

length of an impending pension plan blackout period.<sup>149</sup> We are persuaded that the rules should afford issuers some flexibility in disclosing the beginning and ending dates of a blackout period in the required notice. As adopted, new Rule 104(b)(1)(iv) permits the length of a blackout period to be specified using either the actual or expected beginning date and ending date of the blackout period, or the calendar week or weeks during which the blackout period is expected to begin and end, provided that during such week or weeks information as to whether the blackout period has begun or ended is readily available, without charge, to affected directors and executive officers (such as via a toll-free telephone number or access to a specified web site) and the notice describes how to access the information.<sup>150</sup> New Rule 104(b)(1)(iv) further permits the length of the blackout period to be described in the notice to the Commission using the calendar week or weeks during which the blackout period is expected to begin and end, provided that the notice also describes how a security holder or other interested person may obtain, without charge, the actual beginning and ending dates of the blackout period. Under the rule, it is permissible to use a "week of \_\_\_\_\_" beginning date and a "week of \_\_\_\_\_" ending date. It also is permissible to use a specific beginning date and a "week of \_\_\_\_\_" ending date, or the converse. For purposes of the rule, a calendar week is defined to mean a seven-day period beginning on Sunday and ending on Saturday.<sup>151</sup>

As discussed in the Proposing Release, if an issuer elects to provide the actual or expected beginning and ending dates of a blackout period in the required notice, and either or both of those dates change, the issuer is required to provide directors and executive officers and the Commission with an updated notice identifying the changed date or dates, explaining the reasons for the change in the date or dates and identifying all material changes in the information contained in

the prior notice.<sup>152</sup> The updated notice is required to be provided as soon as reasonably practicable.

(b) *Timing of Notice to Directors and Executive Officers.*

As proposed, the required notice to directors and executive officers would have been due at least 15 calendar days in advance of beginning date of a blackout period. However, one commenter noted that while the content requirements of the notice required under Section 306(a) of the Act and the DOL Rules are essentially the same, the proposed timing requirements were very different and would have placed significantly increased reporting and compliance burdens on issuers.<sup>153</sup> This commenter suggested that there be a single triggering event that would harmonize the different notice requirements.

We believe that, to the extent practicable, the notice requirement of Section 306(a)(6) of the Act should be coordinated with the required notice to pension plan participants and beneficiaries and the issuer under the DOL Rules.<sup>154</sup> Consequently, new Rule 104(b)(2) of Regulation BTR<sup>155</sup> provides that the notice to directors and executive officers will be considered timely if an issuer provides it no later than five business days after the issuer receives the notice from the pension plan administrator required by the DOL Rules.<sup>156</sup> If the issuer does not receive such notice, the issuer must provide its notice to directors and executive officers at least 15 calendar days before the actual or expected beginning date of the blackout period. This requirement will ensure that an issuer typically will not be required to provide the notice required by Section 306(a)(6) to its directors and executive officers until it has received notice of an impending blackout period from the pension plan administrator. Notwithstanding this general requirement, new Rule

104(b)(2)(ii) of Regulation BTR<sup>157</sup> provides that advance notice is not required in any case where an unforeseeable event or circumstances beyond the issuer's reasonable control prevent the issuer from providing advance notice to its directors and executive officers.

(c) *Notice to the Commission on Form 8-K.*

To ensure widespread dissemination of information about an impending blackout period, we proposed that issuers file the notice to the Commission required by Section 306(a)(6) of the Act on Form 8-K. The proposed content of this Form 8-K report was the same as the content of the required notice to directors and executive officers. While one commenter supported the use of Form 8-K to provide the required notice to the Commission,<sup>158</sup> some commenters opposed the requirement, arguing that the disclosure would be of limited interest to investors.<sup>159</sup>

One commenter noted that even if a director or executive officer engaged in a transaction in issuer equity securities during a blackout period, an investor who knew of the Form 8-K report would not know whether the securities in question were subject to the Section 306(a) trading prohibition, only that the transaction had taken place during a blackout period.<sup>160</sup> Another commenter suggested that if public disclosure was necessary, an issuer should be permitted to file a copy of the notice given to participants and beneficiaries by the pension plan administrator under the DOL Rules as an exhibit to its periodic report for the fiscal period during which the blackout period began.<sup>161</sup>

We continue to believe that Congress intended for the notice to the Commission to be publicly available to security holders and other interested persons. Consequently, we believe that Form 8-K is an appropriate vehicle for ensuring timely notice to the Commission of a blackout period that triggers the Section 306(a) trading prohibition.

Some commenters expressed concern about the proposed two business days filing requirement for the Form 8-K.<sup>162</sup> One commenter suggested that since the notice will contain the same information that is required in the notice to the issuer under the DOL Rules, a Form 8-K should be required

<sup>152</sup> See new Rules 104(b)(2)(iii) and 104(b)(3)(iii) of Regulation BTR [17 CFR 245.104(b)(2)(iii) and 104(b)(3)(iii)].

<sup>153</sup> See the Letter dated December 12, 2002 of Compass Bancshares, Inc.

<sup>154</sup> As enacted under Section 306(b) of the Act, Section 101(i)(2)(B) of ERISA [29 U.S.C. 1021(i)(2)(B)] requires that, at least 30 days in advance of a blackout period, a plan administrator notify affected plan participants and beneficiaries of the impending blackout period. In addition, Section 101(i)(2)(E) of ERISA [29 U.S.C. 1021(i)(2)(E)] requires a plan administrator to timely notify the issuer of the plan securities of the impending blackout period.

<sup>155</sup> 17 CFR 245.104(b)(2).

<sup>156</sup> For purposes of the rule, notice will be considered provided as of the date of mailing, if mailed by first class mail, or as of the date of electronic transmission, if transmitted electronically.

<sup>157</sup> 17 CFR 245.104(b)(2)(ii).

<sup>158</sup> See the PWC Letter.

<sup>159</sup> See the ABA Letter, the ACB Letter and the Intel Letter.

<sup>160</sup> See the ACB Letter.

<sup>161</sup> See the ABA Letter.

<sup>162</sup> See the ACB Letter and the Intel Letter.

<sup>149</sup> Comments about the difficulty in projecting in advance the beginning and ending dates of a blackout period were raised with the Department of Labor in response to the interim final rules adopted by the Department of Labor last year under Section 306(b) of the Act. See 67 FR 64766. As a result, the Department of Labor modified its rules to permit use of a limited range of dates for purposes of disclosing the beginning and ending dates of a blackout period.

<sup>150</sup> This rule is similar to the DOL Rules.

<sup>151</sup> See new Rule 104(b)(1)(iv)(C) of Regulation BTR [17 CFR 245.104(b)(1)(iv)(C)].