

and new Rule 100(h)(1)⁴² provides that, except in the case of a foreign private issuer, the term “executive officer” has the same meaning as the term “officer” in Exchange Act Rule 16a-1(f).

In the case of a foreign private issuer, the commenters supported our proposal to specifically identify the directors and executive officers that are subject to the Section 306(a) trading prohibition.⁴³ Thus, new Rule 100(c)(2) of Regulation BTR⁴⁴ provides that the term “director” means a director who is a management employee of the issuer and new Rule 100(h)(2)⁴⁵ provides that the term “executive officer” means the principal executive officer or officers, the principal financial officer or officers and the principal accounting officer or officers of the issuer.

3. Securities Subject to Trading Prohibition

Section 306(a) of the Act applies to any equity security of an issuer other than an exempt security.⁴⁶ We did not receive any comments regarding the proposed definitions for the terms “equity security,” “equity security of the issuer” and “derivative security.” Accordingly, new Rule 100(e) of Regulation BTR⁴⁷ provides that the term “equity security” has the meaning set forth in Section 3(a)(11) of the Exchange

Act⁴⁸ and Exchange Act Rule 3a11-1,⁴⁹ new Rule 100(f)⁵⁰ provides that the term “equity security of the issuer” includes any equity security or derivative security relating to an issuer, whether or not issued by that issuer, and new Rule 100(d)⁵¹ provides that the term “derivative security” has the same meaning as in Exchange Act Rule 16a-1(c).⁵²

In the case of a derivative security, the definition in new Rule 100(d) is to be interpreted in a manner consistent with the rules and interpretations under Section 16 of the Exchange Act. For example, an interest that may be settled only in cash, but the value of which is denominated or based on an equity

⁴⁸ 15 U.S.C. 78c(a)(11). Section 3(a)(11) of the Exchange Act defines the term “equity security” to mean “any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.”

⁴⁹ 17 CFR 240.3a11-1. Exchange Act Rule 3a11-1 defines the term “equity security” to mean “any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; any security future on any such security; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.”

⁵⁰ 17 CFR 245.100(f).

⁵¹ 17 CFR 245.100(d).

⁵² 17 CFR 240.16a-1(c). Exchange Act Rule 16a-1(c) defines the term “derivative securities” to mean “any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security, but shall not include: (1) Rights of a pledgee of securities to sell the pledged securities; (2) rights of all holders of a class of securities of an issuer to receive securities pro rata, or obligations to dispose of securities, as a result of a merger, exchange offer, or consolidation involving the issuer of the securities; (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; (4) interests in broad-based index options, broad-based index futures, and broad-based publicly traded market baskets of stocks approved for trading by the appropriate federal governmental authority; (5) interests or rights to participate in employee benefit plans of the issuer; or (6) rights with an exercise or conversion privilege at a price that is not fixed; or (7) options granted to an underwriter in a registered public offering for the purpose of satisfying over-allotments in such offering.”

security, such as phantom stock, will be considered a derivative security for purposes of Section 306(a) and Regulation BTR. Consequently, an acquisition of a “cash-only” derivative security or the exercise, sale or other transfer of the security during a blackout period will be subject to the Section 306(a) trading prohibition unless the transaction qualifies as an exempt transaction under Regulation BTR.

4. Transactions Subject to Trading Prohibition

Section 306(a) of the Act makes it unlawful for a director or executive officer of an issuer of any equity security, directly or indirectly,⁵³ to purchase, sell or otherwise acquire or transfer any equity security of the issuer during a pension plan blackout period with respect to the equity security, if the director or executive officer “acquires such equity security in connection with his or her service or employment as a director or executive officer.” While Section 306(a) uses the word “acquires” to describe the equity securities that are subject to the statutory trading prohibition, we believe that Congress intended to cover both equity securities that a director or executive officer “acquired” before, or “acquires” during, a pension plan blackout period.⁵⁴ Thus, we read the Section 306(a) trading prohibition to cover:

- An acquisition of issuer equity securities by a director or executive officer during a blackout period if the acquisition is in connection with his or her service or employment as a director or executive officer; and
- A disposition of issuer equity securities by a director or executive officer during a blackout period if the disposition involves issuer equity securities acquired in connection with his or her service or employment as a director or executive officer.⁵⁵

⁵³ Under Regulation BTR, a purchase, sale or other acquisition or transfer of an equity security will be attributed to a director or executive officer if he or she has a pecuniary interest in the transaction. To promote consistency and to simplify compliance, new Rule 100(l) of Regulation BTR [17 CFR 240.100(l)] defines the terms “pecuniary interest” and “indirect pecuniary interest” by reference to the definitions in Exchange Act Rule 16a-1(a)(2) [17 CFR 240.16a-1(a)(2)]. The definition in new Rule 100(l) also encompasses the portfolio exclusion of Exchange Act Rule 16a-1(a)(2)(iii) [17 CFR 240.16a-1(a)(2)(iii)].

⁵⁴ This interpretation of the statute is reflected in new Rule 101(a) of Regulation BTR [17 CFR 245.101(a)].

⁵⁵ Accordingly, a transaction involving equity securities that are not acquired in connection with service or employment as a director or executive officer is not subject to the Section 306(a) trading prohibition.

flexible approach to determining whether a person is a director of an entity. See Release No. 34-46685 (Oct. 18, 2002) [67 FR 65325] at n. 7. Thus, for purposes of Section 306(a) of the Act and Regulation BTR, an individual's title is not dispositive as to whether he or she is a director. As under Section 16 of the Exchange Act, attention must be given to the individual's underlying responsibilities or privileges with respect to the issuer and whether he or she has a significant policy-making role with the issuer. See Release No. 34-28869 (Feb. 21, 1991) [56 FR 7242], at Section II.A.1. An individual may hold the title “director” and yet, because he or she is not acting as such, not be deemed a director. Release No. 34-26333 (Dec. 2, 1988) [53 FR 49997], at Section III.A.2.

⁴² 17 CFR 245.100(h)(1).

⁴³ See the ABA Letter and the Letter dated December 16, 2002 of Cleary, Gottlieb, Steen & Hamilton (the “Cleary Letter”).

⁴⁴ 17 CFR 245.100(c)(2).

⁴⁵ 17 CFR 245.100(h)(2).

⁴⁶ New Rule 100(i) of Regulation BTR [17 CFR 245.100(i)] defines the term “exempt security” by reference to the definition in Section 3(a)(12) of the Exchange Act [15 U.S.C. 78c(a)(12)].

⁴⁷ 17 CFR 245.100(e).