

plan, or, in the case of a subsequent amendment to the plan, within 30 calendar days after adoption of the amendment. The new rule provides that the notice may be in any graphic form that is reasonably accessible to the intended recipient.¹²⁶

Some commenters indicated that the 30-day notice requirement would present a problem for existing plans with a regularly scheduled trading suspension.¹²⁷ These commenters noted that ERISA typically requires delivery of information to a new plan participant within 90 days after enrollment in the plan, and that an issuer that previously provided notice of a regularly scheduled trading suspension in a summary plan description within this 90-day period would not qualify for the exception. To avoid this problem, they suggested that we establish a transition period during which issuers could cure any past failures to satisfy the 30-day notice requirement. Because we believe that the adoption of Regulation BTR should not penalize an issuer retroactively, we will consider an issuer to have satisfied the advance notice requirement of new Rule 102(a)(2) with respect to an individual account plan that includes a regularly scheduled trading suspension that is maintained by an issuer on January 26, 2003, the effective date of Section 306(a) of the Act, if the issuer previously provided the information described in the rule in the documents or instruments required by ERISA to be provided to plan participants within the time period authorized by ERISA.¹²⁸

In the case of a temporary trading suspension in issuer equity securities imposed in connection with a merger, acquisition, divestiture or similar transaction, new Rule 102(b) of Regulation BTR¹²⁹ provides that the temporary suspension will not constitute a "blackout period" for purposes of Section 306(a) if its principal purpose is to enable individuals to become participants or beneficiaries in an individual account plan by reason of the transaction, or to terminate participation in the plan, even though the suspension also is used to effect other administrative actions that are incidental to the admission or withdrawal of plan participants or beneficiaries. In addition, the new rule clarifies that the exception is available solely if the persons becoming participants or beneficiaries are not

permitted to participate in the same class of equity securities after the merger, acquisition, divestiture or similar transaction as before the transaction. This will limit the scope of the exception to temporary trading suspensions affecting persons employed by or affiliated with the acquired or divested entity.

6. Remedies

As we discussed in the Proposing Release, Section 306(a) of the Act contains two distinct sets of remedies. A violation of the statutory trading prohibition in Section 306(a)(1) of the Act is treated as a violation of the Exchange Act and subject to all resulting sanctions, including Commission enforcement action.¹³⁰ In addition, where a director or executive officer realizes a profit from a prohibited transaction during a blackout period, Section 306(a)(2) of the Act¹³¹ permits an issuer, or a security holder of the issuer on its behalf, to bring an action to recover that profit.¹³²

Under the latter provision, an issuer, or a security holder on its behalf, may initiate an action only if a director or executive officer realized a profit as a result of a prohibited purchase, sale or other acquisition or transfer of an equity security during a blackout period. As under Section 16(b) of the Exchange Act, this concept of "realized profits" means that the director or executive officer received a direct or indirect pecuniary benefit from the transaction.¹³³ Although we did not propose a specific method for calculating the amount recoverable by an issuer under Section 306(a)(2) in the Proposing Release, we suggested several possible ways to calculate recoverable profits and solicited comment on these alternatives, as well as any other method consistent with the purposes of the statute.

Some commenters, acknowledging the potential complexity of the calculation, encouraged us not to provide a comprehensive rule.¹³⁴ One commenter suggested that the calculation be left to the courts to determine on a case-by-case basis or, alternatively, that we establish a specific formula or guidelines for use in enforcement and private civil actions.¹³⁵

¹³⁰ See Sections 3(b)(1) and 306(a)(1) of the Act [15 U.S.C. 7202(b)(1) and 7244(a)(1)]. See also the Proposing Release at Section II.B.6.a.

¹³¹ 15 U.S.C. 7244(a)(2).

¹³² 15 U.S.C. 7244(a)(2).

¹³³ See Exchange Act Rule 16a-1(a)(2)(i) [17 CFR 240.16a-1(a)(2)(i)]. See also *Feder v. Frost*, 220 F.3d 29, 34 (2d Cir. 2000).

¹³⁴ See the ACB Letter and the Cleary Letter.

¹³⁵ See the ACB Letter.

In the Proposing Release, one of the potential methods to calculate profits on which we solicited comment was based on the difference between the actual amount paid or received by a director or executive officer as a result of the purchase, sale or other acquisition or transfer of an equity security during a blackout period and the market value of the issuer's equity securities on the first date after the end of the blackout period.¹³⁶ One commenter endorsed this approach as the appropriate measure of the profit recoverable in a private action for a violation of the Section 306(a) trading prohibition.¹³⁷ We believe that this approach has merit, both in terms of its simplicity and its adherence to the statute's purposes. Section 306(a)(2) seeks to equalize the treatment of corporate executives and rank-and-file employees with respect to their opportunity, during a pension plan blackout period, to engage in transactions in issuer equity securities that were acquired in connection with their service to, or employment with, the issuer. Since a plan participant or beneficiary may not engage in a transaction in issuer equity securities through his or her plan account until the blackout period has ended, the statute similarly restricts directors and executive officers. This profit recovery measure focuses on the difference between the amount that a director or executive officer actually paid or received in the transaction and the amount he or she would have paid or received had the transaction been conducted after the end of the blackout period.

To provide guidance to the courts in Section 306(a)(2) private actions against directors and executive officers who have violated the statutory trading prohibition, new Rule 103(c) of Regulation BTR¹³⁸ provides that:

- Where a transaction involves a purchase, sale or other acquisition or transfer (other than a grant, exercise, conversion or termination of a derivative security) of an equity security of the issuer that is registered pursuant to Section 12(b) or 12(g) of the Exchange Act¹³⁹ and listed on a national securities exchange or listed in an automated inter-dealer quotation system of a national securities association, profit is to be measured by comparing the difference between the amount paid or received for the equity security on the date of the transaction during the blackout period and the average market

¹³⁶ See the Proposing Release, at Section II.B.6.c.

¹³⁷ See the ABA Letter.

¹³⁸ 17 CFR 245.103(c).

¹³⁹ 15 U.S.C. 78l(b) or (g).

¹²⁶ See new Rule 102(a)(2) of Regulation BTR [17 CFR 245.102(a)(2)].

¹²⁷ See the ABA Letter, the ERIC Letter and the S&C Letter.

¹²⁸ See Section 104(b) of ERISA [29 U.S.C. 1024(b)].

¹²⁹ 17 CFR 245.102(b).