

provide to their directors and executive officers and the Commission about the imposition of a pension plan blackout period.

#### *A. Reasons for, and Objectives of, New Rules*

Section 306(a) of the Act prohibits directors and executive officers of an issuer from purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity security transactions, if the equity security was acquired in connection with the director or executive officer's service or employment as a director or executive officer. In addition, Section 306(a) requires issuers to provide timely notice to their directors and executive officers and the Commission of the imposition of a blackout period. The new rules, which clarify the application of Section 306(a) and prevent evasion of its statutory trading prohibition, are intended to further the statute's purpose of mitigating the differential opportunities between an issuer's directors and executive officers and its employees who participate in pension plans maintained by the issuer at a time when a substantial number of those participants are unable to engage in transactions involving issuer equity securities through their individual pension plan accounts.

#### *B. Significant Issues Raised by Public Comment*

One commenter indicated that the compliance burden for small business issuers would not be disproportionate to the benefits to be obtained from compliance with Section 306(a) since concerns related to trading by corporate insiders are not unique to large issuers.<sup>176</sup>

#### *C. Small Entities Subject to the New Rules*

Section 306(a) of the Act affects, and the new rules affect, small entities the securities of which are registered under Section 12 of the Exchange Act, that are required to file reports under Section 15(d) of the Exchange Act or that file, or have filed, a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn. For purposes of the Regulatory Flexibility Act, the Exchange Act<sup>177</sup> defines the term "small business," other than an investment

company, to be an issuer that, on the last day of its most recent fiscal year, has total assets of \$5 million or less.<sup>178</sup> Section 306(a) and the new rules apply only to issuers with pension plans as defined in Section 3(34) of ERISA; we do not have data to indicate the number of small issuers that maintain such pension plans, but according to DOL data, only 30% of all issuers maintain such plans. Furthermore, our data indicates that temporary trading suspensions that will be subject to Section 306(a) occur to a plan approximately once every five years. If these percentages are accurate regardless of an issuer's size, the new rules should only affect approximately 150 small entities per year. We estimate that there are approximately 2,500 issuers that are subject to the Act that are not investment companies and that have assets of \$5 million or less.<sup>179</sup> There are approximately 225 registered investment companies that may be considered small entities. However, as noted in the Proposing Release, we anticipate that the burden imposed on investment companies by Section 306(a) and the new rules will be negligible.

#### *D. Reporting, Record Keeping and Other Compliance Requirements*

Section 306(a) of the Act requires issuers, including "small businesses," to provide timely notice to directors and executive officers and the Commission of a blackout period. The new rules specify the content and timing of this notice. The statute's basic prohibition against trading during blackout periods is largely self-executing and does not afford us with substantial discretion to exercise regulatory flexibility with respect to small businesses.

While a cost will be incurred in complying with the notice requirement, we believe that these costs will be minimal for small businesses. A required notice is likely to be prepared once for each blackout period and distributed to affected directors and executive officers. In addition, a current report on Form 8-K will be prepared and filed with the Commission. The cost of preparing and distributing the required notice to directors and executive officers is estimated to be approximately \$590 annually per issuer for both large and small businesses.<sup>180</sup> The notice requirement involves a design standard in that the content of the notice to directors and executive

officers and the form and content of the notice to the Commission is dictated by the new rules and will be comparable for all issuers, including small, as well as large, entities. We do not believe that excepting small businesses from making the notice is in the interests of their directors and executive officers, or consistent with Section 306(a).

While the new rules specify the content of the required notice to directors and executive officers, they do not dictate the specific form of the notice. In addition, the required notice to the Commission will be provided electronically through the filing of a current report on Form 8-K in the case of domestic issuers, or in an annual report on Form 20-F or 40-F in the case of foreign private issuers. We did not receive any information with respect to any special issues facing small businesses with respect to blackout period notices, or any alternatives consistent with the objectives of Section 306(a) of the Act that may serve to facilitate compliance by small businesses.

#### *E. Duplicative, Overlapping or Conflicting Rules*

We believe that there are no rules that duplicate, overlap or conflict with the new rules. We have intended the rules to coordinate with the rules adopted by the Department of Labor pursuant to Section 306(b) of the Sarbanes-Oxley Act of 2002. We also have coordinated the rules with the requirements under Section 16 of the Exchange Act for directors and officers to report transactions in their company's equity securities.

#### *F. Agency Action To Minimize Effect on Small Entities*

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In that regard, we considered the following alternatives: (a) Establishing different compliance or reporting requirements that take into account the resources of small entities, (b) clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities and (c) exempting small entities from all or part of the proposed rules. The new rules generally are intended to ensure that corporate insiders do not trade in an issuer's equity securities during periods when the ability of participants or beneficiaries in the issuer's pension plans to purchase, sell or otherwise acquire or transfer equity securities of the issuer has been

<sup>176</sup> See the Letter dated December 16, 2002 of PricewaterhouseCoopers LLP.

<sup>177</sup> 17 CFR 240.0-10(a).

<sup>178</sup> A similar definition is provided under Securities Act Rule 157 [17 CFR 230.157].

<sup>179</sup> This estimate is based on filings with the Commission.

<sup>180</sup>  $(\$253,073 + (2,357 \times \$200 \text{ per hour}))/1,230$  blackouts = \$589. See also Section IV.B above.