

circumvent Section 306(a) as potential violations of Regulation BTR. We will continue to consider these issues, to attempt to ascertain whether blackout periods of three business days or less are or may become a concern and to talk to the Department of Labor about possible solutions.

(a) *Individual Account Plan.*

New Rule 100(j) of Regulation BTR⁹⁵ sets forth the definition of the term "individual account plan" for purposes of Section 306(a) of the Act. As specified in Section 306(a)(5) of the Act,⁹⁶ this definition is based on Section 3(34) of ERISA.⁹⁷ This definition encompasses a variety of pension plans, including Section 401(k) plans, profit-sharing and savings plans, stock bonus plans and money purchase pension plans.

As specified in the statute, the definition excludes a one-participant retirement plan.⁹⁸ In addition, we have modified the definition to exclude pension plans, including deferred compensation plans, in which participation is limited to directors of the issuer. In the case of a temporary trading suspension in issuer equity securities in such a plan, the unfairness of directors and executive officers being able to trade their equity securities while an issuer's employees may not does not exist.⁹⁹

(b) *Blackout Period.*

New Rule 100(b) of Regulation BTR¹⁰⁰ contains the definition of the term "blackout period" as clarified to achieve the purposes of Section 306(a) of the Act. The new rule makes clear

that, in determining whether a temporary trading suspension in issuer equity securities constitutes a "blackout period," the individual account plans to be considered are individual account plans maintained by an issuer that permit participants or beneficiaries located in the United States to acquire or hold equity securities of the issuer. This includes individual account plans that:

- Permit participants or beneficiaries to invest their plan contributions in issuer equity securities;
- Include an "open brokerage window" that permits participants or beneficiaries to invest in the equity securities of any publicly-traded company, including the issuer;
- Match employee contributions with issuer equity securities; or
- Reallocate forfeitures that include issuer equity securities to the remaining plan participants.

This would include such an individual account plan, whether or not the plan actually contains equity securities of the issuer at the time of the temporary trading suspension and related determination.¹⁰¹ In addition, new Rule 100(b)(3)(i) of Regulation BTR¹⁰² provides that, for purposes of determining the individual account plans maintained by the issuer, the rules under Section 414(b), (c), (m) and (o) of the Internal Revenue Code¹⁰³ with respect to entities treated as a single employer are to be applied.

Two commenters questioned whether all individual account plans maintained by an issuer that permit participants or beneficiaries located in the United States to acquire or hold equity securities of the issuer should be included in the percentage test for determining whether a temporary trading suspension constitutes a

"blackout period."¹⁰⁴ These commenters noted that, as proposed, the 50% test would take into account any individual account plan (wherever located) maintained by an issuer that permits any participants or beneficiaries located in the United States to acquire or hold issuer equity securities. Thus, even though an individual account plan may be maintained outside the United States, if even a single participant or beneficiary was located in the United States, all of the participants or beneficiaries in the plan would have to be taken into account under the 50% test. One commenter asserted that although foreign issuers may have a small number of U.S. employees participating in their pension plans maintained outside the United States, because these issuers may not keep records of such participation (because the plans are not subject to ERISA), to avoid confusion and inaccurate calculations the 50% test should not apply to these plans.¹⁰⁵

We believe that a clarification is warranted. Accordingly, new Rule 100(b)(3)(ii) of Regulation BTR¹⁰⁶ excludes an individual account plan maintained outside of the United States primarily for the benefit of nonresident aliens from the determination of whether a temporary trading suspension constitutes a "blackout period."¹⁰⁷ This should focus the determination of whether a blackout period will occur on those individual account plans that are primarily for the benefit of participants and beneficiaries located in the United States. Because ERISA applies to any "individual account plan" that is primarily for the benefit of U.S. participants or beneficiaries and Section 404(b) of ERISA¹⁰⁸ provides that the indicia of ownership of the assets of plans subject to ERISA may not be maintained outside the jurisdiction of the United States, we do not believe that this modification is inconsistent with the objectives of Section 306(a).

(c) *Determining Participants and Beneficiaries.*

Once an issuer has identified the relevant individual account plans, it must determine whether the temporary suspension of trading in its equity securities affects 50% or more of the participants or beneficiaries under these plans. This is accomplished by comparing the number of participants or beneficiaries located in the United

⁹⁵ 17 CFR 245.100(j).

⁹⁶ 15 U.S.C. 7244(a)(5). Consequently, a temporary trading suspension in issuer equity securities in an individual account plan that is a pension plan as defined in ERISA may trigger the Section 306(a) trading prohibition, whether or not the plan is actually subject to ERISA.

⁹⁷ 29 U.S.C. 1002(34). Section 3(2)(A) of ERISA [29 U.S.C. 1002(2)(A)] defines the term "pension plan" to mean "any plan, fund, or program . . . established or maintained by an employer or an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan."

⁹⁸ See Section 306(a)(5) of the Act.

⁹⁹ This change was made in response to a comment in the Letter dated December 13, 2002 of the Investment Company Institute (the "ICI Letter"). We have made this exclusion applicable to all issuers, not just investment companies, because we believe that it is unnecessary to include director-only plans within the scope of the rule, whether or not the issuer is an investment company.

¹⁰⁰ 17 CFR 245.100(b).

¹⁰¹ Thus, a temporary trading suspension applicable to such an individual account plan in which no issuer equity securities are actually held by plan participants or beneficiaries will trigger a determination of whether a "blackout period" will occur in that plan. Similarly, an individual account plan maintained by an issuer that permits participants or beneficiaries to acquire or hold equity securities of the issuer, whether or not the plan actually contains equity securities of the issuer at the time of the determination, will be taken into account in determining whether a temporary trading suspension in a different plan constitutes a "blackout period."

¹⁰² 17 CFR 245.100(b)(3)(i).

¹⁰³ 26 U.S.C. 414(b), (c), (m) and (o). Section 414(b) provides that, for purposes of various provisions of the Internal Revenue Code, all employees of all corporations that are members of a "controlled group" of corporations are to be treated as employed by a single employer. Section 414(c) provides "single-employer" treatment for certain groups of partnerships and proprietorships under common control, while Section 414(m) provides "single-employer" treatment for organizations that provide services for one another.

¹⁰⁴ See the ERIC Letter and the S&C Letter.

¹⁰⁵ See the S&C Letter.

¹⁰⁶ 17 CFR 245.100(b)(3)(ii).

¹⁰⁷ This type of employee benefit plan is excluded from the coverage provisions of ERISA. See Section 4(b)(4) of ERISA [29 U.S.C. 1003(b)(4)].

¹⁰⁸ 29 U.S.C. 1104(b).