THE REVIEW OF
SECURITIES & COMMODITIES REGULATION
AN ANALYSIS OF CURRENT LAWS AND REGULATIONS AFFECTING THE SECURITIES AND FUTURES INDUSTRIES
Vol. 33, No. 15 September 12, 2000

DEVELOPMENTS UNDER SECTION 16
(Part II of Two Parts)

The Reconstruction of Rule 16b-3 in 1996 Has Made it Relatively Easy For Public Company Insiders to Secure an Exemption from the Short-Swing Trading Provisions of Section 16(b) for Transactions with Their Companies. This Development Has Helped the SEC Achieve a Reasonable Balance Between the Benefits and Burdens of Section 16.

Peter J. Romeo and Alan L. Dye

INTRODUCTION

In 1991, the SEC overhauled the regulatory scheme under Section 16 of the Securities Exchange Act of 1934 ("1934 Act").[1] The overhaul was designed to modernize the rules and forms relating to reporting and short-swing trading by public company insiders, but introduced a great deal of complexity to the regulatory scheme.[2] The added complexity had the dual effect of increasing compliance costs and reducing the level of certainty about the availability of certain exemptions from Section 16. The SEC ultimately recognized that the new regulatory scheme was too complicated and adopted revisions to the Section 16 rules and forms in 1996 that substantially relaxed and simplified many existing requirements.[3] Part I of this article discussed the impact of the 1991 and 1996 changes on the following major areas of interest under Section 16: (1) statutory insiders, (2) beneficial ownership, (3) the reporting system, and (4) derivative securities. [4] Part II below deals with the effects of the changes on transactions by insiders with their companies, including transactions occurring under employee benefit plans.

TRANSACTIONS WITH THE ISSUER UNDER RULE 16b-3

Until 1996, the Commission struggled to provide an appropriate exemption under Section 16 for transactions under executive and director compensation plans. Generally, the exemptions adopted by it failed to strike a proper balance between the legitimate desire of issuers to use plans as compensation vehicles for their insiders and the statutory purpose of preventing speculative abuse by insiders. Moreover, the exemptions presented significant interpretive difficulties for issuers, insiders and the SEC. Although the Commission made a valiant effort to address these deficiencies when it overhauled the Section 16 rules in 1991, the new rule adopted at that time was acknowledged by all (including, eventually, the SEC) to be seriously flawed.[5] As a result, the SEC took a fundamentally different approach to the problem in 1996 by adopting a rule that is broader in coverage and less restric-

1. Section 16 is a charter provision of the 1934 Act which imposes reporting obligations and trading limitations on officers and directors of issuers that have a class of equity securities registered under Section 12 of the 1934 Act and on beneficial owners of more than ten percent of such a class. These statutory insiders must file with the Securities and Exchange Commission ("SEC" or "Commission") public reports disclosing their holdings of and transactions in the issuer's equity securities under Section 16(a), disgorge to the issuer any profits resulting from "short-swing" transactions in the issuer's equity securities under Section 16(b), and refrain from short sales of the issuer's equity securities under Section 16(c). A "short-swing transaction" is any purchase and sale, or sale and purchase, of the issuer's equity securities occurring within a period of less than six months.). For complete information about the Section 16 regulatory scheme, see P. Romeo and A. Dye, Section 16 Treatise and Reporting Guide (1994), P. Romeo and A. Dye, Section 16 Forms and Filings Handbook (1996), and P. Romeo, Comprehensive Section 16 Outline (1999), all of which are published by Executive Press, Inc. (Concord, CA).

2. See Rel. No. 34-28869 (1991). Technical corrections to certain rules and forms subsequently were made in Rel. Nos. 34-28869B (1991) and 34-29131 (1994). The revised rules and forms became effective on May 1, 1991, subject to certain transition provisions described in Rel. Nos. 34-28869 (1991), 34-30850 (1992), 34-32574 (1993), 34-34513 (1994) and 34-36063 (1995

3. See Release Nos. 34-37260 (1996), 34-37261 (1996) and 34-37262 (1996). The rule revisions became effective on August 15, 1996, but issuers were permitted at their election to defer becoming subject to revised Rule 16b-3 until as late as November 1, 1996).

4. See __ Rev. Sec. & Comm. Reg. ____ (_____, 2000).

5. See, e.g., Rel. No. 34-37260, § I at n.11 (1996).

PETER J. ROMEO and ALAN L. DYE are partners of Hogan & Hartson L.L.P. in Washington D.C.

Reprinted with permission of Standard & Poor's,
a division of McGraw Hill Companies.

tive in application than the predecessor rules relating to compensation plans.[6]

The 1996 rule is labeled "Rule 16b-3," as were previous versions of the rule relating to compensation plans, but it is vastly different from its predecessors. The rule exempts not only transactions by an officer or director occurring under a formal benefit plan sponsored by the issuer (as has been traditional), but also any other transaction by such a person with the issuer that satisfies the conditions of the rule.[7] The extension of the rule to non-plan transactions was a major change, and was justified by the SEC on the ground that transactions between an issuer and its officers and directors usually have a compensatory purpose and ordinarily lack any sinister insider trading motive.[8] In addition to being broader in coverage than its predecessors, the rule in many instances provides choices in the form of several alternative methods of exemption. This is in contrast to the predecessor rules, which contained generally inflexible requirements for plans that provided little room for maneuverability.

In nearly every respect, the 1996 version of Rule 16b-3 has been an immense success. In addition to covering a wider range of transactions than its predecessors, the rule is easier to understand, presents fewer possibilities for missteps, and provides the Commission with regulatory flexibility. Perhaps more importantly, the rule relieves issuers and insiders of the need to comply with a thicket of requirements that had caused compliance costs to soar to unreasonable levels. The breadth of the rule's coverage, and the ease of complying with its straightforward provisions represent a sea change from the restrictive, arcane approach of the predecessor rules. At long last, the rule strikes an appropriate balance between the purposes of Section 16 and the need of issuers to provide equity-based compensation to their officers and directors without undue difficulty and expense.

6. See Rel. No. 34-37260, § II. (1996). The predecessor rules included two versions of Rule 16b-3 (one that became effective on May 1, 1991 and one that was in effect prior to that date and remained available as an alternative method of exemption until August 15, 1996) and Rules 16a-8(b) and 16a-8(g)(3) (which were in effect prior to May 1, 1991 and remained available as alternative methods of exemption until August 15, 1996).

7. As in the case of the predecessor versions of Rule 16b-3, the 1996 version of the rule is not available for transactions involving ten percent owners who are not also officers or directors. The reason is that such persons may not be subject to the fiduciary duties of officers and directors or to the constraints on self-dealing resulting from those duties. Rel. No. 34-37260 n.17 and 42 (1996).

8. The rule, however, contains no express or implied requirement that a transaction with the issuer have a compensatory element, as acknowledged in Rel. No. 34-37260, § II.A. (1996).

SUMMARY OF RULE 16b-3

In brief, Rule 16b-3 operates as follows:

- All transactions between an issuer and its officers and directors can be exempted under the rule, regardless of whether they occur pursuant to a benefit plan;[9]
- Transactions under Section 401(k) plans, Section 423 plans, and other broad-based tax, ERISA and related excess benefit plans generally are unconditionally exempt, unless they involve fund switches in or out of an issuer stock fund or cash withdrawals from such a fund that are funded by a volitional disposition of an issuer equity security;
- Fund switches and cash withdrawals (which are characterized as "discretionary transactions" under the rule) are exempt only if they occur pursuant to an election made at least six months after an "opposite-way" election under an issuer plan (e.g., an election to sell cannot be preceded within six months by an election to buy);
- Other acquisitions and dispositions not involving fund switches or cash withdrawals can be exempted by either (i) having the board of directors or a committee of two or more non-employee directors approve them in advance, or (ii) having shareholders approve them in advance;
- Acquisitions not involving fund switches or cash withdrawals also can be exempted (i) by having the insider hold the acquired securities for at least six months, or (ii) by having shareholders ratify them no later than the next annual meeting.

ELIMINATION OF FORMER REQUIREMENTS

In the process of creating a broader and simpler Rule 16b-3, the SEC eliminated many of the conditions of the predecessor rules that had caused compliance costs to be excessive. A number of these requirements, however, were retained in modified form in the new rule as alternative methods of exemption.

9. Rule 16b-3 is broad enough to encompass not only transactions with the issuer itself, but also transactions by officers and directors with subsidiaries of the issuer (American Bar Association, February 10, 1999, Q.1), as well as transactions between the issuer and a partnership, corporation, trust or immediate family member in which an officer or director has a reportable pecuniary interest (American Bar Association, supra, Q.4).

Written Plan

Because the existence of a plan is not necessary to secure an exemption under the 1996 version of Rule 16b-3, the requirement for a written plan was eliminated. Note, however, that a written plan is still required in the following situations by the Code or ERISA: (i) incentive stock option plans, (ii) Section 401(k) plans, (iii) Section 423 stock purchase plans, (iv) ESOPs, (v) excess benefit plans, and (vi) profit sharing plans.

Stockholder Approval

The much maligned requirement for stockholder approval of a plan and any amendment thereto that materially (i) increases shares subject to the plan, (ii) changes the class of eligible insiders, or (iii) increases benefits, similarly was eliminated because of the extension of the rule to non-plan transactions. While this relieved issuers of a significant burden, it still may be necessary to obtain stockholder approval of plans and plan amendments in certain circumstances.[10]

Transferability Restriction

The prohibition against the transfer of stock options and other derivative securities was deleted from Rule 16b-3, but it continues to be a Code requirement for incentive stock options.[11] Further, any transfer of an option granted under Rule 16b-3 must find an exemption from Section 16(b), although the exemption provided by Rule 16b-5 for gifts should be available for transfers made without value.

Disinterested Administration

Although the concept of disinterested administration of discretionary grant and award plans was the keystone of the predecessor versions of Rule 16b-3, the SEC decided that retaining the concept in the current version would be inconsistent with its goal of simplification. As a result, it now is possible for directors to make awards to themselves without limitation and to participate in omnibus and other plans previously off-limits to them. The SEC believes that fiduciary obligations under state law and the potential adverse reaction of shareholders and employees to perceived overreaching will act as restraining influences and largely prevent excesses from occurring.

Window Period and Other SAR Exercise Requirements

The SEC also eliminated entirely the window period and other requirements of paragraph (e) of the predecessor rules applicable to cash settlements of stock appreciation rights ("SARs") and settlements of tax withholding rights. Variations of the window period provision, which effectively restricted SAR transactions by insiders to a period of ten business days beginning on the third business day following the release of quarterly or annual earnings data by the issuer, were incorporated by many issuers into their insider trading policies and continue to survive in some form under many of these policies.

Six-Month Holding Period Requirement

The six-month holding period requirement for equity securities granted or awarded to an insider was inserted in paragraph (c) of the 1991 version of Rule 16b-3, and survived in the 1996 version as an optional form of exemption for acquisitions of securities from the issuer. This provision can serve as a convenient "fall-back" exemption where another method of exemption relied upon for an acquisition unexpectedly fails.

Participant-Directed Transaction Requirements

The extremely complex requirements of the 1991 version of Rule 16b-3(d) for participant-directed transactions proved to be so unworkable that the Commission deleted them in their entirety.

THE FOUR CATEGORIES OF EXEMPTION

The 1996 version of Rule 16b-3 essentially requires that a transaction between an issuer and its officers or directors satisfy the applicable conditions of any of four alternative categories of exemption set forth in the rule. The four alternative exemption categories, each of which is separately discussed below, deal respectively with (1) tax-conditioned plans, (2) discretionary transactions, (3) acquisitions from the issuer, and (4) dispositions to the issuer.

Tax-Conditioned Plans

Paragraph (c) of Rule 16b-3 provides an unconditional exemption from Section 16(b) for any acquisition or disposition of an issuer equity security,

10. Generally, stockholder approval will be necessary for (i) plans involving the issuance of stock that are subject to stock exchange or NASDAQ requirements, (ii) incentive stock option plans, (iii) qualified employee stock purchase plans, and (iv) plan amendments increasing available shares or changing the class of covered individuals. Further, Section 162(m) of the Code requires stockholder approval with respect to the adoption or amendment of individual award limits or the establishment or amendment of the material terms of a performance goal.

11. Code Reg. § 1.83-7(b)(2).

other than one involving a "Discretionary Transaction,"[12] that occurs pursuant to a "Tax-Conditioned Plan." The term "Tax-Conditioned Plan" implies that the exemption is available only for transactions under tax-qualified plans. To the contrary, the term is broad enough to encompass not only transactions under a Qualified Plan,[13] but also transactions under an Excess Benefit Plan,[14] or a Stock Purchase Plan.[15]

Because the definitions of the terms used in this exemption (i.e., Discretionary Transaction, Qualified Plan, Excess Benefit Plan, and Stock Purchase Plan) are critical to its application, they must be reviewed carefully to assure that the exemption is available. Generally, the definitions are strictly construed.[16] Thus, the exemption is not available for transactions under a plan not meeting the requirements of an applicable definition, even though the plan operates in a manner similar to a Tax-Conditioned Plan or contains some provisions that meet the requirements of a definition while others do not.[17]

Discretionary Transactions

Paragraph (f) of Rule 16b-3 exempts "Discretionary Transactions." In applying this exemption, it is important to remember that (i) the scope of the exemption is limited solely to those transactions that are within the narrow definition of the term "Discretionary Transaction" in paragraph (b)(1) of the rule, and (ii) no other exemption is available under the rule for such transactions.[18] The latter characteristic is unusual because Rule 16b-3 generally provides several alternative methods of exemption for most other types of transactions. Alternative exemptions, however, are not deemed appropriate for Discretionary Transactions because of the significant opportunities for abuse presented by them.[19]

What Constitutes a "Discretionary Transaction"

As used in Rule 16b-3, a "Discretionary Transaction" generally means a transaction under an employee benefit plan that results in either (a) a volitional intra-plan transfer involving an issuer equity securities fund, or (b) a cash distribution funded by a volitional disposition of an issuer equity security.[20] The term, however, does not include transactions otherwise meeting these requirements that (i) are made in connection with a plan participant's death, disability, retirement or termination of employment,[21] or (ii) are required by the Internal Revenue Code to be made available to a participant.[22]

Determining whether a particular transaction under a plan is within the scope of the definition of "Discretionary Transaction" is not always easy. The mere fact that a transaction involves discretion by an insider is insufficient by itself to bring the transaction within the definition. For example, a voluntary withdrawal in kind of issuer equity securities from a plan would not be a Discretionary Transaction

12. The term "Discretionary Transaction" is narrowly defined in new Rule 16b-3(b)(1), as discussed in the next section captioned "Discretionary Transactions."

13. The term "Qualified Plan" is defined in Rule 16b-3(b)(4) to include any employee benefit plan that satisfies the coverage and participation requirements of Sections 410 and 401(a)(26) of the Code, regardless of whether the plan is tax qualified.

14. The term "Excess Benefit Plan" is defined in Rule 16b-3(b)(2) to mean an employee benefit plan that is operated in conjunction with a qualified plan (as defined in the rule), and provides only the benefits or contributions that would be provided under a qualified plan but for any benefit or contribution limitations set forth in the Code. As indicated in Rel. No. 34-37260 n. 49 (1996), transactions pursuant to an Excess Benefit Plan need not be in tandem with transactions in the related qualified plan in order to be eligible for an exemption.

15. The term "Stock Purchase Plan" is defined in Rule 16b-3(b)(5) to mean an employee benefit plan that satisfies the coverage and participation requirements of Sections 423(b)(3) and 423(b)(5), or Section 410, of the Code. An open market stock purchase plan that is not required to be registered under Section 5 of the Securities Act of 1933 under the standards of Release No. 33-4790 (1965) is considered a Stock Purchase Plan "sponsored by the issuer" for purposes of Rule 16b-3(a) if certain conditions regarding the operation of the plan are met. American Bar Association (October 15, 1999).

16. See American Society of Corporate Secretaries (December 11, 1996) (Q.4). For example, a deferred compensation plan which accommodates contributions from several sources, including 401(k) excess benefit plans and non-qualified deferred salary and bonus plans, would not be eligible for the Rule 16b-3(c) exemption because it would not satisfy all applicable conditions of the exemption. Id. Further, transactions under a supplemental non-qualified plan which permits the amount of issuer securities acquired under the plan to be determined on the basis of the amount of salary deferred by the officer or director, rather than an objective measure determined by the Code, would not be an Excess Benefit Plan under Rule 16b-3(c). American Bar Association (February 10, 1999) (Q. 2). Where questions exist as to whether a plan qualifies as a Tax-Conditioned Plan, the staff has indicated that it is available to provide interpretive assistance. American Society supra.

17. American Society of Corporate Secretaries (December 11, 1996) (Q.4). Transactions under plans that fail to satisfy all requirements necessary to rely on the exemption provided by Rule 16b-3(c) for Tax-Conditioned Plans may, however, be eligible for other exemptions provided by the rule, such as those set forth in paragraphs (d), (e) and (f) thereof. Id.

18. The other three exemptive categories under Rule 16b-3 specifically exclude Discretionary Transactions from their coverage, making it necessary for an insider to look solely to paragraph (f) of the rule for an exemption for such transactions.

19. The Commission believes such transactions involve investment decisions of the type attendant to market transactions, and often trigger market transactions by the plan pursuant to which a member of the public, rather than the issuer, is on the other side of the transaction. See generally Rel. No. 34-37260, § II.C. at n.54 (1996).

20. Rule 16b-3(b)(1).

21. Rule 16b-3(b)(1)(ii).

22. Rule 16b-3(b)(1)(iii). This exclusion is available for distributions pursuant to a qualified plan that provides more generous benefits than the minimums mandated by the Code. For example, the exclusion may be relied upon for distributions pursuant to a Section 401(a) qualified plan that (a) complies with Section 401(a)(9) of the Code; (b) permits distributions to commence in the year a participant reaches age 70-1/2 (rather than April 1 of the following year, as required by the Code), and/or allows participants to select a shorter distribution period than the maximum period required by the Code; and (c) applies equally to all plan participants. American Bar Association (December 20, 1996) (Q.3). The exclusion also applies to transactions pursuant to a Section 401(a) qualified plan that (a) complies with Section 401(a)(28) of the Code; (b) permits a diversification election that is more generous (either as to the number of investment options available or the percentage of the account that may be diversified) than the minimum specified by Section 401(a)(28) of the Code; and (c) applies equally to all Qualified Participants, as defined by Section 401(a)(28)(B)(iii) of the Code. American Society of Corporate Secretaries (December 11, 1996) (Q.7).

because it involves neither an intra-plan transfer nor a cash withdrawal.[23]

Whether a cash-out under a plan is a Discretionary Transaction subject to Rule 16b-3(f) requires careful analysis. A cash-out from an issuer stock fund [24] of a plan will always be a Discretionary Transaction subject to Rule 16b-3(f), regardless of whether the plan has a single fund or several funds, because the cash-out is tantamount to a sale of stock.[25] On the other hand, a cash-out of a derivative security (such as a stock option, SAR, or phantom stock unit) will be a Discretionary Transaction only where the derivative security is held in a multi-fund plan that permits fund switching.[26] Finally, certain types of cash-outs are deemed not to involve either issuer stock or a derivative security and therefore are not subject to Rule 16b-3(f). These include (i) a withdrawal of cash from an employee stock purchase plan before any equity security is purchased at the end of the prescribed purchase period,[27] and (ii) an election to take a bonus award in cash rather than stock that is made prior to the receipt of any award.[28]

Plan loans also require careful attention where they are funded by the disposition of an issuer equity security. Generally, such a loan would be a Discretionary Transaction, unless the insider continues to bear the risk of loss with respect to the issuer equity securities during the term of the loan.[29] Note, however, that the repayment of a loan into the issuer equity securities fund by means of a lump sum or otherwise would not be a Discretionary Transaction.[30]

23. Withdrawals in kind are deemed to involve a mere change in the form of ownership from indirect to direct and therefore are exempt under Rule 16a-13. Rel. No. 34-37260 n.54 (1996).

24. The term "issuer stock fund" includes for purposes of Rule 16b-3 a common stock fund or any other fund consisting of issuer stock. The term is broad enough to encompass a fund consisting of stock that also is considered a derivative security (such as convertible preferred stock) because it provides a right to acquire another equity security of the issuer. American Bar Association (December 20, 1996) (Q.2, n.1).

25. American Bar Association (December 20, 1996) (Q.2).

26. American Bar Association (December 20, 1996) (Q.2). If fund-switching is not an available alternative, there is no potential for abuse of the type that the conditions of Rule 16b-3(f) were designed to prevent. Id. (Q.2 and 4(c)). Where a cash-out of a derivative security is not a Discretionary Transaction subject to Rule 16b-3(f) (as in the case of the cash-out of a stand-alone stock option, SAR or phantom stock unit), it would be eligible for the exemption provided by Rule 16b-3(e) for dispositions to the issuer. Id. (Q.2).

27. American Bar Association (December 20, 1996) (Q.2).

28. Id.

29. Rel. No. 34-37260 n.61 (1996).

30. American Society of Corporate Secretaries (December 11, 1996) (Q.3). Loan repayments to an issuer equity security fund would trigger acquisitions of the equity securities held in the fund and would be eligible for exemption pursuant to other provisions of Rule 16b-3. Specifically, a repayment pursuant to a Tax-Conditioned Plan would be eligible for the exemption provided by Rule 16b-3(c), and a repayment under any other type of plan would be eligible for the exemption provided by Rule 16b-3(d). Id.

Condition for Exemption

The sole condition for exempting Discretionary Transactions is that there be an interval of at least six months between the date of election by the insider to engage in the transaction and the date of the insider's most recent "opposite-way" election under any plan of the issuer.[31] Thus, the date of an acquisition election must be at least six months removed from any prior disposition election, and vice versa. Note that "same-way" elections are not subject to the six-month restriction,[32] and that non-plan elections are not taken into account. As a result, an insider can engage in an opposite-way market transaction within six months without jeopardizing the exemption. In the event that a plan election occurs within less than six months of the last previous opposite-way plan election, the staff informally has stated that while the most recent transaction is denied an exemption, the earlier opposite-way transaction remains exempt.

Acquisitions From the Issuer

Perhaps the most encompassing exemption category in new Rule 16b-3 is the one provided by paragraph (d) for grants, awards and other acquisitions from the issuer. This category is broad enough to exempt any acquisition from the issuer, other than one deemed to be a "Discretionary Transaction."[33] Paragraph (d) provides five alternative methods of exempting such acquisitions: (i) advance approval by the board of directors, (ii) advance approval by a committee of two or more non-employee directors, (iii) advance approval by security holders, (iv) subsequent ratification by security holders no later than the next annual meeting, and (v) holding the acquired securities for at least six months. Because the first three methods of exemption also can be used to exempt dispositions to the issuer under Rule 16b-3(e), they are discussed separately in a subsequent section of this article under the caption "The Advance Approval Exemptions." The remaining two methods are discussed below.

31. The exemption focuses on the date of the plan election rather than the date of the transaction because the former date is within the insider's control while the latter date may not be. Rel. No. 34-37260 n.57 (1996).

32. Rel. No. 34-37260, § II.C. at n.57 (1996).

33. Included among the acquisitions that can be exempted are acquisitions from the acquiror in a merger by the acquiror's officers and directors, or by persons who may become officers or directors as a result of the merger. Skadden, Arps, Slate, Meagher & Flom LLP (January 12, 1999) (Q. 2). Approval under Rule 16b-3(d) of an acquisition to be made by a person who will become an officer or director of the acquiror as a result of the merger may be granted before the person assumes office. Skadden supra (Q. 3(d)).

Ratification by Security Holders

Rule 16b-3(d)(2) exempts any acquisition from the issuer that is ratified after the fact by the issuer's security holders no later than the next annual meeting. This is an exemption of last resort that generally is utilized only in the extreme circumstance where all other methods of exemption have failed and substantial short-swing liability is looming under Section 16(b). The standard for approval or ratification is essentially identical to that employed in the predecessor versions of Rule 16b-3 for security holder approval of plans and material amendments thereto.[34] In all instances, the approval or ratification must be obtained in compliance with the proxy or consent requirements of Section 14 of the 1934 Act.[35]

Six-Month Holding Period

Where approval or ratification of an acquisition either was not obtained, or was obtained in a defective manner, it still is possible to exempt the acquisition under Rule 16b-3(d)(3) if the officer or director holds the acquired securities for a period of six months following the acquisition. The six-month holding period is satisfied with respect to a derivative security if at least six months elapse between the date of acquisition of the derivative security and the date of disposition of the underlying security.[36] Thus, an intervening exercise or conversion will not destroy the exemption in such circumstances. For dividend equivalent rights ("DERs") and shares purchased pursuant to the automatic reinvestment of dividends, the holding period is deemed to commence on the date of acquisition of the shares on which the DERs and dividends are paid.[37] Finally, the holding period is deemed satisfied where an officer or director dies prior to the end of the six month period following the date on which the person acquired the security in question.[38]

34. Pursuant to Rule 16b-3(d)(2), the transactions at issue must be approved or ratified by "the affirmative votes of the holders of a majority of the securities of the issuer present, or represented, and entitled to vote at a meeting duly held in accordance with the applicable laws of the state or other jurisdiction in which the issuer is incorporated; or the written consent of the holders of a majority of the securities of the issuer entitled to vote."

35. See Rule 16b-3(d)(2).

36. See Rule 16b-3(d)(3). In this respect, the provision operates in the same manner as a similar six-month holding period requirement for grants and awards in former Rule 16b-3(c)(1).

37. Rel. No. 34-37260, § II.D.2. at n.69 (1996). A six-month holding period for the DERs or shares received as a result of a dividend is necessary only if the officer or director is relying on the six-month holding period provision as the basis for exempting the acquisitions. Rel. No. 34-37260 n.69.

38. American Society of Corporate Secretaries (December 11, 1996) (Q.6). Except in the unusual circumstance where the estate or personal representative of the deceased officer or director is subject to Section 16, the subsequent sale of the securities (including any underlying equity securities acquired upon the exercise or conversion of a derivative security acquired in reliance on the six-month holding period exemption of Rule 16b-3) will not be subject to Section 16. Id.

Dispositions to the Issuer

Rule 16b-3(e) provides a broad exemption for dispositions to the issuer not involving a "Discretionary Transaction."[39] The rule provides three alternative methods of exemption involving advance approval by either the board of directors, a committee of two or more non-employee directors, or security holders.[40] Because these methods also can be used to exempt acquisitions from the issuer, they are discussed later in this article in the section captioned "The Advance Approval Exemptions."

Broad Exemption

The exemption for dispositions to the issuer is expansive. In addition to sales to the issuer, it also can cover, among other things: (i) redemptions of securities in connection with nonexempt replacement grants, (ii) the surrender or withholding of securities in connection with exercises of options or tax withholding rights, (iii) the expiration, cancellation, or surrender of options or SARs in connection with the grant of replacement options or rights, (iv) the election to receive, and the receipt of, cash in settlement of SARs, and (v) dispositions in mergers.[41]

With respect to merger dispositions, the SEC staff has indicated that the exemption will be available for the disposition to the acquiror in a merger of both derivative and non-derivative securities by the target's officers and directors, regardless of the manner in which the securities were acquired or the form of consideration paid by the acquiror.[42] If approval by security holders is the method to be relied upon under Rule 16b-3(e) for exempting the merger dispositions, both the proxy card and proxy statement relating to the merger should provide that a vote to approve the merger also will constitute a vote to approve exempt dispositions by insiders of issuer equity securities in the merger.[43]

39. Release No. 34-37260, § II.E. (1996).

40. See Rule 16b-3(e). Note that ratification by security holders following the disposition to the issuer is not an available alternative under this provision, unlike the situation in Rule 16b-3(d)(2) with respect to acquisitions.

41. Rel. No. 34-37260, § II.E. (1996). See also Skadden, Arps, Slate, Meagher & Flom LLP (January 12, 1999).

42. Skadden, Arps, Slate, Meagher & Flom LLP (January 12, 1999) (Q. 1(a) and 1(b)). The staff's position means that it is not necessary to provide in the merger agreement that the equity securities held by Section 16 insiders will be disposed of to the issuer immediately before the merger is effected. Prior statements by the Commission in Rel. No. 34-37260, § II.E. at n. 85 (1996) had implied otherwise.

43. Release No. 34-37260, § II.E. at n. 86 (1996). In addition, the SEC stated in n. 86 that the proxy statement should describe the security holdings of each officer and director as to which approval of an exempt disposition is solicited.

Transition Considerations

Subsequent transactions arising from grants made under the predecessor versions of Rule 16b-3 will be exempt only if they comply with the requirements of the current version of the rule that became mandatory on November 1, 1996.[44] Thus, even though tax withholding and cashless exercise rights may have been granted in accordance with former Rule 16b-3 as part of an exempt option grant, only the grant transactions would be deemed to have been exempted under the old rule. The subsequent exercise of those rights will occur at a time when the current rule applies and therefore will require compliance with an available exemption under the current rule. For example, if the original grant of an option and related cashless exercise and tax withholding rights under the old rule had been made by a disinterested committee of directors which contained one or more members who would not qualify as non-employee directors under current Rule 16b-3, the subsequent transactions arising from the exercise of the ancillary rights would have to be made in accordance with the requirements of the new rule in order to be exempt. As a result, advance approval by the board of directors, a committee of non-employee directors or by security holders would be necessary to exempt the exercise of the rights and related disposition of shares under Rule 16b-3(e).[45]

THE ADVANCE APPROVAL EXEMPTIONS

Both Rule 16b-3(d) and (e) provide exemptions for transactions that are approved in advance by either (i) the board of directors, (ii) a committee of two or more non-employee directors, or (iii) security holders.

General Considerations

Each of the advance approval methods is subject to the following general considerations. First, a director or officer is not precluded from voting to approve a transaction in which the person has a personal interest, since conflicts of interest are not a barrier to reliance on any of the approval methods.[46] Second, even though Rule 16b-3(d) does not expressly require that the approval occur in advance of the transaction, the Commission has said that it must.[47] Third, the approval will be effective only if it (a) describes the nature of the transaction, (b) states that it is being given for the purpose of making the transaction exempt under Rule 16b-3, and (c) specifically identifies the persons covered and the number and type of securities attributable to each.[48] Fourth, the approval must relate to specific transactions rather than to any plan under which the transactions may occur, except in the case of a formula or similar plan or arrangement which fixes in advance the terms and conditions of each transaction.[49] Finally, where the terms of a subsequent transaction are fixed at the time an initial transaction is approved, specific approval is not required for the subsequent transaction.[50] The last two points raise a number of issues that warrant special attention. Accordingly, they are discussed in the "Special Considerations" section that follows the discussion below of the three methods of advance approval.

Advance Approval by Board of Directors

Directors who would be among the beneficiaries of any transaction approved by the board are not required by the rule to recuse themselves from the approval process, although corporate governance and fiduciary duty considerations would seem to make recusal advisable. When the board acts to approve a transaction, it should exercise care in formulating the approval resolution. The reason, as explained later, is that it often is possible to avoid the need for approval of follow-up related transactions whose terms are fixed at the time of board approval (such as subsequent transactions resulting from the exercise of tax withholding and cashless exercise rights) by including them within the scope of the resolution approving the initial transaction.

Advance Approval by Committee of Non-Employee Directors

Rule 16b-3(d)(1) also provides an exemption for any acquisition from the issuer that is approved in advance by a committee of the board of directors composed solely of two or more non-employee directors. In many instances, approval by a committee of non-employee directors is the preferred alternative because it (i) minimizes the appearance of conflicts of interest, (ii) frees up board time that otherwise might be spent on the approval of a stream of rather mundane insider transactions, (iii) avoids the need to have the entire board sign off on the yearly

44. American Society of Corporate Secretaries (December 11, 1996) (Q.2).

45. Id.

46. Generally, the Commission believes that traditional fiduciary duties arising under state laws governing corporate self-dealing will facilitate compliance with the underlying purposes of Section 16 by directors who are approving transactions. Rel. No. 34-37260, § II.D.4. at n.79 (1996).

47. Note 3 of Rule 16b-3. See also Rel. No. 34-37260, § II.D.2. at n.66-67 (1996).

48. See generally Skadden, Arps, Slate, Meagher & Flom LLP (January 12, 1999) (Q. 3); American Bar Association (February 10, 1999) (Q. 4).

49. Note 3 of Rule 16b-3. See also Rel. No. 34-37260, § III.D.3. (1996).

50. See Note (3) of Rule 16b-3 and Rel. No. 34-37260, § II.D.3. (1996).

report on executive compensation includable in the issuer's annual Form 10-K and proxy statement,[51] and (iv) prevents the occurrence of an event that might trigger interlock disclosures in the issuer's annual 10-K report and proxy statement.[52]

The "Solely" Requirement

Rule 16b-3(d) and (e) require that the committee be composed "solely" of non-employee directors. In those instances where a committee of directors includes some persons who do not qualify as non-employee directors, the exemption for acquisitions under Rule 16b-3(d)(1) (or the exemption for dispositions under Rule 16b-3(e)) will still be available if the non-qualifying directors abstain or recuse themselves from action on the matter.[53] Alternatively, the exemptions can be preserved through the formation by the committee of a subcommittee composed solely of two or more non-employee directors to approve the transactions.[54] In either situation, however, the non-employee directors must have full authority to act independently without further approval in order for the transactions approved by them to be exempt.[55] If further approval is needed, the transactions will be exempt only if they are approved by the board of directors.[56]

Standards Required for Non-Employee Directors

A "non-employee director" under Rule 16b-3 is a director who (i) is not currently an officer or employee of the issuer or a parent or subsidiary of the issuer, (ii) does not receive compensation from the issuer or a parent or subsidiary for services rendered as a consultant or in any other non-director capacity that would exceed the $60,000 threshold for which disclosure would be required under Item 404(a) of Regulation S-K, (iii) does not possess an interest in any other transaction for which disclosure would be required under Item 404(a), and (iv) is not engaged in a business relationship with the issuer (such as that of a lawyer or investment banker) which would be disclosable under Item 404(b) of Regulation S-K. [57]

Application of the Qualification Standards

It is important to recognize that the non-employee director standards described above are cast in the present tense.[58] Thus, a director who no longer is an employee of the issuer or a parent or subsidiary would not be rendered ineligible by the former employment relationship. Similarly, a director who had engaged in a transaction or relationship disclosable under either Item 404(a) or Item 404(b) of Regulation S-K would not be ineligible if the transaction or relationship had terminated,[59] and the issuer in good faith believed that any current or contemplated transaction or relationship with the director during the current fiscal year would not require disclosure under Items 404(a) and (b).[60] Where, however, the issuer believes, on the basis of readily available information, that a current (or currently contemplated) transaction or relationship with a director will require disclosure under Item 404(a) or (b) in a future filing, the director no longer will be eligible to serve as a non-employee director.[61]

Item 404 References

Three of the four qualification standards for non-employee directors refer to Item 404 of Regulation S-K, and are subject to a number of ground rules regarding their operation. First, even though some issuers are subject to Regulation S-B rather than Regulation S-K, all issuers are to look to the S-K provisions of Item 404 when applying the non-employee director definition of Rule 16b-3.[62] Second, issuers may rely on the instructions to Items 404(a) and (b)

51. See generally Item 402(k)(3) of Regulation S-K, which requires that the compensation report be issued over the names of all board members where the entire board is involved in executive compensation determinations.

52. See generally Item 402(j) of Regulation S-K, which could require the interlock disclosures of that provision to be made where the CEO or other executive officer serving on the board participated in the compensation approval process.

53. American Society of Corporate Secretaries (December 11, 1996)(Q.1(b)).

54. American Society of Corporate Secretaries (December 11, 1996) (Q.1(a)).

55. American Society of Corporate Secretaries (December 11, 1996) (Q.1). Note, however, that the availability of the approval exemptions provided by Rule 16b-3(d)(1) and Rule 16b-3(e), respectively, will not be jeopardized where a committee of directors that includes persons who do not qualify as non-employee directors makes non-binding recommendations to either (i) the board of directors, or (ii) the non-employee directors who will be acting to approve the transactions at issue. Id., at n.1.

56. American Society of Corporate Secretaries (December 11, 1996) (Q.1).

57. Rule 16b-3(b)(3)(i). In the case of a closed-end investment company, a non-employee director means a director who is not an "interested person" of the issuer, as that term is defined in Section 2(a)(19) of the Investment Company Act of 1940. See Rule 16b-3(b)(3)(ii).

58. See generally American Bar Association (December 20, 1996) (Q.1), in which the staff stated that "...the Rule 16b-3(b)(3)(i) tests envision compliance at the time the director votes to approve a transaction..."

59. American Bar Association (December 20, 1996) (Q.1). This position also would apply to any disclosable transaction or relationship that had occurred before the issuer's initial public offering but was terminated before the person acted as a non-employee director under Rule 16b-3. Id.

60. American Bar Association (December 20, 1996) (Q.1). The belief should be based on information that is readily available to the issuer at the time a director proposes to act as a non-employee director. Id. In forming this belief, the issuer may rely on information obtained from the director (e.g., in response to an inquiry). Id.

61. American Bar Association (December 20, 1996) (Q.1). A determination that a director no longer is eligible to serve as a non-employee director will not result in the retroactive loss of an exemption under Rule 16b-3(d)(1) or 16b-3(e) with respect to a transaction previously approved by the director while serving as a non-employee director. Id.

62. Rel. No. 34-37260 n. 75 (1996); American Bar Association (December 20, 1996) (Q.1).

and related staff interpretations when applying the Rule 16b-3 qualification standards relating to those Items.[63] Third, the interest of a director in a transaction that is subject to disclosure under Item 404(a) will not disqualify the director under Rule 16b-3 unless the interest, whether direct or indirect, is a material one.[64]

The SEC has provided a number of helpful illustrations of circumstances under which the interest of a director in a transaction will not disqualify the person from serving as a non-employee director under Rule 16b-3. For example, the fact that a member of the director's immediate family engages in a transaction that is subject to disclosure under Item 404(a)(4) due to the person's relationship to the director will not disqualify the director under Rule 16b-3 if the director personally does not have a material interest in the transaction.[65] Further, a business relationship that does not require disclosure pursuant to Item 404(b) because the five percent of consolidated gross revenues standards of that Item are not satisfied likewise will not disqualify the director unless the director derives special benefits from the relationship.[66] Finally, a material interest will be deemed not to exist, pursuant to Instruction 8.A. of Item 404(a), where a director's interest in a transaction arises solely from the person's position as a director of another corporation or organization that is a party to the transaction.[67]

Advance Approval by Security Holders

This method of exemption is unlikely to be the first choice of issuers in any circumstance. Issuers, however, may utilize it in connection with formula and other plans under which specific grants to insiders already have been determined and shareholder approval is required by a stock exchange, NASDAQ or the Code. The standard for approval is specified in Rule 16b-3(d)(2) and is identical to the standard applicable to the ratification of transactions after the fact under that rule.[68]

63. American Society of Corporate Secretaries (December 11, 1996) (Q.5).

64. Id. Although Rule 16b-3(b)(3) does not expressly require that the interest be a material one, Item 404(a) by its terms requires disclosure only of transactions exceeding $60,000 in which the director had or will have a direct or indirect material interest. Id., n.3.

65. Gibson, Dunn & Crutcher LLP (November 20, 1996). In American Society of Corporate Secretaries (December 11, 1996) (Q.5), the staff reiterated this principle in reverse form by stating that "a director may fail to comply if the director has a direct or indirect material interest in a family member's transaction for which disclosure is required pursuant to S-K Item 404(a)." In Gibson supra, the staff further noted that it will not express a view on whether a director has such an interest, since determinations of that nature usually involve assessments of facts and circumstances which can best be made by the issuer and its counsel.

66. American Society of Corporate Secretaries (December 11, 1996) (Q.5).

67. Id.

68. This standard was discussed previously under the caption "Ratification by Security Holders."

Special Considerations

Formula Plans

With rare exception, only formula plans would qualify for the special exception permitting plan approval to substitute for the approval of specific transactions where the plan fixes in advance the terms and conditions of transactions under it. As to what constitutes a formula plan for this purpose, the Commission has indicated that the various staff interpretations of former Rule 16b-3(c)(2)(ii) relating to such plans apply.[69] In addition to those interpretations, the staff has provided the guidance described below regarding other situations in which the approval of certain types of plans may eliminate the need for approval of individual transactions under the plans.

Directors Fee Plans

The staff has indicated that one-time approval in its entirety of a plan allowing directors to elect to receive stock or options in lieu of cash fees will make it unnecessary to obtain approval of individual acquisitions under the plan.[70] As described by the staff, the plan (i) was limited to directors, (ii) permitted directors to make their election prior to the beginning of the next specified payment period for directors' fees, (iii) specified a formula for determining, on the basis of the fair market value on the date of acquisition, the number of shares or options to be paid in lieu of cash, and (iv) set forth all other relevant provisions governing the acquisition of securities pursuant to the plan.[71]

Single Fund Deferred Compensation Plans

A deferred compensation plan that makes available only a single fund consisting of phantom stock also may qualify for the exception provided for approvals of formula plans.[72] Specifically, a single fund plan will qualify where the plan (i) defines the class of eligible participants (e.g., all non-employee directors or all employees above a certain salary grade), (ii) permits each participant to elect, prior to the year in which the participant's cash compensation will be paid, to defer a specified portion (e.g., up to 100%) of the person's cash compensation in phan-

69. Rel. No. 34-37260 n.71 (1996). The various staff interpretations of what constituted a formula plan for purposes of that rule are described in P. Romeo, Comprehensive Section 16 Outline, § IV.D.5. at 306-11 (1999).

70. American Society of Corporate Secretaries (December 11, 1996) (Q.8).

71. Id.

72. American Bar Association (December 20, 1996) (Q.4(b)).

tom stock, (iii) credits phantom stock to the participant's account at the time the compensation otherwise would be paid on the basis of the then fair market value of the stock, (iv) credits dividends in additional phantom stock, and (v) pays out the value of the phantom stock in cash or stock according to the participant's election at the time of the election to defer compensation, either (a) on a fixed date (including pursuant to an installment schedule specified by the plan) more than six months in the future determined at the time of the election to defer compensation, or (b) automatically on an earlier date pursuant to the terms of the plan in the event of the participant's death, disability, retirement or termination of service.[73]

In the foregoing situation, the election to participate in the plan would be a non-event under Section 16, and acquisitions of phantom stock (including the crediting of dividends in additional phantom stock) would be exempt under Rule 16b-3(d) without the need for specific approval of each acquisition.[74] This result apparently would be unaffected by any change in the amount of compensation to be deferred in the future, assuming the new deferral amount elected by the participant was within the prescribed limits of the plan and all other plan requirements were satisfied. Dispositions of phantom stock on either the payout date determined at the time of the deferral election or the earlier date fixed automatically by the plan in the event of death, disability, retirement or termination of service also would be exempt under the advance approval standards of Rule 16b-3(e) that mirror those of Rule 16b-3(d).[75] But dispositions resulting from a subsequent election by the participant to change the fixed payout date or installment schedule, or to elect installment payments in lieu of a lump sum, would require specific approval to be exempted under Rule 16b-3(e) because of their deviation from the fixed terms of the plan.[76]

Multi-Fund Deferred Compensation Plans

The above analysis of transactions under a single fund deferred compensation plan also applies, with one exception, to transactions under a multi-fund deferred compensation plan that permits participants to (i) invest deferred amounts in phantom stock units or one or more alternative investments, and (ii) make intra-plan transfers between phantom stock units and alternative investments.[77] The exception applies to payouts on a fixed date elected by the participant, which would require advance individual approval under Rule 16b-3(e) unless the participant specifically agreed at the time of his or her deferral election that funds invested in phantom stock units will not be eligible for intra-plan transfers out of the phantom stock units.[78] Without such a limitation, approval of the plan in its entirety would not be specific enough to exempt payouts on the date elected by the participant.[79]

Pre-Approval of Subsequent Transactions

Note 3 of Rule 16b-3 states that where the terms of a subsequent transaction are provided for at the time a transaction is initially approved in accordance with the rule, the subsequent transaction will not require further approval.[80] Some examples of subsequent transactions not requiring further approval are the following: (i) the exercise or conversion of a derivative security (and the related disposition of the derivative security and acquisition of the underlying issuer equity security) where the exercise or conversion are in accordance with the terms provided in the derivative security at the time its acquisition was approved;[81] (ii) the acquisition of reload options pursuant to the terms of a previously approved award that specifically provided for the automatic grant of

73. Id.

74. Id. In the same letter, in Q.4(d), the staff provided the following guidance regarding the method of reporting transactions and events under single fund deferred compensation plans. The election to participate is a non-event and therefore can be disregarded. Each transaction should be reported on a separate line on the reporting form, rather than being aggregated. Acquisitions may be reported on Form 5 because of their exempt nature. Acquisitions of units payable in stock only, or in stock or cash, would be reported on Table II of the form, and the acquisition date would be the date on which the price is fixed and units are allocated to the participant's account. If, however, acquisitions of units are subject to performance criteria other than the passage of time or continued employment, they should be reported as of the date the performance criteria are satisfied.

75. American Bar Association (December 20, 1996) (Q.4(b)). In Q. 4(d), the staff provided the following additional guidance regarding the reporting of dispositions of phantom stock under single fund deferred compensation plans. Payouts made only in stock are deemed not to involve a change in the form of ownership exempt under Rule 16a-13. Instead, such a payout is considered the exercise of a derivative security that is reportable on Form 4 pursuant to Rule 16a-3(f)(1)(i)(A). The Form 4 report should indicate in Table II a disposition of the phantom stock upon their exercise and the acquisition of the underlying stock on Table I. (Alternatively, in situations where the units are to be settled automatically on a one-for-one basis in stock, an insider may report the acquisition of the phantom stock on Form 5 in the same manner as an acquisition of restricted stock (i.e., as simply the acquisition of the underlying shares on Table I), pursuant to Lincoln National Corporation (March 20, 1992) (Q.3).) Dispositions of phantom stock payable in cash or stock would be treated upon their settlement as the exercise of a derivative security. If the payout were in stock, it should be reported on Form 4 as the disposition of the phantom stock on Table II upon its exercise, and the acquisition of stock on Table I. If the payout were in cash, it should be reported on Form 4 as the disposition of the phantom stock on Table II upon its exercise, and the acquisition and sale of the underlying stock on Table I.

76. American Bar Association (December 20, 1996) (Q.4(b)).

77. American Bar Association (December 20, 1996) (Q.4(c)).

78. Id.

79. Id.

80. See also Rel. No. 34-37260, § II.D.3. (1996).

81. Rel. No. 34-37260, § II.D.3. at n.72 (1996). See also Note 3 of Rule 16b-3. In the event Rule 16b-3 is not available to exempt the exercise or conversion, Rule 16b-6(b) generally could be relied upon to provide an exemption. See the discussion in Rel. No. 34-37260 n.72.

such options;[82] (iii) the election to defer the receipt of an award of restricted stock where the terms of the award as approved provided for such an election by the awardee at a later date;[83] and (iv) the cash settlement of stock options, stock appreciation rights, phantom stock rights and other derivative securities where (a) the derivative securities were issued pursuant to terms that contemplated a cash settlement that either was volitional or would occur pursuant to an exercise at the holder's discretion within a finite term,[84] (b) the derivative securities were issued upon terms that did not grant the holder discretion as to the number of derivative securities acquired,[85] and (c) the disposition to the issuer of the derivative securities was pursuant to terms specified at the time of initial approval of the acquisition of the derivative securities in accordance with Rule 16b-3(d)(1) or (2).[86]

COMPLIANCE CHART

The chart set forth at the end of this article illustrates the treatment under the revised Section 16 rules of various transactions with the issuer occurring under common types of employee benefit plans and other executive compensation arrangements with the issuer.[87]

82. Rel. No. 34-37260, § II.D.3. (1996).

83. Id.

84. According to the staff, "the duration of the derivative security will be considered finite where it is a fixed term of years, or otherwise discernible at the time the award is initially approved, such as a term that is coextensive with employment." American Bar Association (December 20, 1996) (n.2).

85. Although deferred compensation plans ordinarily would fail to satisfy this condition because they typically allow a plan participant discretion as to the number of phantom stock units that may be acquired, transactions under such plans would not have to be specifically approved where the plan satisfies the conditions described in American Bar Association (December 20, 1996) (Q.4(b), and (c)). See generally American Bar Association supra (n.3).

86. American Bar Association (December 20, 1996) (Q.4(a)).

87. The chart has been reprinted with the permission of Executive Press, Inc. from The Corporate Counsel (July-August 1996). A more comprehensive set of charts describing the application of the revised Section 16 rules to a broader array of transactions than those shown in the chart can be found in P. Romeo, Comprehensive Section 16 Outline, 327-42 (1999).

Section 16(b) Exemptive Relief and Section 16(a) Reporting for Common Compensatory Transactions

Grant or Transaction Type	Transaction	Exemptive Relief	Section 16(a) Reporting
Stock Option / SAR	Grant	16b-3(d)	Form 5 (1)
	Vesting	Non-Event	None Required
	Exercise	16b-6(b) and 16b-3(d) 16b-3(e)(2)	Form 4
	Stock Disposition for Exercise Price (stock-for-stock exercise)	16b-3(e)	Form 4
	Expiration or Cancellation (not available if for value, e.g., regrants or other cancellations for value)	16b-6(d)	None Required, Per 16a-4(d)
Restricted Stock and	Grant	16b-3(d)	Form 5
Performance Shares	Vesting	Non-Event	None Required
(Actual Shares)	Forfeiture	16b-3(e)	Form 5
Performance Share Units	Grant	16b-3(d)	Form 5
with Stock Price Based Vesting	Earnout		
and Phantom Stock Units	- in shares	16b-6(b) and 16b-3(d)	Form 4
	- in cash	16b-3(e)	Form 4
Performance Share Units	Grant	Not Applicable	Not Applicable
with Non-Stock Price Based	Earnout		
Vesting	- in shares	16b-3(d)	Form 5
	- in cash	16b-3(d) and (e)	Form 5
Stock-for-Tax Withholding	Disposition (to the company)	16b-3(e)	Form 4, 5(3)
Sale of Shares	Disposition		
	- to the Company	16b-3(e)	Form 5
	- in the Market	Not Exempt	Form 4
Stock in Lieu of Cash	Acquisition of		
Compensation	- Stock Option	16b-3(d)	Form 5
	- Stock Units	16b-3(d)	Form 5
	- Shares of Stock	16b-3(d)	Form 5
Distribution from SERPs,	In Cash (disposition)	16b-3(e) or (f)	Form 4(4)
Non-qualified Deferred	In stock (acquisition)	16b-3(d)	Form 4(4)
Compensation Plans and other accounts denominated in stock			
TAX CONDITIONED PLANS			
Contribution to Company	Company Match (acquisition)	16b-3(c)	None Required
Stock Fund	Employee Contribution (acquisition)	16b-3(c)	None Required (16a-3(f)1(i)(E)
Funds Transferred	Into Stock (acquisition)	16b-3(f)	Form 5
	Out of Stock account (disposition)	16b-3(f)	Form 5
Hardship Withdrawal	In Cash from Stock Fund (disposition)	16b-3(f)	Form 5
Distribution from Stock Fund	In Cash		
	- At Retirement (disposition)	16b-3(c)	None Required
	- Other (non-diversification) (disposition)	16b-3(f)	Form 5
	In stock (change in form of ownership)	16b-13	None Required

(1) Any transaction reportable on Form 5 may be reported earlier on a Form 4. (2) Covers disposition of the option to the issuer, as well as deemed sale of shares back to the issuer upon SAR exercise. (3) If option exercise, report on Form 4. See Note 82 of Release No. 34-37260. If restricted stock vesting, report on Form 5. (4) Assumes reported as derivative securities at time of grant. If, instead, reported as receipt of securities at time of grant (on Form 5), report cash distribution on Form 5; no report required for stock distribution.