

After considering the comments, we continue to think that it is appropriate and consistent with the purposes of the Sarbanes-Oxley Act to extend the scope of our rules under Section 406 to include a company's principal executive officer, as proposed. It seems reasonable to expect that a company would hold its chief executive officer, an official superior to the company's senior financial officers, to at least the same standards of ethical conduct to which it holds its senior financial officers. Some commenters who are investors confirmed that they not only have an interest in knowing whether a company holds its senior financial officers to certain ethical standards, but whether the company holds its principal executive officer to ethical standards as well.

c. Final Disclosure Requirements. The final rules require a company to disclose whether it has adopted a code of ethics that applies to the registrant's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. If the company has not adopted such a code of ethics, it must explain why it has not done so.⁴²

2. Definition of the Term "Code of Ethics"

a. Proposed Definition. We proposed to define the term "code of ethics" to mean written standards that are reasonably designed to deter wrongdoing and to promote:⁴³

(1) Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

(2) Avoidance of conflicts of interest, including disclosure to an appropriate person or persons identified in the code of any material transaction or relationship that reasonably could be expected to give rise to such a conflict;

(3) Full, fair, accurate, timely, and understandable disclosure in reports and documents that a company files with, or submits to, the Commission and in other public communications made by the company;

(4) Compliance with applicable governmental laws, rules and regulations;⁴⁴

(5) The prompt internal reporting to an appropriate person or persons identified in the code of violations of the code; and

(6) Accountability for adherence to the code.

The second, fifth and sixth prongs of this proposed definition were broader than the requirements specified by Section 406 of the Sarbanes-Oxley Act, but were intended to supplement the requirements contained in the Act.

b. Commenters' Remarks. We received several comments on the proposed definition of a code of ethics. Some commenters recommended that we make the code of ethics cover more issues or general topics than proposed. Some of these recommendations identified very specific topics that the code of ethics should address. These topics included matters such as: personal participation in initial public offerings, the reporting of any items of value received as a result of the officer's position with the company, and change of control transactions.

c. Final Definition of "Code of Ethics". The final rule defines the term "code of ethics" as written standards that are reasonably designed to deter wrongdoing and to promote:

- Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

- Full, fair, accurate, timely, and understandable disclosure in reports and documents that a registrant files with, or submits to, the Commission and in other public communications made by the registrant;

- Compliance with applicable governmental laws, rules and regulations;

- The prompt internal reporting to an appropriate person or persons identified in the code of violations of the code;⁴⁵ and

- Accountability for adherence to the code.⁴⁶

We eliminated the component of the definition requiring the code to promote the avoidance of conflicts of interest, including disclosure to an appropriate person or persons identified in the code of any material transaction or relationship that reasonably could be expected to give rise to such a conflict, because the conduct addressed by this component already is addressed by the first prong of the proposed definition, requiring honest and ethical conduct and the ethical handling of actual and apparent conflicts of interest.

We are not adopting commenters' suggestions that we set forth additional ethical principles that the code of ethics should address. We continue to believe that ethics codes do, and should, vary from company to company and that decisions as to the specific provisions of the code, compliance procedures and disciplinary measures for ethical breaches are best left to the company. Such an approach is consistent with our disclosure-based regulatory scheme. Therefore, the rules do not specify every detail that the company must address in its code of ethics, or prescribe any specific language that the code of ethics must include. They further do not specify the procedures that the company should develop, or the types of sanctions that the company should impose, to ensure compliance with its code of ethics. We strongly encourage companies to adopt codes that are broader and more comprehensive than necessary to meet the new disclosure requirements.

We have added an instruction to the code of ethics disclosure item indicating that a company may have separate codes of ethics for different types of officers. The instruction also clarifies that the provisions of the company's code of ethics that address the elements listed in the definition and apply to those officers may be part of a broader code that addresses additional issues and applies to additional persons, such as all executive officers and directors of the company.⁴⁷

3. Filing of Ethics Code as an Exhibit

We proposed to require a company to file a copy of its ethics code as an exhibit to its annual report. We received several comment letters stating that the rules should not include this requirement. A common ground for objection was that some codes are extremely lengthy and therefore would be difficult to file electronically on our

⁴² See new Items 406(a) of Regulation S-K, and S-B, Item 16B(a) of Form 20-F and paragraph (9)(a) of General Instruction B to Form 40-F.

⁴³ The Sarbanes-Oxley Act Section 406(c) definition of the term "code of ethics" does not include the phrase "to deter wrongdoing" that we have incorporated into proposed Item 406 of Regulations S-K and S-B, but we think that it is appropriate to expand the definition in this manner. Although codes of ethics typically are designed to promote high standards of ethical conduct, they also generally seek to instruct those to whom they apply as to improper or illegal conduct or activity and to prohibit such conduct or activity.

⁴⁴ We proposed to add "laws" to this prong of the proposed definition. The Sarbanes-Oxley Act Section 406(c) definition refers only to compliance with applicable governmental rules and regulations.

⁴⁵ Although the company retains discretion to determine the identity of the appropriate person or persons, such person should not be involved in the matter giving rise to the violation. Furthermore, we believe the person identified in the code should have sufficient status within the company to engender respect for the code and the authority to adequately deal with the persons subject to the code regardless of their stature in the company.

⁴⁶ See new Items 406(b) of Regulations S-K, and S-B, Item 16B(b) of Form 20-F and paragraph (9)(b) of General Instruction B to Form 40-F.

⁴⁷ See Instruction 1 to Items 406 of Regulations S-K and S-B, Instruction 2 to Item 16B of Form 20-F and Note 2 to paragraph (9) of General Instruction B to Form 40-F.