

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 245 and 249

[Release No. 34-47225; IC-25909; File No. S7-44-02]

RIN 3235-A171

Insider Trades During Pension Fund Blackout Periods

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting rules that clarify the application and prevent evasion of Section 306(a) of the Sarbanes-Oxley Act of 2002. Section 306(a) prohibits any director or executive officer of an issuer of any equity security from, directly or indirectly, purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that temporarily prevents plan participants or beneficiaries from engaging in equity securities transactions through their plan accounts, if the director or executive officer acquired the equity security in connection with his or her service or employment as a director or executive officer. In addition, the rules specify the content and timing of the notice that issuers must provide to their directors and executive officers and to the Commission about a blackout period. The rules are designed to facilitate compliance with the will of Congress as reflected in Section 306(a), and to eliminate the inequities that may result when pension plan participants and beneficiaries are temporarily prevented from engaging in equity securities transactions through their plan accounts.

DATES: *Effective Date:* January 26, 2003. *Compliance Date:* Issuers must comply with § 245.104(b)(3)(i) and (iii) of Regulation BTR beginning March 31, 2003.

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SUPPLEMENTARY INFORMATION: We are adopting new Regulation BTR¹ under the Securities Exchange Act of 1934 (the "Exchange Act")² and amendments to

Exchange Act Rules 13a-11³ and 15d-11⁴ and to Forms 20-F,⁵ 40-F⁶ and 8-K⁷ under the Exchange Act.

I. Introduction

On July 30, 2002, the Sarbanes-Oxley Act of 2002 (the "Act") was enacted.⁸ Section 306(a) of the Act,⁹ entitled "Prohibition of Insider Trading During Pension Fund Blackout Periods," makes it unlawful for any director or executive officer of an issuer of any equity security, directly or indirectly, to purchase, sell or otherwise acquire or transfer any equity security of the issuer during any pension plan blackout period with respect to such equity security, if the director or executive officer acquired the equity security in connection with his or her service or employment as a director or executive officer.¹⁰ Section 306(a) also requires an issuer to timely notify its directors and executive officers and the Commission of a blackout period that could affect them.¹¹ Section 306(a) takes effect January 26, 2003, 180 days after the date of enactment of the Act.¹²

Section 306(a) equalizes the treatment of corporate executives and rank-and-file employees with respect to their ability to engage in transactions involving issuer equity securities during a pension plan blackout period if the securities have been acquired in connection with their service to, or employment with, the issuer. When a director or executive officer engages in a transaction involving issuer equity securities at a time when participants or beneficiaries in the issuer's pension plans cannot engage in similar transactions through their plan accounts, the director or executive officer obtains an unfair advantage that the statute seeks to ameliorate. Section 306(a) restricts the ability of directors and executive officers to trade in such securities until a pension plan blackout period has ended and the ability to trade through the pension plan has been restored to plan participants and beneficiaries. This should align the interests of directors and executive officers more closely with those of the rank-and-file employees who engage in transactions involving issuer equity

securities through an issuer's pension plans.

After consulting with the Secretary of Labor, we proposed new Regulation Blackout Trading Restriction ("BTR") on November 6, 2002 to clarify the scope and operation of Section 306(a) and to prevent evasion of the statutory trading prohibition.¹³ We received 18 letters commenting on the Proposing Release.¹⁴ Many commenters suggested changes to the proposed rules to better achieve the purposes of section 306(a). Today, we are adopting Regulation BTR, which has been revised as discussed below, to incorporate a number of the changes recommended by commenters.

II. Regulation BTR

A. Statutory Trading Prohibition

As adopted, Regulation BTR addresses the operation of section 306(a) of the Act and its prohibition against trading in issuer equity securities by an issuer's directors and executive officers during a pension plan blackout period as follows:

- New Rule 100¹⁵ defines terms used in Section 306(a) and Regulation BTR.
- New Rule 101¹⁶ clarifies the operation of the Section 306(a) trading prohibition and establishes several exemptions from the prohibition.
- New Rule 102¹⁷ describes the exceptions to the definition of "blackout period" set forth in Section 306(a)(4)(A) of the Act.¹⁸
- New Rule 103¹⁹ clarifies the operation of the private remedy for a violation of the Section 306(a) trading prohibition, including a method for calculation of recoverable profits.
- New Rule 104²⁰ sets forth the content and delivery requirements for the notice that an issuer must provide in connection with a blackout period.

As proposed and adopted, in order to give effect to section 306(a) in a manner consistent with Congressional intent, we are incorporating a number of concepts developed under Section 16 of the

¹³ Release No. 34-46778 (Nov. 2, 2002) [67 FR 69430] (the "Proposing Release").

¹⁴ The commenters included six members of the legal and accounting communities, eight professional associations, three issuers and one individual investor. These comment letters and a summary of comments are available for public inspection and copying in our Public Reference Room, 450 Fifth Street, NW, Washington, DC 20549, in File No. S7-44-02. Public comments submitted electronically and the summary of comments is available on our Web site <http://www.sec.gov>.

¹⁵ 17 CFR 245.100.

¹⁶ 17 CFR 245.101.

¹⁷ 17 CFR 245.102.

¹⁸ 15 U.S.C. § 7244(a)(4)(A).

¹⁹ 17 CFR 245.103.

²⁰ 17 CFR 245.104.

³ 17 CFR 240.13a-11.

⁴ 17 CFR 240.15d-11.

⁵ 17 CFR 249.220f.

⁶ 17 CFR 249.240f.

⁷ 17 CFR 249.308.

⁸ Pub. L. 107-204, 116 Stat. 745 (2002).

⁹ 15 U.S.C. 7244(a).

¹⁰ Section 306(a)(1) of the Act [15 U.S.C. 7244(a)(1)].

¹¹ Section 306(a)(6) of the Act [15 U.S.C. 7244(a)(6)].

¹² Section 306(c) of the Act [15 U.S.C. 7244(c)].

¹ 17 CFR 245.100-104.

² 15 U.S.C. 78a *et seq.*