

- Acquisitions of equity securities under dividend or interest reinvestment plans;

- Purchases or sales of equity securities pursuant to a trading arrangement that satisfies the affirmative defense conditions of Exchange Act Rule 10b5-1(c);⁷⁵

- Purchases or sales of equity securities, other than discretionary transactions,⁷⁶ pursuant to certain "tax-conditioned" plans;⁷⁷ and

- Increases or decreases in the number of equity securities held as a result of a stock split or stock dividend applying equally to all equity securities of that class.

While commenters generally supported the proposed exemptions, some requested clarification as to the intent of the statement in the Proposing Release that "[a]wareness of an impending blackout period would be considered awareness of material, non-public information that could render the [proposed exemption for a trading arrangement that satisfies the affirmative defense conditions of Exchange Act Rule 10b5-1(c)] unavailable." In particular, commenters expressed concern that the statement could have implications beyond Section 306(a). One commenter noted that a broad reading of this statement could preclude a director or executive officer from establishing an Exchange Act Rule 10b5-1(c) trading arrangement indefinitely if he or she was aware that a pension plan blackout period was planned, even if the dates of the blackout period had not been established.⁷⁸ The same commenter asserted that the statement would not permit a director or executive officer to evaluate the materiality of his or her knowledge about an impending blackout period on the basis of applicable facts and circumstances. Another commenter noted that the statement created uncertainty as to whether "awareness" of an impending blackout period was material non-public information that would preclude trading

in an issuer's securities by any person with such awareness until the blackout period was publicly disclosed.⁷⁹ A third commenter suggested that we clarify the statement to provide that "awareness" of an impending blackout period would require awareness of the actual or approximate beginning and ending dates of a specific blackout period (whether or not notice of the blackout period as required by Section 306(a)(6) of the Act had been received).⁸⁰

We did not intend for this statement to be read so broadly. The statement simply was intended to clarify that a director or executive officer who is aware of a scheduled blackout period could not subsequently enter into or modify an Exchange Act Rule 10b5-1(c) trading arrangement to circumvent the Section 306(a) trading prohibition. The "awareness" of an impending blackout period described in the statement would require awareness of the actual or approximate beginning or ending dates of a specific blackout period (whether or not notice of the blackout period as required by Section 306(a)(6) had been received), and not merely awareness of the potential for a blackout period. Accordingly, we have modified new Rule 101(c)(2) of Regulation BTR⁸¹ to provide that transactions pursuant to a trading arrangement that satisfies the affirmative defense conditions of Exchange Act Rule 10b5-1(c) will be exempt from the Section 306(a) trading prohibition, as long as the arrangement is not entered into or modified during the blackout period in question or at a time when the director or executive officer is aware of the actual or approximate beginning or ending dates of the blackout period, whether or not the director or executive officer has received notice of the blackout period as required by Section 306(a)(6). This information may or may not be material non-public information for other purposes, depending on the applicable facts, including whether the information has not been disclosed or otherwise made public and whether the information is material under customary legal analysis.⁸² We do not intend that our treatment of this information under Regulation BTR affect that customary legal analysis of materiality.

The exemption for purchases or sales of equity securities pursuant to certain "tax-conditioned" plans in new Rule 101(c)(3) of Regulation BTR⁸³ has been

expanded to include purchases or sales pursuant to an employee benefit plan of a foreign private issuer that either has been approved by the taxing authority of a foreign jurisdiction, or is eligible for preferential treatment under the tax laws of a foreign jurisdiction because the plan provides for broad-based employee participation. This change is intended to equalize the treatment of directors and executive officers of domestic and foreign private issuers where a foreign issuer has an employee benefit plan maintained outside the United States that is substantially similar to a "tax-conditioned" employee benefit plan.⁸⁴

As adopted, the exemption in new Rule 101(c)(3) does not extend to "discretionary transactions," such as an intra-plan transfer involving an issuer equity securities fund or a cash distribution funded by a volitional disposition of an issuer equity security, that occur during a blackout period. However, it would cover acquisitions or dispositions of equity securities made in connection with death, disability, retirement or termination of employment or transactions involving a diversification or distribution required by the Internal Revenue Code to be made available to plan participants because these transactions are not "discretionary transactions."⁸⁵

We have expanded new Rule 101(c) to include the following additional exemptions from the statutory trading prohibition that were suggested by commenters:

- Compensatory grants and awards of equity securities (including options and stock appreciation rights) pursuant to a plan that, by its terms, permits directors or executive officers to receive grants or awards, provides for grants or awards to occur automatically and specifies the terms and conditions of the grants or awards;

- Exercises, conversions or terminations of derivative securities that were not written or acquired by a director or executive officer during the blackout period in question or while aware of the actual or approximate beginning or ending dates of the blackout period, and where (i) the derivative security, by its terms, may be exercised, converted or terminated only on a fixed date, with no discretionary provision for earlier exercise, conversion or termination,⁸⁶ or (ii) the derivative security is exercised, converted or terminated by a counterparty and the director or

⁷⁵ 17 CFR 240.10b5-1(c).

⁷⁶ As defined in Exchange Act Rule 16b-3(b)(1) [17 CFR 240.16b-3(b)(1)].

⁷⁷ These plans include Qualified Plans (as defined in Exchange Act Rule 16b-3(b)(4) [17 CFR 240.16b-3(b)(4)]), Excess Benefit Plans (as defined in Exchange Act Rule 16b-3(b)(2) [17 CFR 240.16b-3(b)(2)]) and Stock Purchase Plans (as defined in Exchange Act Rule 16b-3(b)(5) [17 CFR 240.16b-3(b)(5)]) and, with respect to foreign private issuers, specified similar plans. See n. 83 below and the accompanying text. Some commenters requested exemptions for specific transactions under these "tax-conditioned" plans. As discussed in this section, we do not believe that these exemptions are necessary. See n. 85 below and the accompanying text.

⁷⁸ See the PSCA Letter.

⁷⁹ See the Intel Letter.

⁸⁰ See the ABA Letter.

⁸¹ 17 CFR 245.101(c)(2).

⁸² See *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

⁸³ 17 CFR 245.101(c)(3).

⁸⁴ See n. 77 above.

⁸⁵ See n. 76 above.

⁸⁶ For example, European-style options.