

States who are subject to the temporary trading suspension in issuer equity securities to the number of participants or beneficiaries located in the United States under all individual account plans maintained by the issuer.¹⁰⁹ In the case of a domestic issuer, where this percentage is 50% or more the temporary trading suspension constitutes a "blackout period," so that the Section 306(a) trading prohibition applies to the issuer's directors and executive officers.

We recognize that it may be difficult to determine the number of participants and beneficiaries in an individual account plan because participants and beneficiaries continuously enter and leave such plans. For example, newly eligible employees regularly enter plans, terminating and retiring employees regularly leave plans, beneficiaries of deceased employees frequently acquire benefit rights under plans and employees commonly enter and leave plans as a result of acquisitions and divestitures.¹¹⁰ On any day, it may be difficult for an issuer to know precisely how many participants and beneficiaries are then covered by all of its individual account plans. As a result, issuers will need to apply the 50% test on the basis of estimates.

For purposes of determining the number of participants and beneficiaries in an individual account plan, commenters suggested a variety of ways to establish a reasonably accurate estimate.¹¹¹ One commenter suggested that the determination be made using data as of any convenient date within the 12-month period preceding the start of the temporary trading suspension.¹¹² We believe that this approach strikes the proper balance between ensuring that reasonably accurate data is used to make the required calculation and minimizing the burden on issuers. New Rule 100(b)(4)(i) of Regulation BTR¹¹³ provides that an issuer may use plan census data as of any date within the 12-month period preceding the beginning date of the temporary trading suspension in question (such as the last day of the most recently completed fiscal year) to determine the number of participants or beneficiaries in its individual account plans. However, where there has been a significant change in participation in an individual account plan since the date selected (for example, because of a merger or

divestiture), an issuer is required to use plan census data as of the most recent practicable date that reflects such change (for example, the most recently completed fiscal quarter or month for that plan). This should provide adequate flexibility to issuers to determine the number of participants or beneficiaries in their individual account plans using reasonably accurate and available data.

In addition, new Rule 100(b)(4)(ii) of Regulation BTR¹¹⁴ provides that, in making the calculation, issuers may aggregate participants or beneficiaries under their individual account plans without regard to overlapping plan participation. This should alleviate the burden that might otherwise arise where individual employees participate in more than one individual account plan maintained by an issuer. Under this provision, an issuer is permitted to calculate the aggregate number of participants and beneficiaries under each of its individual account plans, even if an individual who participates in multiple plans is counted with respect to each plan in which he or she participates.

(d) *Foreign Private Issuers.*

In the case of a foreign private issuer, we proposed a concurrent second calculation to be applied to determine if a temporary trading suspension in issuer equity securities in the individual account plans maintained by the issuer constitutes a "blackout period" for purposes of Section 306(a) of the Act. This calculation would have compared the number of participants or beneficiaries located in the United States who are subject to the temporary trading suspension in issuer equity securities to the number of participants or beneficiaries under all individual account plans maintained by the issuer worldwide.¹¹⁵ Where this percentage exceeded 15% and the concurrent 50% test also was met, the Section 306(a) trading prohibition would have applied to the foreign private issuer's directors and executive officers.

However, commenters expressed concern that, as proposed, the 15% test would not operate as intended.¹¹⁶ These commenters noted that many foreign private issuers do not maintain pension plans that meet the ERISA definition of an "individual account plan," other than the plans they maintain for their U.S. employees. In particular, they noted that outside the United States

employees customarily participate in defined benefit pension plans, rather than individual account plans. Because the proposed 15% test was based on the percentage of an issuer's employees who participate in individual account plans, an issuer maintaining individual account plans only in the United States that were subject to a temporary trading suspension in issuer equity securities almost always would meet the test, even where the number of participants or beneficiaries in those plans was insignificant. In addition, one commenter indicated that many foreign issuers do not maintain centralized information on the types of plans they maintain or the numbers of participants or beneficiaries under the plans subject to the laws of jurisdictions other than the United States.¹¹⁷

These commenters suggested that the appropriate balance between protecting U.S. participants and beneficiaries and accommodating the interests of foreign private issuers with a limited U.S. presence could be achieved by comparing the number of participants and beneficiaries located in the United States who are subject to the temporary trading suspension in issuer equity securities to the number of employees of the issuer worldwide. While we agree with this suggestion, we are mindful that, in some situations, such a test may frustrate the purposes of Section 306(a) where a significant number of U.S. employees are affected by a temporary trading suspension in issuer equity securities, even though that number may not represent at least 15% of a foreign private issuer's total number of employees. Accordingly, we are modifying the separate calculation for foreign private issuers in new Rule 100(b)(2) of Regulation BTR¹¹⁸ to provide that if the number of participants or beneficiaries located in the United States in individual account plans maintained by a foreign private issuer who are affected by a temporary trading suspension in issuer equity securities either exceeds 15% of the total number of employees of the issuer and its consolidated subsidiaries or 50,000 affected participants and beneficiaries¹¹⁹ and the concurrent 50% test is satisfied, the Section 306(a) trading prohibition will apply to the issuer's directors and executive officers.

¹¹⁷ See the S&C Letter.

¹¹⁸ 17 CFR 245.100(b)(2).

¹¹⁹ We arrived at this number after examining the number of employees (including the number of employees based in the United States) of several foreign private issuers, applying the 15% calculation to these issuers and balancing the objectives of Section 306(a) of the Act with the interests of foreign private issuers.

¹⁰⁹ See new Rule 100(b)(1) of Regulation BTR.

¹¹⁰ See the ERIC Letter.

¹¹¹ See, for example, the Letter dated December 16, 2002 of Computer Sciences Corporation, the PSCA Letter and the PWC Letter.

¹¹² See the ABA Letter.

¹¹³ 17 CFR 245.100(b)(4)(i).

¹¹⁴ 17 CFR 245.100(b)(4)(ii).

¹¹⁵ See proposed Exchange Act Rule 100(b)(2).

¹¹⁶ See the ABA Letter; the Cleary Letter; the S&C Letter and the Letter dated December 16, 2002 of Shearman & Sterling.