

Under new Exchange Act Rule 100(b)(2):

- If the number of participants and beneficiaries located in the United States in individual account plans maintained by a foreign private issuer who are subject to a temporary trading suspension in issuer equity securities exceeds 15% of the number of employees of the issuer worldwide (and the concurrent 50% test is satisfied), the issuer will be considered to have a sufficient presence in the United States for purposes of applying the Section 306(a) trading prohibition to the issuer's directors and executive officers.

- If the number of participants and beneficiaries located in the United States in individual account plans maintained by a foreign private issuer who are subject to a temporary trading suspension in issuer equity securities does not exceed 15% of the number of employees of the issuer worldwide but exceeds 50,000 participants and beneficiaries (and the concurrent 50% test is satisfied), the issuer will be considered to have a sufficient presence in the United States for purposes of applying the Section 306(a) trading prohibition to the issuer's directors and executive officers.

- If the number of participants and beneficiaries located in the United States in individual account plans maintained by a foreign private issuer who are subject to a temporary trading suspension in issuer equity securities does not exceed 15% of the issuer's employees worldwide and is 50,000 or less participants and beneficiaries (even if the concurrent 50% test is satisfied), the issuer's presence in the United States will be considered sufficiently small so that its directors and executive officers will not be subject to the Section 306(a) trading prohibition.

The application of these principles is illustrated by the following examples:

- *Example 1.* Company X is a foreign private issuer with 100,000 employees worldwide. 30,000 employees located in the United States participate in the company's two U.S. pension plans, which are individual account plans. A fiduciary of one of the U.S. pension plans temporarily suspends the ability of all plan participants to trade in issuer equity securities through their plan accounts. This temporary trading suspension affects 16,000 participants in the U.S. plans. Since the number of participants located in the United States in individual account plans maintained by the issuer who are subject to the temporary trading suspension comprises 50% or more of the total number of participants located in the United States in individual account plans maintained by the issuer (16,000/30,000), and since the number of participants located in the United States in individual account plans maintained by the

issuer who are subject to the temporary trading suspension represents more than 15% of the issuer's employees worldwide (16,000/100,000), the temporary trading suspension is a "blackout period" for purposes of Section 306(a) of the Act and the statutory trading prohibition applies to the issuer's directors and executive officers.

- *Example 2.* Company X is a foreign private issuer with 1,000,000 employees worldwide. 100,000 employees located in the United States participate in the company's two U.S. pension plans, which are individual account plans. A fiduciary of one of the U.S. pension plans temporarily suspends the ability of all plan participants to trade in issuer equity securities through their plan accounts. This temporary trading suspension affects 60,000 participants in the U.S. plans. Since the number of participants located in the United States in individual account plans maintained by the issuer who are subject to the temporary trading suspension comprises 50% or more of the total number of participants located in the United States in individual account plans maintained by the issuer (60,000/100,000), and since the number of participants located in the United States in individual account plans maintained by the issuer who are subject to the temporary trading suspension exceeds 50,000, the temporary trading suspension is a "blackout period" for purposes of Section 306(a) of the Act even though the 60,000 participants located in the United States in individual account plans maintained by the issuer who are subject to the temporary trading suspension represent less than 15% of the issuer's employees worldwide (150,000/1,000,000). Consequently, the statutory trading prohibition applies to the issuer's directors and executive officers.

- *Example 3.* Company X is a foreign private issuer with 100,000 employees worldwide. 6,000 employees located in the United States participate in the company's two U.S. pension plans, which are individual account plans. A fiduciary of one of the U.S. pension plans temporarily suspends the ability of all plan participants to trade in issuer equity securities through their plan accounts. This temporary trading suspension affects 4,000 participants in the U.S. plans. Although the number of participants located in the United States in individual account plans maintained by the issuer who are subject to the temporary trading suspension is 50% or more of the total number of participants located in the United States in individual account plans maintained by the issuer (4,000/6,000), because this number represents 15% or less of the issuer's employees worldwide (4,000/100,000) and is less than 50,000 participants, the temporary trading suspension is not a "blackout period" for purposes of Section 306(a) of the Act. Consequently, the statutory trading prohibition does not apply to the issuer's directors and executive officers.

(e) *Exceptions to Definition of Blackout Period.*

Section 306(a)(4)(B) of the Act¹²⁰ expressly excludes two types of

temporary trading suspensions from the definition of the term "blackout period." These exceptions are for:

- a regularly scheduled period in which the participants and beneficiaries may not purchase, sell or otherwise acquire or transfer an interest in any equity security of an issuer, if such period is:

- Incorporated into the individual account plan; and
- Timely disclosed to employees before they become participants under the individual account plan or as a subsequent amendment to the plan;¹²¹ and

- any temporary trading suspension that would otherwise be a "blackout period" that is imposed solely in connection with persons becoming participants or beneficiaries, or ceasing to be participants or beneficiaries, in an individual account plan by reason of a corporate merger, acquisition, divestiture or similar transaction involving the plan or plan sponsor.¹²²

New Rule 102 of Regulation BTR¹²³ addresses the application of these exceptions.¹²⁴ New Rule 102(a) of Regulation BTR¹²⁵ clarifies the exception for regularly scheduled trading suspensions. It provides that the requirement that the regularly scheduled period be incorporated into the individual account plan may be satisfied by including a description of the regularly scheduled trading suspension in issuer equity securities, including the suspension's frequency and duration and the plan transactions to be suspended or otherwise affected, in either the official plan documents or other documents or instruments that govern plan operations. In the latter case, these documents or instruments may include an ERISA Section 404(c) notice or an advance notice included in either the plan's summary plan description or any other official plan communication.

The new rule also provides that disclosure of the regularly scheduled trading suspension will be considered timely if the employee is notified of the trading suspension at any time prior to, or within 30 calendar days after, the employee's formal enrollment in the

¹²¹ See Section 306(a)(4)(B)(i) of the Act [15 U.S.C. 7244(a)(4)(B)(i)].

¹²² See Section 306(a)(4)(B)(ii) of the Act [15 U.S.C. 7244(a)(4)(B)(ii)].

¹²³ 17 CFR 245.102.

¹²⁴ These clarifications are necessary to resolve ambiguities that might otherwise require literal compliance with the conditions of the exceptions in order to avoid having the described temporary trading suspensions be "blackout periods" for purposes of Section 306(a) of the Act.

¹²⁵ 17 CFR 245.102(a).

¹²⁰ 15 U.S.C. 7244(a)(4)(B).