

price of the equity security calculated over the first three trading days after the ending date of the blackout period.

- Where a transaction is not otherwise described in the preceding paragraph, profit is to be measured in a manner that is consistent with the objective of identifying the amount of any gain realized or loss avoided as a result of the transaction taking place during the blackout period rather than taking place outside of the blackout period.

To mitigate the effect of large fluctuations in the market price of an issuer's equity securities after a blackout period and deter attempts to manipulate this market price, new Rule 103(c)(1) of Regulation BTR¹⁴⁰ uses a three-day average trading price to determine the amount that a director or executive officer would have paid or received if the transaction had occurred after the end of the blackout period. New Rule 103(c)(2) of Regulation BTR¹⁴¹ addresses transactions that do not lend themselves to a simple calculation (such as derivative securities transactions, transactions involving an issuer that is required to file reports under Section 15(d) of the Exchange Act and transactions involving an issuer that has filed a registration statement for an initial public offering that has not yet become effective). This rule reflects a pragmatic approach that should permit consideration of equitable factors in determining the amount recoverable in a private action consistent with the purposes of the Section 306(a) trading prohibition. New Rule 103(c)(3) of Regulation BTR¹⁴² provides that the calculation methods with respect to a private action under Section 306(a)(2) do not limit in any respect the authority of the Commission to seek or determine remedies as the result of a transaction taking place in violation of Section 306(a)(1) of the Act.

This operation of the new rule is illustrated by the following examples:

- *Example 1:* The XYZ Company Section 401(k) plan imposes a temporary trading suspension on plan participants and beneficiaries from December 1st through the following January 3rd that is a "blackout period" for purposes of Section 306(a). Director A acquires 1,000 shares of XYZ Company common stock in connection with his or her service as a director on December 15th for \$10.00. Between January 6th and 8th, the first three trading days after the end of the blackout period, XYZ Company common stock trades at an average price of \$12.00 per share. Director A has "realized"

a profit of \$2000 that is recoverable under Section 306(a)(2).

- *Example 2:* The XYZ Company Section 401(k) plan imposes a temporary trading suspension on plan participants and beneficiaries from December 1st through the following January 3rd that is a "blackout period" for purposes of Section 306(a). Director A acquires 1,000 shares of XYZ Company common stock in connection with his or her service as a director on December 15th for \$10.00. Between January 6th and 8th, the first three trading days after the end of the blackout period, XYZ Company common stock trades at an average price of \$8.00 per share. There is no recoverable profit under Section 306(a)(2), as Director A received no price advantage over plan participants from purchasing the share of XYZ Company common stock during the blackout period.

- *Example 3:* The XYZ Company Section 401(k) plan imposes a temporary trading suspension on plan participants and beneficiaries from December 1st through the following January 3rd that is a "blackout period" for purposes of Section 306(a). Director A disposes of 1,000 shares of XYZ Company common stock previously acquired in connection with his or her service as a director on December 15th for \$20.00. Between January 6th and 8th, the first three trading days after the end of the blackout period, XYZ Company common stock trades at an average price of \$12.00 per share. Director A has "realized" a profit of \$8000 that is recoverable under Section 306(a)(2).

- *Example 4:* The XYZ Company Section 401(k) plan imposes a temporary trading suspension on plan participants and beneficiaries from December 1st through the following January 3rd that is a "blackout period" for purposes of Section 306(a). Director A disposes of 1,000 shares of XYZ Company common stock previously acquired in connection with his or her service as a director on December 15th for \$20.00. Between January 6th and 8th, the first three trading days after the end of the blackout period, XYZ Company common stock trades at an average price of \$25.00 per share. There is no recoverable profit, as Director A received no price advantage over plan participants from selling the share of XYZ Company common stock during the blackout period.

Without regard to whether any amount is recoverable under Section 306(a)(2), in each example Director A has violated Section 306(a)(1) and, as a result, is subject to sanctions, including Commission enforcement action.

7. Notice

Section 306(a)(6) of the Act¹⁴³ requires an issuer to provide timely notice to its directors and executive officers and to the Commission of the imposition of a blackout period that triggers the trading prohibition of Section 306(a) of the Act. New Rule 104 of Regulation BTR¹⁴⁴ specifies how

issuers must satisfy this notice requirement. As discussed in the Proposing Release, an issuer's failure to provide notice will not preclude a Commission enforcement action for a violation of Section 306(a)(1) of the Act or a private action to recover profits under Section 306(a)(2) of the Act. In addition, an issuer's failure to provide notice, whether or not a director or executive officer subsequently violates the Section 306(a) trading prohibition, may result in a Commission enforcement action against the issuer for violating the Exchange Act.¹⁴⁵

(a) Content of Notice.

New Rule 104(b)(1) of Regulation BTR¹⁴⁶ sets forth the content requirements for the notice required by Section 306(a)(6) of the Act. With one exception, these content requirements track the requirements described in the Proposing Release. New Rule 104(b)(1)(iv) of Regulation BTR¹⁴⁷ requires that the notice specify the length of the blackout period. As proposed, this requirement contemplated that the notice specify the actual or expected beginning and ending dates of the blackout period. One commenter indicated that many issuers would find it difficult to project in advance the beginning and ending dates of a blackout period, noting that a wide range of events (such as problems with plan records or recordkeeper, extensive document reviews and data reconciliation, required modifications to systems and software and the like) could affect these dates.¹⁴⁸ As a result, the dates included in the notice could be missed and issuers would have to incur additional costs to furnish updated notices. To avoid this potential problem, this commenter speculated that issuers would be likely to establish longer blackout periods, thereby unnecessarily prolonging the inability of plan participants and beneficiaries, as well as directors and executive officers, to engage in transactions involving issuer equity securities. To address this concern, the commenter suggested that issuers be permitted to identify in the notice a range of possible dates during which the blackout period might begin or end.

We recognize the difficulty of predicting specific beginning and ending dates for a blackout period well in advance of when the blackout will occur. We also note that the DOL Rules have been modified to permit a more flexible approach in describing the

¹⁴⁰ 17 CFR 245.103(c)(1).

¹⁴¹ 17 CFR 245.103(c)(2).

¹⁴² 17 CFR 245.103(c)(3).

¹⁴³ 15 U.S.C. 7244(a)(6).

¹⁴⁴ 17 CFR 245.104.

¹⁴⁵ See Section 3(b)(1) of the Act.

¹⁴⁶ 17 CFR 245.104(b)(1).

¹⁴⁷ 17 CFR 245.104(b)(1)(iv).

¹⁴⁸ See the ICI Letter.