rule, all plans must be converted, provided that any transaction between an issuer and its officers or directors that occurs outside the scope of a formal plan or pursuant to a plan that permits only the issuance of cash-only instruments