SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

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RIN 3235–AF66

Ownership Reports and Trading by Officers, Directors and Principal Security Holders

AGENCY: Securities and Exchange Commission.

ACTION: Proposed Rule; Extension of Comment Period and Further Request for Comment.

SUMMARY: In connection with proposals issued on August 10, 1994, Release No. 34–34514 [59 FR 42449] (the ''Proposing Release'') and the request for further comment issued on September 16, 1994, Release No. 34–34681 [59 FR 48579] (the ''Cash-Only Release'') regarding the treatment of compensatory cash-only instruments under its rules regarding the filing of ownership reports by officers, directors, and principal security holders, the Commission today is issuing an alternative proposal. This proposal would amend the rule that exempts certain employee benefit plan transactions from the short-swing profit recovery provisions of Section 16(b) of the Securities Exchange Act of 1934 (''Exchange Act'') by broadening the exemption and extending it to other transactions between issuers and their officers and directors. There is also a proposal to amend the rule exempting transactions in dividend or interest reinvestment plans to reduce regulatory burdens. Comment also is solicited on other issues related to Section 16, including the manner in which exempt transactions should be reported and possible legislative rescission of Section 16(b). In addition, the comment periods for the Proposing Release and Cash-Only Release are extended until December 15, 1995.

DATES: Comments should be received on or before December 15, 1995.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comment letters should refer to File No. S7–21–94. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C., 20549.

FOR FURTHER INFORMATION CONTACT: Anne M. Krauskopf, Office of Chief Counsel, at (202) 942–2900, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: On August 10, 1994, the Commission released for public comment proposals to amend certain of its rules under Section 16[1] of the Exchange Act.[2] On September 16, 1994, the Commission solicited additional comment with respect to the Section 16 treatment of cash-only instruments. The Commission now proposes an alternative scheme to amend Rule 16b–3[3] (the ''Alternative Proposal'') that differs from the amendments to Rule 16b–3 that were proposed in the Proposing Release. All rule proposals, including proposed amendments to Rule 16b–3, and requests for comment made in both the Proposing Release and the Cash-Only Release (the ''1994 proposals'') remain under consideration, and the Commission may adopt any combination of the 1994 proposals and the Alternative Proposal. However, it is contemplated that if the Alternative Proposal is adopted in its entirety, the exclusion from the definition of ''derivative security'' for cash-only instruments provided by the current rules[4] would be rescinded, and the Section 16 status of such instruments would be governed by the Section 16(a) reporting rules and Rule 16b–3 as amended by the Alternative Proposal.

I. Summary

The strict liability and short-swing profit recovery provisions of Section 16(b)[5] and the exemptive rules thereunder have been criticized as unnecessarily complex, unduly burdensome with respect to innocent transactions, and inappropriately intrusive in the area of corporate governance. Rule 16b–3 has generated the most significant controversy with respect to these issues. In the Proposing Release, the Commission published numerous proposed amendments to the Section 16 rules in an attempt to simplify and clarify this subject. In particular, amendments were proposed to Rule 16b–3 that responded to objections that the conditions of that rule applicable to broad-based plans are difficult to administer and unduly restrictive, given the lack of opportunity for speculative abuse in connection with most plan transactions. Although public comment on the 1994 proposals generally was favorable, the Commission has continued to consider whether issues arising from the treatment of employee benefit plan transactions, as well as other officer and director transactions, could be better resolved through a simpler and more flexible approach that fully serves the policy underpinnings of the Section 16 regulatory scheme.

To this end, the Commission has focused on the distinction between market transactions by officers and directors (''insiders''),[6] which present opportunities for profit based on non-public information that Section 16(b) is intended to discourage, and transactions between an issuer and its officers and directors, which typically constitute a legitimate and increasingly popular mechanism for an issuer to compensate persons in its service. The Commission is of the view that the inherent differences in the usual purpose and effects of these two classes of transactions may establish a more cogent rationale upon which to base an exemption from the strict liability, short-swing profit recovery provisions of Section 16(b).[7]

Congress adopted Section 16(b) in 1934 ''to deter insiders from using inside information to aid them in their trading activities.''[8] According to the relevant legislative history, the drafters intended specifically to target ''directors and officers of corporations who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities.''[9] To ameliorate the potential harshness of applying strict liability to classes of transactions that are not susceptible to insider misuse of non-public corporate information, the Commission was

[1] 15 U.S.C. 78p (1988).

[2] 15 U.S.C. 78a *et seq.* (1988).

[3] Rule 16b–3 [17 CFR 240.16b–3].

[4] Rule 16a–1(c)(3) [17 CFR 240.16a–1(c)(3)].

[5] 15 U.S.C. 78p(b) (1988).

[6] Like current Rule 16b–3, the Alternative Proposal would not exempt transactions with persons who beneficially own greater than ten percent of a class of an issuer's equity securities.

[7] Although some transactions between officers or directors and issuer-sponsored employee benefit plans technically are not transactions with the issuer, such transactions should be within the scope of an exemption premised on the compensatory nature of insiders' transactions with issuers. Employee benefit plans are the most common vehicle by which issuers provide for securities-based compensation of employees, including officers and directors.

[8] P. Romeo and A. Dye, *Section 16 Treatise and Reporting Guide* § 1.03[b][i], at 1–23 (1994) (hereinafter ''Romeo and Dye'') (discussing the legislative history of Section 16(b)).

[9] S. Rep. No. 1455, 73d Cong., 2d Sess. 55 (1934). Congress also was concerned about ''the unscrupulous employment of inside information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others.'' *Id.*

granted express exemptive authority under Section 16(b).[10]

Generally, transactions between issuers and their officers or directors do not appear to present the same opportunities for insider profit on the basis of non-public information. Typically, where the company, rather than the trading markets, is on the other side of an insider transaction in that company's securities, any profit obtained is not at the expense of uninformed shareholders and other market participants of the type contemplated by the statute.[11] This may be the case even if the insider is in possession of confidential company information that otherwise might permit him or her to reap unfair gains from a *market* transaction.

Nevertheless, the Commission believes that imposition of traditional state-law procedural protections can be useful in further ensuring compliance with the underlying purposes of Section 16 by creating effective prophylactics against possible insider trading abuses. Consequently, as is the case with respect to the existing rules and the 1994 Proposals, this Alternative Proposal retains the concepts, where applicable, of approval by shareholder vote or non-employee directors.[12]

Through the Alternative Proposal, the Commission has sought to craft a rule that, consistent with the statutory purpose of Section 16(b), erects meaningful safeguards against the abuse of inside information by officers and directors without impeding their participation in legitimate compensatory transactions that do not present the possibility of such abuse, and facilitates compliance. In so doing, the Commission has recognized that most, if not all, transactions between an issuer and its officers and directors are intended to provide a benefit or other form of compensation to reward service or to incentivize performance. Shareholders, economists, compensation experts and others increasingly have been urging public companies to compensate their officers and directors in stock rather than cash, in order to align more closely the interests of management and shareholders.[13] Many companies have begun to use stock and stock-based instruments in lieu of traditional cash incentives to encourage managers to adopt a longer-term perspective by sharing the risks and rewards of equity ownership.

At the same time, the Commission's exemptive rules under Sections 16(a) and 16(b), including the regulatory exclusion of SARs payable solely in cash and other cash-only derivative securities from *both* statutory provisions, have been criticized for creating an undue regulatory bias in favor of cash compensation. The restrictions, complexity and uncertainties attendant to compliance with Rule 16b–3 tend to discourage the use of equity and thus further bias compensation arrangements toward cash. Additionally, some believe that the current exclusion from treatment as ''derivative securities'' of cash-only instruments promotes issuer use of such instruments, rather than the identical instruments payable in stock, to compensate their insiders.

In proposing to bring within the definition of derivative security cash-only instruments that are the economic equivalents of derivative securities payable in stock,[14] the Commission has sought, in part, to reduce this bias. Today's proposal reflects an approach that recognizes that companies could just as easily compensate their insiders through cash or other non-equity instruments to avoid compliance with the perceived burdens of the Section 16(b) exemptive rules.

In brief, the Alternative Proposal would exempt, subject to certain conditions, most transactions—both acquisitions and dispositions—between an officer or director and the issuer. *First*, the Alternative Proposal would exempt without condition almost all transactions pursuant to plans that satisfy specified provisions of the Internal Revenue Code, such as thrift and stock purchase plans, and certain related plans. Since volitional intra-plan transfers involving issuer equity securities funds and cash distributions funded by volitional dispositions of issuer equity securities are the equivalent of discretionary purchase and sale transactions, these transactions would be exempt only if effected pursuant to an election by the insider made at least six months after an election pursuant to which the last such transaction was effected.[15] Except for the foregoing transactions, the anti-discrimination provisions of the tax laws applicable to broad-based plans should suffice to minimize the potential for insider profit through unfair use of confidential corporate information. An acquisition pursuant to a plan or transaction that satisfies the conditions applicable to performance-based compensation imposed by Section 162(m) of the Internal Revenue Code[16] also would be exempt without further condition on the basis that the tax conditions applicable to such transactions (some of which such conditions closely mirror the first two conditions specified in the next paragraph describing part of the Alternative Proposal) provide an adequate safeguard for Section 16(b) purposes.

Second, with respect to grants and awards of issuer equity securities, whether made pursuant to an employee benefit plan or directly by an issuer, the Alternative Proposal would provide three alternative conditions to exemption: (1) Prior approval of the transaction by the issuer's board of directors or a committee comprised solely of two or more non-employee directors; (2) shareholder approval (or subsequent ratification) of the transaction; or (3) satisfaction of a six-month holding period.

Third, the Alternative Proposal would provide a general exemption for insider dispositions to the issuer, provided the terms of the disposition are approved in advance by the board of directors, a non-employee director committee, or shareholders.

As noted above, cash-only instruments whose value is derived from the market value of an issuer equity security no longer would be excluded from the coverage of Section 16 in a manner different from

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[10] *See* Section 16(b) (''This subsection shall not be construed to cover any transaction * * * which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection[;]'' *i.e.*, ''[f]or the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship with the issuer. * * *''); *see also Romeo and Dye, supra* n. 8, § 1.03[b][i], at 1–24.

[11] An insider's breach of fiduciary duty to profit from self-dealing transactions with the company is a concern of state corporate law; most states have created potent deterrents to insider self-dealing and other breaches of fiduciary duty. *See generally* 3 Fletcher Cyc. Corp. § 837.60 (Perm. ed. 1994); D. Block, S. Radin and N. Barton, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors* 124–137 (4th ed. 1993). There are also potential considerations under Rule 10b–5 [17 CFR 240.10b–5].

[12] *Cf.* Del. Gen. Corp. Law §§ 144 (a)(1) and (a)(2); N.Y. Bus. Corp. Law § 713; Model Business Corp. Act §§ 8.60(1), 8.62 and 8.63. *See also Oberly* v. *Kirby*, 592 A.2d 445, 466–67 (Del. 1991) (dictum).

[13] *See, e.g.*, Report of the NACD Blue Ribbon Commission on Director Compensation (1995); M. Klein, *Top Executives Pay for Performance* (Conference Board 1995); Loucks, ''An Equity Cure for Managers,'' Wall St. J., Tues., Sept. 26, 1995.

[14] *See* the Cash-Only Release.

[15] Volitional intra-plan transfers and cash distributions funded by issuer equity securities that are in connection with a participant's death, disability, retirement or termination of employment, or are required to be made available to participants pursuant to a provision of the Internal Revenue Code would not be subject to this proviso, but instead would be exempt without condition.

[16] 26 U.S.C. 162(m) (1993).

instruments that can be settled in such securities. Thus, cash-only instruments would be subject to Section 16(a) reporting, but usually would be exempt from Section 16(b) in accordance with Rule 16b–3, as amended by the Alternative Proposal.

The Alternative Proposal would eliminate:

- General written plan conditions,[17] including specification of the basis on which insiders may participate, specification of the price or amount of the securities to be offered, and the restriction prohibiting transferability of derivative securities;
- Shareholder approval as a general condition for plan exemption; [18]
- The six-month holding period as a general condition for the exemption of grant and award transactions; [19]
- The disinterested administration requirement with respect to grant transactions; [20]
- The formula plan requirement with respect to grant transactions, both as a substitute for disinterested administration and as a means by which administrators may receive securities awards while remaining disinterested; [21]
- Any conditions with respect to any transaction in a broad-based plan other than a volitional intra-plan transfer or a cash distribution funded by a volitional disposition of an issuer equity security; [22] and
- The current public information, disinterested administration, window period and six-month holding period conditions with respect to the exercise of stock appreciation rights for cash.[23]

As a corollary to adoption of the Alternative Proposal, the Commission contemplates modifying the Section 16(a) reporting system so that most transactions exempt pursuant to Rule 16b–3 would be required to be reported on a *current* basis on Form 4,[24] rather than *annually* on Form 5, as now permitted for transactions exempt under current Rule 16b–3, and certain other exempt transactions. However, reporting no longer would be required for routine transactions pursuant to broad-based plans, dividend or interest reinvestment plan transactions, gifts, and transactions pursuant to qualified domestic relations orders.

In addition, the Commission proposes to make the exemption for reinvestment transactions pursuant to dividend and interest reinvestment plans [25] more readily available by amending the rule so that it no longer requires the plan to be available to all holders of the class of securities. Finally, public comment is solicited as to the merit of legislative rescission of Section 16(b).

II. Transactions Between an Issuer and its Officers or Directors

A. Tax-Conditioned and Related Plans

As discussed in the Proposing Release,[26] one of the principal objections raised to current Rule 16b–3 has been that the treatment of thrift, stock purchase and other broad-based, tax-qualified plans is unduly cumbersome, presents significant record-keeping problems, and discourages insiders from participation in plan funds holding issuer equity securities. The proposals set forth in the Proposing Release would streamline the treatment of such plans, and the Alternative Proposal goes still further.

Specifically, under the Alternative Proposal, any acquisition or disposition of issuer equity securities, other than a volitional intra-plan transfer involving an issuer equity securities fund or a cash distribution funded by a volitional disposition of an issuer equity security, would be exempt without condition if made pursuant to a plan that satisfies the definition of a ''Qualified Plan,'' an ''Excess Benefit Plan,'' or a ''Stock Purchase Plan.'' [27] The broad-based, non-discriminatory character of these plans, together with their relatively inflexible administrative requirements, indicate that transactions pursuant to such plans are strictly for compensatory purposes and are not amenable to the type of abuse that Section 16(b) was intended to proscribe.

A volitional intra-plan transfer involving an issuer equity securities fund or a cash distribution involving a volitional disposition of an issuer equity security [28] would be exempt only if effected pursuant to an election made at least six months following the date of the election that effected the most recent prior transaction subject to the same condition.[29] Assuming satisfaction of this condition, an insider participant would be able to dispose of his or her entire interest in a plan's issuer equity securities fund for cash.

However, only transactions that arise solely from an insider's volitional investment decision would be subject to this condition. In contrast, transactions resulting from an election to receive, or to defer the receipt of, securities and/or cash in connection with death, disability, retirement or termination of employment,[30] as well as transactions that effect a diversification or distribution which the Internal Revenue Code requires an employee plan to make available to a participant,[31] would be exempt without regard to this condition. Although such transactions may be volitional to the insider, the insider's opportunity to speculate in the context of a death, disability, retirement or termination would seem well circumscribed, as is also the case with regard to the specified diversification and distribution elections.

Just as with the tax code provisions relating to Qualified Plans and Stock Purchase Plans, as discussed above, Section 162(m) of the Internal Revenue

[17] Such conditions are set forth in current Rule 16b–3(a). Instead, the Alternative Proposal focuses on the inherently compensatory nature of transactions between the issuer and its officers and directors, and does not require that such transactions occur pursuant to an employee benefit plan as a condition for exemption.

[18] This condition is set forth in current Rule 16b–3(b). However, shareholder approval would be retained as an alternative basis for exempting grants or awards.

[19] This condition is set forth in current Rule 16b–3(c)(1). However, a six-month holding period would be proposed as an alternative basis for exempting a grant or award.

[20] This condition is set forth in current Rule 16b–3(c)(2)(i). However, approval by the full board or a committee comprised solely of two or more non-employee directors would be retained as an alternative basis for exempting grants or awards.

[21] These standards are set forth in current Rules 16b–3(c)(2)(ii) and 16b–3(c)(2)(i)(A), respectively.

[22] These conditions are set forth in current Rules 16b–3(d)(2)(i) (B), (C) and (D) and 16b–3(d)(2)(ii).

[23] These conditions are set forth in current Rules 16b–3(e) (1), (2), (3) and (4), respectively. It should be noted that these conditions do not currently apply at all to cash-only instruments that satisfy the conditions of Rule 16a–1(c)(3) and are thus excluded from the definition of ''derivative security.''

[24] For example, grants and awards under Section 162(m)-eligible plans that would be exempted by Alternative Proposed Rule 16b–3 would be required to be reported on current Forms 4.

[25] Rule 16b–2 [17 CFR 240.16b–2].

[26] *See* Proposing Release at Section II.A.

[27] Alternative Proposed Rule 16b–3(b)(1). Definitions of these terms would be provided in Alternative Proposed Rule 16b–3(b)(4). Note that the plan itself would not be required to be tax-qualified, but would need to satisfy specified conditions applicable to tax-qualified plans.

[28] A loan funded by the disposition of issuer equity securities would be considered a cash distribution involving a volitional disposition of an issuer equity security unless the insider continued to bear the risk of loss with respect to such issuer equity securities during the term of the loan. Involuntary distributions of cash for the purpose of satisfying the limitations on employee elective contributions and employer matching contributions imposed by the Internal Revenue Code would be exempt without condition because such transactions do not occur at the insider's volition.

[29] Alternative Proposed Rule 16b–3(b)(2). Because it is anticipated that the actual date on which such a plan transaction occurs will be outside the control of an insider participant, the proposed rule is premised on a six-month interval between the date of subsequent elections. The proposed rule does not require that such an election be made six months in advance of the related transaction.

[30] Such transactions are exempted by current Rule 16b–3(d)(1)(ii).

[31] Such transactions would include diversification elections and distributions provided for by Internal Revenue Code Section 401(a)(28), and distributions required by Internal Revenue Code Section 401(a)(9).

Code and the regulations thereunder [32] impose conditions that may serve as an effective safeguard for Section 16(b) purposes. Accordingly, it appears appropriate to exempt, without further condition, an acquisition pursuant to a plan or transaction that satisfies these conditions.[33] The Section 162(m) provisions require that compensation be paid solely on the attainment of one or more performance goals, such goals be established by a compensation committee consisting solely of two or more outside directors,[34] the terms of the plan be disclosed to and approved by shareholders, and the compensation committee certify that the performance goals were satisfied prior to making payment. With respect to options and stock appreciation rights, these provisions require that the grant be made by the compensation committee, the plan state the maximum number of shares for which options or rights may be granted during a specified period to any employee, and the terms of the option or right provide that the amount of compensation to be received be based solely on an increase in the value of the stock after the date of grant.[35] Because a substantial number of plans must satisfy Section 162(m) in order to obtain a tax deduction, this would appear to provide a simple method for exempting grants and awards from Section 16(b) without the need to satisfy additional Commission-imposed requirements.[36]

Commenters are asked to address the proposed unconditional general exemption for transactions pursuant to Qualified Plans, Excess Benefit Plans and Stock Purchase Plans. Do the proposed references to the objective standards of the Internal Revenue Code adequately define classes of plans that, by virtue of their broad-based character and/or specific administrative requirements, do not present opportunities for the abuse of inside information that Section 16(b) was crafted to prevent? [37] Should the exemption for Excess Benefit Plans be revised to require that transactions in such plans must be in tandem with transactions pursuant to a related Qualified Plan?

Is the proposed exemptive condition that volitional intra-plan transfers and cash distributions resulting from a volitional disposition of an issuer equity security be effected pursuant to elections at least six months apart an appropriate requirement? Should an insider be permitted to cash-out his or her entire interest in an issuer equity securities fund in reliance on satisfaction of this condition? Should the proposed condition also apply to such a transaction that is expressly authorized by the Internal Revenue Code or that otherwise implements a retirement planning decision? Would the proposed condition be easier to administer than the current window-period requirement? Should the proposed condition only apply if the transaction would be opposite way (*e.g.*, purchase vs. sale) to the prior transaction? Should a quarterly window period requirement be included in the rule as an alternative basis for exemption, with or without an additional requirement that elections take place in window periods that are at least six months apart?

Comment also is solicited on whether the conditions of Section 162(m) provide an appropriate basis for an exemption from Section 16(b), and whether there are other types of compensation and/or transactions involving issuer equity grants to insiders that should be exempt from Section 16(b) because of protections afforded by provisions of the Internal Revenue Code. To what extent are plans operated in a manner that satisfies the conditions of Internal Revenue Code Section 162(m) with respect to grants to persons other than the issuer's chief executive officer and four other most highly compensated officers?

B. Grants and Awards

The Alternative Proposal would provide three alternative bases for exempting the grant or award of issuer equity securities (including derivative securities). The first two prongs would exempt an award if the specific award is either: (i) approved in advance by the board of directors or a committee of the board comprised solely of two or more ''Non-Employee Directors;'' or (ii) or approved in advance or subsequently ratified [38] by the affirmative vote or written consent of the holders of the majority of the issuer's securities entitled to vote, solicited in compliance with Section 14 of the Securities Exchange Act.[39] The purpose of these prongs is to ensure that appropriate company gate-keeping procedures are in place to monitor any grants or awards and to ensure acknowledgement and accountability on the part of the company when it makes such grants or awards. Finally, a grant or award that did not satisfy any of these exemptive conditions would become exempt if the securities awarded were held by the insider for six months following the grant, or in the case of a derivative security, at least six months had elapsed between the grant of the derivative security and the disposition of the underlying security.[40]

- With respect to the first basis for exemption, a ''Non-Employee Director'' would be defined simply as a director who is not currently an officer of, or otherwise employed by or a consultant to, the issuer, its parent or its subsidiary.[41] This definition differs from the requirements of the current ''disinterested director'' standard in that any employment or consulting relationship with the issuer expressly

[32] Proposed Regulation § 1.162–27(e). It is contemplated that this prong of Alternative Proposed Rule 16b–3 will function in tandem with final tax regulations that contain provisions substantially similar to Proposed Regulation § 1.162–27(e). If a substantially different tax regulation is adopted, the Commission may revisit this prong of the Alternative Proposal.

[33] Alternative Proposed Rule 16b–3(b)(3).

[34] As defined in Proposed Regulation § 1.162–27(e)(3), a director is an outside director if the director (i) is not a current employee of the company; (ii) is not a former employee of the company who receives compensation for prior services; (iii) has not been an officer of the company; and (iv) does not receive remuneration from the company, either directly or indirectly, in any capacity other than as a director. This definition is somewhat different from the proposed definition of Non-Employee Director set forth in the Alternative Proposal.

[35] Proposed Regulation § 1.162–27(e)(2)(vi). Alternatively, if the compensation to be received is not based solely on an increase in the value of the stock after the date of grant, the grant nevertheless may be considered performance-based compensation if it is made on account of attainment of a performance goal that otherwise satisfies the requirements of Proposed Regulation § 1.162–27(e)(2), or the vesting or exercisability of the grant is contingent on attainment of such a performance goal.

[36] The scope of this proposed condition would not be limited to persons who are ''covered employees'' for purposes of the $1,000,000 deduction limit of Section 162(m), *i.e.*, the issuer's chief executive officer and four other most highly compensated officers under Item 402 of Regulation S–K [17 CFR 229.402], but would be available to exempt grants to any officer or director, provided that all Section 162(m) regulatory conditions applicable to performance-based compensation are met with respect to the individual grant. Of course, grants that do not satisfy this condition would be eligible for exemption pursuant to the proposed specific conditions applicable to grants and awards discussed in Section II.B, below.

[37] Although Excess Benefit Plans by their terms are not broad-based, they have not been viewed under current staff interpretations or the 1994 proposals as susceptible to abuse because they are operated in a manner that replicates tax-qualified plans.

[38] Such ratification would be required to be obtained not later than the date of the next annual meeting of shareholders.

[39] 15 U.S.C. 78n. Alternative Proposed Rules 16b–3(c)(1)(i) and 16b–3(c)(1)(ii).

[40] Alternative Proposed Rule 16b–3(c)(1)(iii).

[41] Alternative Proposed Rule 16b–3(c)(2). For purposes of this proposed rule, ''consultant'' would include attorneys, accountants or others who indirectly receive compensation from the issuer through firms that provide services to the issuer.

would be precluded.[42] Further, as an alternative to approval by Non-Employee Directors, approval by the full board would constitute a basis for exemption.[43]

• It should be noted that the first two bases for exemption would require approval of specific transactions, not merely approval of a plan in its entirety, as is sufficient for the current shareholder approval requirement. This is because approval of a specific grant appears to provide a more effective procedure, which may be appropriate when approval is a stand-alone basis for exemption rather than a condition imposed in combination with other conditions. However, it is contemplated that approval of a plan pursuant to which the terms and conditions of each grant are fixed in advance, such as a formula plan, would satisfy this basis for exemption, and the exemption also would be available for a plan with an attachment providing for specific grants to specific individuals. Of course, the transaction approval only relates to Section 16 insiders. Transactional approval of grants to other persons would not be required for the purpose of obtaining the exemption under Alternative Proposed Rule 16b–3. Comment is solicited as to whether there are any other circumstances under which whole-plan approval, standing alone, would be a sufficient safeguard.

• Finally, the six-month holding period exemption would be available to exempt grants that, for reasons of timing or otherwise, fail to satisfy any of the other alternative conditions.

Commenters are asked to address whether approval by shareholders should be required in advance of a grant or award, or would subsequent ratification be sufficient, provided that such ratification is obtained not later than the date of the next annual meeting of shareholders? Comment is solicited on whether full board approval, as an alternative to Non-Employee Director approval, would be useful to issuers and whether it would provide an adequate standard. Should a director who is hired as a consultant to the issuer be considered an employee of the issuer, and hence be ineligible to serve as a Non-Employee Director?

Should equity grants received by Non-Employee Directors be required to be made pursuant to a formula plan, as is currently required, or is satisfaction of any of the other alternatives an adequate standard to assure impartiality?[44] Why would equity grants be treated differently for this purpose than any other arrangement pursuant to which a Non-Employee Director is compensated? If formula plan grants are required as such a condition, should there be a separate exemption for formula plans, or should such plans be subjected to shareholder approval as a condition to exemption? As a general matter, is either (i) administration by the board of directors or Non-Employee Directors or (ii) shareholder approval, standing alone, effective to prevent abuse of the type addressed by Section 16(b) when only transactions with the issuer are included, or must either of such procedures be coupled with a six-month holding period to be effective with respect to such transactions? Is satisfaction of a six-month holding period, absent *any* other condition, an adequate procedure on which to premise an exemption for grants?

Should a grant or award that satisfies any of the proposed alternative conditions be exempt only if the officer or director to whom the award is made had not disposed of issuer equity securities on a non-exempt basis during the previous six months at a price higher than the price at which such grant or award is made? Would such a timing condition, which is not present in either current Rule 16b–3 or the 1994 proposals, be necessary in order to preclude the use of the proposed broader exemptive rule, which would eliminate significant conditions attached to the current exemption for grants and awards, as a vehicle for abuse?

C. Dispositions to the Issuer

Consistent with its focus on the compensatory nature of transactions between an issuer and its officers and directors, the Commission is of the view that transactions pursuant to which an insider is deemed to have made a disposition of issuer equity securities to the issuer under appropriate conditions may merit exemption from the short-swing profit recovery provisions of Section 16(b). Accordingly, the Alternative Proposal would exempt any transaction involving a disposition to the issuer, provided that such disposition is approved in advance by the board of directors, a committee of Non-Employee Directors, or the shareholders.[45] This provision would provide for the flexibility to redeem issuer equity securities from insiders in connection with non-exempt replacement grants, and in such discrete compensatory situations as individual buy-backs in connection with estate planning. As drafted, this provision also would exempt the exercise of out-of-the-money options, provided that the requisite approval is obtained.[46] The shareholder approval prong could provide exemptive relief in such scenarios as mergers that had received majority shareholder approval that specifically addressed such disposition.

Should a disposition that satisfies either condition be exempt only if the officer or director making the disposition has not acquired issuer equity securities on a non-exempt basis during the previous six months at a price lower than the price at which such disposition is made? Would such a timing condition be necessary to preclude the use of this proposed exemption as a vehicle for abuse?

It should be noted that the Alternative Proposal does not separately address dispositions pursuant to: (1) the right to have securities withheld, or to deliver securities already owned, either in payment of the exercise price of an option or to satisfy the tax withholding consequences of an option exercise or the vesting of restricted securities, (2) the expiration, cancellation, or surrender to the issuer of a stock option or stock appreciation right in connection with the grant of a replacement option or right, or (3) the election to receive, and the receipt of, cash in complete or partial settlement of a stock appreciation right. As proposed, all of these transactions would automatically satisfy the exemptive condition of prior approval by the board of directors, a committee of Non-Employee Directors or shareholders if the grant that contained these

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[42] Additionally, the proposed definition would not include the current requirement that, during the one year prior to service as a ''disinterested director,'' the director not be granted issuer equity securities other than pursuant to a formula plan, participation in a broad-based securities acquisition plan, or an election to receive an annual retainer in an equivalent amount of securities.

[43] Current Rule 16b–3(c)(2)(i) provides for administration by the full board of directors if all members are disinterested.

[44] Although the Alternative Proposed Rule would not expressly forbid Non-Employee Directors from awarding themselves grants of issuer equity securities, such grants would need to be reviewed in the context of state laws governing corporate self-dealing.

[45] Alternative Proposed Rule 16b–3(d). Unlike the exemption for grants and awards, subsequent ratification by shareholders would not be included as an alternative condition to the exemption for dispositions. Because such transactions are more likely to be at the volition of the insider and thus more susceptible to abuse with respect to timing, prior approval is considered necessary. Commenters should address whether subsequent shareholder ratification of a disposition would provide an effective procedure.

[46] Reliance on this proposed exemption would not be necessary with respect to the exercise or conversion of a derivative security that is at- or in-the-money because such transactions would continue to be exempt pursuant to Rule 16b–6(b) [17 CFR 240.16b–6(b)].

provisions had been so approved. Commenters are asked to address whether additional and/or different conditions would be more appropriate to exempt these transactions.

III. Dividend or Interest Reinvestment Plans

Rule 16b–2 exempts from the short-swing profit recovery provisions of Section 16(b) the acquisition of issuer equity securities resulting from reinvestment of dividends or interest on securities of the same class, if made pursuant to a plan, available on the same terms to all holders of that class of securities, providing for regular reinvestment of dividends or interest. Companies have raised concerns that the requirement that the plan be made available to all holders of the class can impose significant burdens on companies that wish to allow for officer and director participation. For example, companies have indicated that because of this requirement, they may have to spend potentially significant sums to comply with foreign laws relating to the offering of securities to shareholders in foreign jurisdictions if they want to have Rule 16b–2 available to their officers and directors.

The requirement to include all shareholders does not appear necessary to address Section 16(b) concerns—that is, to assure that these plans do not provide an opportunity for speculative abuse by officers and directors. Consequently, the Commission is proposing to tailor the dividend reinvestment plan exemptive rule to address concerns about possible opportunities for abuse, while removing unnecessary burdens. As proposed to be amended, Rule 16b–2 would be available to exempt acquisitions resulting from reinvestment of dividends or interest on securities of the same class if made pursuant to a plan that meets three conditions. First, it must provide for the regular reinvestment of dividends or interest. Second, the plan must be broad-based and not discriminate in favor of employees of the issuer.[47] Third, the plan must operate on substantially the same terms for all plan participants. These proposed standards should assure that officers and directors do not use the plan in a manner inconsistent with the purposes of Section 16(b).

If Rule 16b–2 is amended as proposed, companies would have more flexibility to structure their dividend reinvestment plans. Commenters are asked to address whether the proposed standards are appropriate and serve the intended goals of reducing burdens while retaining protections against possible speculative abuse, or whether the current standard should be retained. Would it be consistent with the purposes of Section 16(b) to provide an exemption for officers and directors participating in plans that exclude certain holders, as would be permissible under the proposed amendments? Would such exclusions permit opportunities for speculative abuse in a manner inconsistent with Section 16(b)? Should there be a limitation on the ability to exclude certain shareholders, as permitted under this proposal, such as those with small holdings or those residing in foreign jurisdictions or certain states? Are there other standards that are consistent with Section 16(b) that should be considered, such as exempting transactions in plans that permit certain holders to be excluded only if their inclusion would impose unreasonable burdens and expense?

IV. Reporting

In the interest of establishing the least burdensome reporting system that effectively will achieve the disclosure purposes of Section 16(a),[48] the Proposing Release, without endorsing a specific proposal, solicited comment on various alternative schemes to modify the reporting of exempt transactions. In addition to the alternatives discussed there, which remain under consideration, the Commission contemplates a different reporting treatment with respect to transactions that would be exempted pursuant to the Alternative Proposal.

In order to simplify the reporting scheme while assuring that adequate and timely public information is provided with respect to these transactions, it is anticipated that essentially all reporting be done on a current basis; that is, on a Form 4 no later than ten days following the close of the month in which a transaction occurs. Since the Alternative Proposal would exempt a greater variety of transactions than either current Rule 16b–3 or the 1994 proposals, it would be appropriate to provide the public with information about these transactions on a more timely basis than if annual reporting on Form 5 were permitted. Such transparency would help the markets monitor Section 16(b) compliance on a real-time basis. At the same time, officers and directors subject to reporting, many of whom now voluntarily file reports on a current basis, would benefit from the simplicity of the proposed revised reporting system, as well as from the broader exemptive provisions of the Alternative Proposal.

Generally, it is contemplated that exempt grants and awards, as well as dispositions, would be reportable on Form 4 no later than ten days following the close of the month in which the grant or award is made to the insider. Exercises of options[49] that are exempt pursuant to Rule 16b-6(b) either would remain reportable on the earlier of the next otherwise due Form 4 or Form 5, or simply would be required to be reported on Form 4.[50]

In recognition of the practical difficulties presented by requiring Form 4 reporting of transactions in Qualified Plans, Excess Benefit Plans and Stock Purchase Plans, as well as the relatively lesser public need for this information to be reported, most of these transactions no longer would be required to be reported. However, intra-plan transfers and cash distributions would be reportable on Form 4 no later than ten days following the close of the month in which such transaction occurs.[51] Assuming that the Alternative Proposal is adopted in its entirety, gifts, transactions pursuant to dividend or

[47] This standard would be evaluated by reference to all shareholders of the class. For example, the requirement would not be satisfied merely by making the plan available to all employees of the issuer. Consistent with current interpretation, the rule as amended would exempt only the reinvestment of dividends or interest. Additional securities acquired through voluntary cash contributions to such plans would not be exempt pursuant to this rule, but could be exempt under Alternative Proposed Rule 16b–3, assuming other conditions are met. *See* Release 34–28869, n. 89.

[48] To facilitate the filing of Section 16(a) reports and encourage the speedy dissemination of information considered valuable by many members of the investment community, the Commission has announced its intention to expand the capacity of the EDGAR system to accommodate the electronic filing of ownership and transaction reports pursuant to both Section 16(a) of the Exchange Act and Rule 144 [17 CFR 230.144] under the Securities Act [15 U.S.C. 77a *et seq.*]. *See* Release No. 33–7231 (October 5, 1995). The necessary programming already has been initiated, and filers should be able to file these documents electronically on a voluntary basis by late 1995 or early 1996. A further announcement will be made when the effective date is determined.

[49] To the extent withholding or surrender rights are exercised in conjunction with the exercise or conversion of a derivative security, they would be reported at the same time as such exercise or conversion. The exercise of a tax-withholding right in connection with vesting of a security would be reported on Form 4. Similarly, the exercise of a stock appreciation right to receive cash, the exercise of an out-of-the-money option, and any other disposition transaction that would be exempted under the Alternative Proposal also would be reported on Form 4.

[50] Comment previously was solicited concerning this potential revision to the reporting system. *See* Proposing Release at Section III.B.

[51] Form 4 reporting thus would be required for all transactions exempt under Alternative Proposed Rule 16b-3 except for those exempted pursuant to Alternative Proposed Rule 16b-3(b)(1).

interest reinvestment plans and transactions pursuant to qualified domestic relations orders (''QDROs''), all of which would remain exempt from the short-swing profit recovery provisions of Section 16(b) pursuant to other rules,[52] also would be exempted from reporting.

Commenters are asked to address whether these modifications to the reporting scheme would be appropriate. With respect to transactions that would be exempted from reporting, to what extent, and for what purposes, is there a public need for such information? In lieu of eliminating any reporting requirement for these transactions, should they be reported on an annual basis on Form 5, as currently required? Alternatively, should Form 5 be rescinded, with annual reporting, where permitted, accomplished on Form 4? Assuming Form 5 is rescinded, how would the current requirement to report on Form 5 all holdings and transactions that should have been, but were not, previously reported [53] be revised? Should such holdings and transactions be reported on the last Form 4 filed with respect to the calendar year?

Would accelerated reporting for other transactions that would be exempted by the Alternative Proposal, but currently may be reported on an annual basis, impose significant burdens on insiders and/or issuers, or provide significant benefits to users of the reported information? Would such accelerated reporting simplify the overall reporting system by eliminating the need to keep track of exempt transactions during the year in anticipation of filing the Form 5? Commenters are requested to address these questions from the viewpoint of users of the information that would be reported, as well as from the viewpoint of filing parties.

V. Request For Comment

Any interested person wishing to submit written comments on the Alternative Proposal, the Proposing Release, the Cash-Only Release, and any other matters that might have an impact on such proposals, is requested to do so. Comment is requested specifically from persons subject to Section 16; issuers whose officers, directors and ten percent shareholders are subject to Section 16; and persons using the information afforded by the Section 16(a) reports.

Commenters should address whether the Alternative Proposal, as drafted, is easy to understand and practicable to implement. Commenters also should address whether the Alternative Proposal would be preferable to the proposed amendments to Rule 16b-3 set forth in the Proposing Release. The Commission also requests comment on whether the Alternative Proposal, if adopted, would have an adverse impact on competition or would impose a burden on competition that is neither necessary nor appropriate in furthering the purposes of the Exchange Act.

Finally, commenters are asked to consider the on-going merit of the strict liability short-swing profit recovery provisions of Section 16(b), and whether the Commission should recommend that Congress rescind this section of the statute. Some have suggested that the prohibitions of Exchange Act Rule 10b-5, as interpreted by case law, adequately address the abuse of inside information and obviate the need for a strict liability statute. Others point out that the scienter and other standards of the Rule 10b-5 remedy suggest the contrary. Assuming Congress, which has the sole authority to do so, were to rescind Section 16(b), would insider trading and market manipulation adequately be deterred by Rule 10b-5, or does Section 16(b) continue to serve a useful purpose? In the absence of Section 16(b), would state laws establishing a fiduciary duty on the part of officers and directors adequately protect the interests of public company shareholders?

Comments responsive to these inquiries will be considered by the Commission in complying with its responsibilities under Section 23(a) [54] of the Exchange Act. In order to give commenters sufficient time to consider this Alternative Proposal and request for further comment, the comment periods on the Proposing Release and the Cash-Only Release are extended to December 15, 1995.

VI. Transition To New Rules

Upon adoption of the Alternative Proposal, the 1994 proposals, or any combination thereof, provisions for a transition from the current rules will be necessary. Although the Commission's current intent regarding transition to the proposed revised rules remains as expressed in the Proposing Release,[55] this schedule is subject to modification. Most recently, the Commission has extended the phase-in period for current Rule 16b-3 until September 1, 1996, or such different date as set in further rulemaking.[56] Current and former Rule 16b-3 would remain available until September 1, 1996,[57] unless a different date is set by the Commission in the adopting release. Comment is solicited on how long a transition period issuers and insiders would need, assuming adoption of the Alternative Proposal. Of course, issuers continue to be permitted to convert their plans to current Rule 16b-3 at any time, or to convert back to the former exemptions, provided that all plans of the issuer are so converted. After the phase-in date, issuers and insiders no longer will be able to rely on the former exemptions, but instead will be required to comply with Rule 16b-3 as amended.

VII. Cost-Benefit Analysis

The Alternative Proposal is intended to simplify the conditions under which insider's transactions in issuer equity securities are deemed to be exempt from the short-swing profit recovery provisions of Section 16(b), while ensuring that the statutory purposes continue to be served. The Commission views this as a way of correcting unintended consequences of the present regulatory scheme in terms of creating a bias against equity-based compensation and insider participation in broad-based plans, and significantly reducing the compliance burden imposed on persons subject to Section 16 without undercutting the statutory objectives of disclosing information concerning insider trading and discouraging speculative short-term insider trading. Although some reporting would be accelerated under the Alternative Proposal, other reporting requirements would be eliminated. Even where accelerated reporting might increase compliance costs, these costs may be outweighed by the benefit of having the information available to the public on a more timely basis, as well as the ease of compliance with a simpler reporting scheme.

In order to assist the Commission in assessing the costs and benefits of the Alternative Proposal, commenters are requested to provide their views and data on the following issues. In addressing these issues, commenters should be as specific and detailed with their views and data as possible, and quantify the costs and benefits to the extent practicable.

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[52] Dividend or interest reinvestment plan transactions would continue to be exempt pursuant to Rule 16b-2. Gifts (currently exempt pursuant to Rule 16b-5 [17 CFR 240.16b-5]) and QDRO transactions (currently exempt pursuant to current Rule 16b-3(f)(3) [17 CFR 240.16b-3(f)(3)]) would remain exempt pursuant to Rule 16b-5 as proposed to be amended. *See* Proposing Release at Section IV.A.

[53] Rule 16a-3(f)(1)(i) and (ii) [17 CFR 240.16a-3(f)(1)(i) and (ii)].

[54] 15 U.S.C. 78w(a).

[55] *See* Proposing Release at Section VI.

[56] *See* Release 34–36063 [60 FR 40994].

[57] The exemptions afforded by former Rules 16a-8(b) [17 CFR 240.16a-8(b)] and 16a-8(g)(3) [17 CFR 240.16a-8(g)(3)] also would remain available.

(1) To what extent would the newly proposed exemptive conditions increase or decrease the compliance burden imposed on persons subject to Section 16?

(2) Could any of the exemptive provisions be crafted in a manner that would further reduce compliance burdens, consistent with the statutory objectives of Section 16? If so, how could that be done?

(3) What would be the costs and benefits of the proposed accelerated reporting of transactions on Form 4, together with the elimination of reporting of certain other transactions? In particular, to what extent do insiders currently choose voluntarily to report exempt transactions on Form 4 rather than annually on Form 5?

(4) Could the reporting requirements be crafted in a manner that would further reduce compliance burdens, consistent with the statutory objectives of Section 16? If so, how could that be done?

VIII. Summary of Initial Regulatory Flexibility Analysis

An Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603 concerning the Alternative Proposal. The analysis notes that the Alternative Proposal is intended to simplify the Section 16 regulatory scheme with respect to employee benefit plans.

As discussed more fully in the analysis, most of the reporting persons the Alternative Proposal would affect are small entities, as defined by the Commission's rules. The Alternative Proposal would decrease the compliance requirements imposed upon corporate insiders subject to Section 16.

The analysis discusses several possible alternatives to the Alternative Proposal. As discussed more fully in the analysis, implementation of any of these alternatives either would be duplicative of the Alternative Proposal or the Prior Proposals, or would be inconsistent with the Exchange Act.

Comments are encouraged on any aspect of the analysis. A copy of the analysis may be obtained by contacting Elizabeth Murphy, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

IX. Statutory Basis

The amendments to the Section 16 rules are being proposed by the Commission pursuant to Exchange Act Sections 3(a)(11),[58] 3(a)(12),[59] 3(b),[60] 9(b),[61] 10(a),[62] 12(h),[63] 13(a),[64] 14, 16, and 23(a). As the Section 16 rules relate to the Investment Company Act and the Public Utility Holding Company Act, they also are proposed pursuant to Investment Company Act Sections 30[65] and 38,[66] and Public Utility Holding Company Act Sections 17[67] and 20,[68] respectively.

List of Subjects in 17 CFR 240

Reporting, Recordkeeping requirements, and Securities.

Text of Proposals

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78ll(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, and 80b–11, unless otherwise noted.

* * * * *

2. By revising § 240.16b–2 to read as follows:

§ 240.16b–2 Dividend or interest reinvestment plans.

Any acquisition of securities resulting from the reinvestment of dividends or interest on securities of the same issuer shall be exempt from Section 16(b) of the Act if made pursuant to a plan providing for the regular reinvestment of dividends or interest, if the plan provides for broad-based participation, does not discriminate in favor of employees of the issuer and operates on substantially the same terms for all plan participants.

3. By revising § 240.16b–3 to read as follows:

§ 240.16b–3 Transactions between an issuer and its officers or directors.

(a) *General.* A transaction between the issuer (including an employee benefit plan sponsored by the issuer) and an officer or director of the issuer that involves issuer equity securities shall be exempt from Section 16(b) of the Act if the transaction satisfies the applicable conditions set forth in this section.

Note to Paragraph (a): The exercise or conversion of a derivative security that has a fixed exercise price and is not out-of-the-money is eligible for exemption from Section 16(b) of the Act to the extent that the conditions of Rule 16b–6(b) are satisfied.

(b) *Tax-conditioned and related plans.*

(1) Any transaction pursuant to a Qualified Plan, an Excess Benefit Plan, or a Stock Purchase Plan shall be exempt without condition, except as provided in paragraph (b)(2) of this section.

(2) A transaction pursuant to a Qualified Plan, an Excess Benefit Plan, or a Stock Purchase Plan that is at the volition of a plan participant; is not made in connection with the participant's death, disability, retirement or termination of employment; is not required to be made available to a plan participant pursuant to a provision of the Internal Revenue Code; and results in either: an intra-plan transfer involving an issuer equity securities fund, or a cash distribution funded by a volitional disposition of an issuer equity security, shall be exempt only if effected pursuant to an election made at least six months following the date of the most recent election that effected a transaction subject to this paragraph (b)(2).

(3) An acquisition pursuant to a plan or transaction that satisfies the conditions applicable to performance-based compensation imposed by Section 162(m) of the Internal Revenue Code and the regulations thereunder shall be exempt without condition.

(4) *Definitions.*

(i) A *Qualified Plan* shall mean an employee benefit plan that satisfies the coverage and participation requirements of Sections 410 and 401(a)(26) of the Internal Revenue Code of 1986, or any successor provisions thereof.

(ii) An *Excess Benefit Plan* shall mean an employee benefit plan that is operated in conjunction with a Qualified Plan, and provides only the benefits or contributions that would be provided under a Qualified Plan but for the limitations of Sections 401(a)(17), 415 and any other applicable contribution limitation set forth in the Internal Revenue Code, or any successor provisions thereof.

(iii) A *Stock Purchase Plan* shall mean an employee benefit plan that satisfies the coverage and participation standards of Sections 410, 423(b)(3) and

[58] 15 U.S.C. 78c(a)(11).
[59] 15 U.S.C. 78c(a)(12).
[60] 15 U.S.C. 78c(b).
[61] 15 U.S.C. 78i(b).
[62] 15 U.S.C. 78j(a).
[63] 15 U.S.C. 78l(h).
[64] 15 U.S.C. 78m(a).
[65] 15 U.S.C. 80a–29.
[66] 15 U.S.C. 80a–37.
[67] 15 U.S.C. 79q.
[68] 15 U.S.C. 79t.

423(b)(5) of the Internal Revenue Code of 1986, or any successor provisions thereof.

(c) *Grant and Award Transactions.*

(1) *General.* A grant or award transaction shall be exempt if:

(i) The transaction is approved by the board of directors of the issuer, or a committee of the board of directors that is comprised solely of two or more Non-Employee Directors;

(ii) The transaction is approved or ratified by the affirmative vote or written consent of the holders of the majority of the securities of the issuer entitled to vote, in compliance with Section 14 of the Act, provided that such ratification occurs no later than the date of the next annual meeting of shareholders; or

(iii) The issuer equity securities so awarded are held by the officer or director for a period of six months following the date of such grant or award, provided that this condition shall be satisfied with respect to a derivative security if at least six months elapse from the date of acquisition of the derivative security to the date of disposition of the derivative security (other than upon exercise or conversion) or its underlying equity security.

(2) *Definition.* A *Non-Employee Director* shall mean a director who is not currently an officer (as defined in § 240.16a–1(f)) of the issuer or a parent or subsidiary of the issuer, or otherwise currently employed by or a consultant to the issuer or a parent or subsidiary of the issuer.

(d) *Dispositions to the issuer.* Any transaction involving the disposition to the issuer of issuer equity securities shall be exempt from Section 16(b) of the Act, provided that the terms of such disposition are approved in advance in the manner prescribed by either paragraph (c)(1)(i) or paragraph (c)(1)(ii) of this section.

Dated: October 11, 1995.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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