

Exchange Act²¹ into Regulation BTR. By doing so, we are able to take advantage of a well-established body of rules and interpretations concerning the trading activities of corporate insiders and, as to directors and executive officers of domestic issuers, facilitate enforcement of the Section 306(a) trading prohibition through monitoring of the reports publicly filed by directors and executive officers pursuant to Section 16(a) of the Exchange Act.²²

B. Discussion

1. Issuers Subject to Trading Prohibition

Section 306(a) of the Act applies to directors and executive officers of issuers as defined in Section 2(a)(7) of the Act.²³ Consistent with this definition, new Rule 100(k) of Regulation BTR²⁴ provides that the term “issuer” means an issuer (as defined in Section 3(a)(8) of the Exchange Act²⁵):

- The securities of which are registered under Section 12 of the Exchange Act;²⁶
- That is required to file reports under Section 15(d) of the Exchange Act;²⁷ or
- That files, or has filed, a registration statement that has not yet become effective under the Securities Act of 1933 (the “Securities Act”)²⁸ and that the issuer has not withdrawn.

Accordingly, Section 306(a) and Regulation BTR apply to the directors and executive officers of domestic issuers, foreign private issuers, small business issuers and, in rare instances, registered investment companies.²⁹

While some commenters questioned the application of Section 306(a) to foreign private issuers,³⁰ the statute, by its terms, applies to these issuers.³¹ However, Regulation BTR limits Section 306(a)’s application to the directors and executive officers of a foreign private issuer to situations where 50% or more of the participants or beneficiaries located in the United States in individual account plans maintained by the issuer are subject to a temporary trading suspension in issuer equity securities, and the affected participants and beneficiaries represent an appreciable portion of the issuer’s worldwide employees.³²

Similarly, Section 306(a) does not distinguish between large and small issuers. Accordingly, the statute applies to any entity that satisfies the definition of “issuer” under Section 2(a)(7) of the Act without regard to the entity’s size, including a “small business issuer.”³³ One commenter indicated that the compliance burden for small business issuers would not be disproportionate to the benefits to be obtained from compliance with Section 306(a) since concerns related to trading by corporate insiders are not unique to large issuers.³⁴

2. Persons Subject to Trading Prohibition

Section 306(a) of the Act applies to directors and executive officers of issuers subject to the Act. While one commenter expressly supported the

proposed definitions for these terms,³⁵ some commenters suggested that we use the existing definition in Exchange Act Rule 3b–7³⁶ to define the term “executive officer.”³⁷ We continue to believe that the broader definition in Exchange Act Rule 16a–1(f)³⁸ is more suitable for purposes of Section 306(a) and Regulation BTR because of its focus on the policy-making functions of the individual in question.³⁹ In addition, as some commenters noted, this definition will make it easier for domestic issuers to coordinate their trading policies for their corporate insiders who are subject to Section 16 of the Exchange Act and monitor compliance with both Section 16 and Section 306(a). Accordingly, new Rule 100(c)(1) of Regulation BTR⁴⁰ provides that, except in the case of a foreign private issuer, the term “director” has the meaning set forth in Section 3(a)(7) of the Exchange Act⁴¹

³⁵ See the PWC Letter.

³⁶ 17 CFR 240.3b–7. This definition differs from the definition in Exchange Act Rule 16a–1(f) [17 CFR 240.16a–1(f)] in that it does not expressly include an issuer’s principal financial officer or principal accounting officer (or controller). It also does not expressly cover officers of a parent corporation or explain how to identify an issuer’s executive officers when the issuer is a limited partnership or trust.

³⁷ See the Letter dated December 16, 2002 of America’s Community Bankers (the “ACB Letter”) and the Letter dated December 16, 2002 of the Profit Sharing/401k Council of America (the “PSCA Letter”).

³⁸ Exchange Act Rule 16a–1(f) defines the term “officer” to mean “an issuer’s president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Officers of the issuer’s parent(s) or subsidiaries shall be deemed officers of the issuer if they perform such policy-making functions for the issuer. In addition, when the issuer is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. When the issuer is a trust, officers or employees of the trustee(s) who perform policy-making functions for the trust are deemed officers of the trust.”

³⁹ Thus, the standard for determining whether an individual is an “executive officer” for purposes of Section 306(a) of the Act and Regulation BTR is the same as the standard applicable under Exchange Act Rule 16a–1(f). For example, the term “policy-making functions” does not include policy-making functions that are not significant. Similarly, if pursuant to Item 401(b) of Regulation S–K [17 CFR 229.401(b)], an issuer identifies an individual as an “executive officer,” it will be presumed that the board of directors of the issuer made that judgment and that the individuals so identified are executive officers of the issuer for purposes of Section 306(a) and Regulation BTR, as are such other persons enumerated in Exchange Act Rule 16a–1(f) but not in Item 401(b). See the note to Exchange Act Rule 16a–1(f).

⁴⁰ 17 CFR 245.100(c)(1).

⁴¹ 15 U.S.C. 78c(a)(7). As we have previously noted, this definition reflects a functional and

²¹ 15 U.S.C. 78p. Because the purposes of Section 306(a) of the Act and Section 16 of the Exchange Act are not identical, however, we note that Section 306(a) and Regulation BTR will not always be interpreted the same as Section 16 if these purposes diverge or the interests of investors require a different interpretation.

²² 15 U.S.C. 78p(a).

²³ 15 U.S.C. 7201(7).

²⁴ 17 CFR 245.100(k).

²⁵ 15 U.S.C. 78c(a)(8). Section 3(a)(8) of the Exchange Act defines the term “issuer” to mean “any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term “issuer” means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term “issuer” means the person by whom the equipment or property is, or is to be, used.”

²⁶ 15 U.S.C. 78l.

²⁷ 15 U.S.C. 78o(d).

²⁸ 15 U.S.C. 77a et seq.

²⁹ For a discussion of the application of Regulation BTR to registered investment

companies, see the Proposing Release at Section II.B.1.d.

³⁰ See the Letter dated December 24, 2002 of the American Bar Association (the “ABA Letter”) and the Letter dated November 27, 2002 of the Organization for International Investment.

³¹ Exchange Act Rule 3b–4(c) [17 CFR 240.3b–4(c)] defines the term “foreign private issuer” to mean “any foreign issuer other than a foreign government except an issuer meeting the following conditions: (1) more than 50% of the issuer’s outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) any of the following: (i) The majority of the executive officers or directors are United States citizens or residents; (ii) more than 50% of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.”

³² See Section II.B.5.d below.

³³ Item 10(a)(1) of Regulation S–B [17 CFR 228.10(a)(1)] defines the term “small business issuer” to mean “a company that meets all of the following criteria: (i) Has revenues of less than \$25,000,000; (ii) is a U.S. or Canadian issuer; (iii) is not an investment company; and (iv) if a majority-owned subsidiary, the parent corporation is also a small business issuer. *Provided however*, that an entity is not a small business issuer if it has a public float (the aggregate market value of the issuer’s outstanding securities held by non-affiliates) of \$25,000,000 or more.”

³⁴ See the Letter dated December 16, 2002 of PricewaterhouseCoopers LLP (the “PWC Letter”).