

executive officer does not exercise any influence on the counterparty with respect to whether or when to exercise, convert or terminate the derivative security;

- Acquisitions or dispositions of equity securities involving a *bona fide* gift or a transfer by will or the laws of descent and distribution;
- Acquisitions or dispositions of equity securities pursuant to a domestic relations order;
- Sales or other dispositions of equity securities compelled by the laws or other requirements of an applicable jurisdiction; and
- Acquisitions or dispositions of equity securities in connection with a merger, acquisition, divestiture or similar transaction occurring by operation of law.⁸⁷

Section 306(a)(3) of the Act⁸⁸ permits us to provide appropriate exemptions from the statutory trading prohibition, citing examples of transactions eligible for exemption such as purchases pursuant to an automatic dividend reinvestment program or purchases or sales made pursuant to an advance election. These examples reflect transactions that occur automatically, are made pursuant to an advance election or are otherwise outside the control of the director or executive officer. The exemptions that we originally proposed and are adopting embody one or both of these characteristics. The additional exemptions that we are adopting also reflect these characteristics.

Compensatory grants and awards of equity securities during a blackout period pursuant to a plan that, by its terms, provides for grants and awards to be made to directors and executive officers automatically and specifies the terms and conditions of the grants or awards are outside the control of the directors and executive officers and do not present the concerns that Section 306(a) is intended to remedy. Similarly, an exercise, conversion or termination of a derivative security written or acquired by a director or executive officer before the blackout period in question and while not aware of the actual or approximate beginning or ending dates of the blackout period is a transaction that is outside the control of the director or executive officer where the derivative security either, by its terms, may be exercised, converted or terminated only on a fixed date, or is exercised, converted or terminated by a counterparty where the director or

executive officer does not exercise any influence on the counterparty with respect to whether or when to exercise, convert or terminate the derivative security.

The exemption for *bona fide* gifts and acquisitions or dispositions of equity securities by will or the laws of descent and distribution is modeled on a similar exemption under Section 16 of the Exchange Act.⁸⁹ The exemption for acquisitions or dispositions pursuant to a domestic relations order is modeled on the exemption in Exchange Act Rule 16a-12.⁹⁰

The exemption for sales or other dispositions of equity securities compelled by the laws or other requirements of an applicable jurisdiction addresses a category of involuntary transactions that do not provide the opportunity for improper self-dealing or present the unfairness Section 306(a) was designed to address. Finally, the exemption for acquisitions or dispositions of equity securities in connection with a merger, acquisition, divestiture or similar transaction occurring by operation of law is intended to cover an exchange of equity securities affecting substantially all of an entity's equity security holders that occurs upon a statutory merger, acquisition, divestiture or similar transaction that closes during a blackout period.

5. Blackout Period

Section 306(a)(4)(A) of the Act defines the term "blackout period" to mean any period of more than three consecutive business days during which the ability of not fewer than 50% of the participants or beneficiaries under all individual account plans maintained by an issuer to purchase, sell or otherwise acquire or transfer an interest in any equity security of the issuer held in such an individual account plan is temporarily suspended by the issuer or by a fiduciary⁹¹ of the plan. In the Proposing Release, we solicited comment on whether a trading suspension of three business days or

less should be considered a "blackout period" for purposes of the statute.

Several commenters opposed expanding the definition of the term "blackout period" to encompass periods of three business days or less. One commenter noted that the specific statutory language providing this standard had resulted from extensive discussions among policymakers and representatives of the voluntary employer-provided retirement system, and that blackout periods of three business days or less do not significantly impact the rights of plan participants and beneficiaries.⁹² Two commenters requested that Regulation BTR be consistent with the rules under Section 306(b) of the Act adopted by the Department of Labor (the "DOL Rules"), so that issuers are not subject to different blackout period rules.⁹³ Two commenters noted that because there may be unforeseen technical problems or other emergencies that could result in unscheduled temporary trading suspensions lasting one or two business days which would not be subject to the advance notice requirement of the DOL Rules, it would be impracticable to comply with Section 306(a) of the Act in these circumstances.⁹⁴

Although Regulation BTR retains the "more than three consecutive business days" language in its definition of the term "blackout period," we remain concerned that the problems Section 306(a) is intended to address may not be limited to blackout periods that last longer than three consecutive business days. A sharp decline in the value of an issuer's equity securities can take place in a single day, and, if that decline coincides with a temporary trading suspension in the issuer's pension plans, it is still unfair that directors and executive officers may be able to dispose of the equity securities that they acquired in connection with service or employment as a director or executive officer while rank-and-file employees are precluded from selling issuer equity securities in their individual plan accounts. While most of these temporary trading suspensions are likely the result of unforeseeable technical problems or other emergencies, we are mindful that, given the requirements of the statute, issuers and plan administrators may be motivated to structure blackout periods to last three business days or less. We would view any such efforts to

⁸⁹ See Exchange Act Rule 16b-5 [17 CFR 240.16b-5].

⁹⁰ 17 CFR 240.16a-12.

⁹¹ For purposes of the Act and Regulation BTR, a plan administrator will be considered a "fiduciary" of the plan even if it has invoked the rules under Section 404(c) of the Employment Retirement Income Security Act of 1974 ("ERISA") [29 U.S.C. 1104(c)] to avoid liability for losses in participant or beneficiary accounts where participants and beneficiaries are provided an opportunity to exercise control over the assets in their individual accounts and are given an opportunity to choose from a broad range of investments.

⁸⁷ See new Rules 101(c)(4)-(9) of Regulation BTR [17 CFR 245.101(c)(4)-(9)].

⁸⁸ 15 U.S.C. 7244(a)(3).

⁹² See the PSCA Letter.

⁹³ See the ACB Letter and the PWC Letter.

⁹⁴ See the ACB Letter and the Letter dated December 16, 2002 of The ERISA Industry Committee (the "ERIC Letter").