

SECURITIES AND EXCHANGE COMMISSION**17 CFR Parts 240, 249 and 274**

[Release Nos. 34-46421; 35-27563; IC-25720; File No. S7-31-02]

RIN 3235-AI62

Ownership Reports and Trading by Officers, Directors and Principal Security Holders**AGENCY:** Securities and Exchange Commission.**ACTION:** Final rule; request for comment.

SUMMARY: We are adopting rule and form amendments to implement the accelerated filing deadline applicable to change of beneficial ownership reports required to be filed by officers, directors and principal security holders under Section 16(a) of the Securities Exchange Act of 1934, as amended by the Sarbanes-Oxley Act of 2002. The amendments are intended to facilitate the statutory changes, which become effective August 29, 2002, consistent with their purpose.

DATES: *Effective Date:* August 29, 2002.*Comment Date:* Comments on the amended rules must be received on or before September 30, 2002.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Comments also may be submitted electronically at the following electronic mail address: rule-comments@sec.gov. To help us process and review your comments more efficiently, comments should be sent by one method only. All comment letters should refer to File No. S7-31-02; this file number should be included in the subject line if electronic mail is used. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW, Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web Site (<http://www.sec.gov>).¹

FOR FURTHER INFORMATION CONTACT:

Anne M. Krauskopf, Special Counsel, David Lee, Special Counsel, or Carol McGee, Special Counsel at (202) 942-2900, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0402.

¹ We do not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. You should submit only information that you wish to make available publicly.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Rules 16a-3,² 16a-6³ and 16a-8⁴ under the Securities Exchange Act of 1934 ("Exchange Act"),⁵ and Forms 3,⁶ 4⁷ and 5⁸ under the Exchange Act.

I. Executive Summary and Background

Section 16⁹ applies to every person who is the beneficial owner of more than 10% of any class of equity security registered under Section 12 of the Exchange Act,¹⁰ and each officer and director (collectively, "reporting persons" or "insiders") of the issuer of such security. Upon becoming a reporting person, or upon the Section 12 registration of that security, Section 16(a)¹¹ requires a reporting person to file an initial report with the Commission disclosing his or her beneficial ownership of all equity securities of the issuer.¹² To keep this information current, Section 16(a) also requires reporting persons to report changes in such ownership, or the purchase or sale of a security-based swap agreement¹³ involving such equity security. Previously, Section 16(a) provided for such transactions to be reported on a monthly basis within 10 days after the close of each calendar month in which such a change in ownership or purchase or sale of a security-based swap agreement occurs.

On July 30, 2002, the Sarbanes-Oxley Act of 2002 (the "Act")¹⁴ was enacted. Section 403(a) of the Act amends Section 16(a) to require reports of such a change in ownership or purchase or sale of a security-based swap agreement "before the end of the second business day following the day on which the subject transaction has been executed,

² 17 CFR 240.16a-3.

³ 17 CFR 240.16a-6.

⁴ We adopt a technical amendment to Rule 16a-8(a)(1) [17 CFR 240.16a-8(a)(1)], which defines trusts subject to Section 16, to implement an amendment that we adopted in Exchange Act Release No. 37260 (Jun. 14, 1996) [61 FR 30392]. This amendment provides that a trust is subject to Section 16 only if the trust is a more than ten percent beneficial owner.

⁵ 15 U.S.C. 78a *et seq.*

⁶ 17 CFR 249.103 and 17 CFR 274.202.

⁷ 17 CFR 249.104 and 17 CFR 274.203.

⁸ 17 CFR 249.105.

⁹ 15 U.S.C. 78p.

¹⁰ 15 U.S.C. 78l.

¹¹ 15 U.S.C. 78p(a).

¹² Rule 3a12-3 [17 CFR 240.3a12-3] provides that securities registered by a foreign private issuer, as defined in Rule 3b-4 [17 CFR 240.3b-4] are exempt from Section 16. The legislative and regulatory actions addressed in this release do not change this exemption.

¹³ As defined in Section 206B of the Gramm-Leach-Bliley Financial Modernization Act of 1999, as amended by H.R. 4577, P. L. No. 106-554, 114 Stat. 2763.

¹⁴ Pub. L. 107-204, 116 Stat. 745.

or at such other time as the Commission shall establish, by rule, in any case in which the Commission determines that such 2-day period is not feasible."¹⁵

Section 403(b) of the Act provides that this amendment becomes effective 30 days after the date of enactment. That effective date is August 29, 2002. Thus, reporting persons will be required to report all transactions subject to Section 16(a) for which the date of execution (trade date) is on or after August 29, 2002 on Form 4 in accordance with the amended two-business day deadline,¹⁶ except where the rules under Section 16(a) provide otherwise.

On August 6, 2002, we announced that we anticipated adopting final rules to implement the new accelerated reporting deadline, effective no later than the August 29, 2002 effective date of the Section 16(a) amendments.¹⁷ The final rules that we adopt today accomplish the following:

- Amend the Section 16(a) forms to conform all references to the Form 4 filing deadline to the amended statutory filing deadline and to reflect that Form 4 is no longer a monthly form.
- Amend Rule 16a-6(b), the small acquisitions rule, to conform the description of the Form 4 deadline contained in that rule to the amended statutory filing deadline.

¹⁵ Section 16(a)(2)(C) (15 U.S.C. 78p(a)(2)(C)), as amended by the Act. Section 30(h) of the Investment Company Act of 1940 (15 U.S.C. 80a-29(h)) provides that "Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of outstanding securities (other than short-term paper) of which a registered closed-end company is the issuer or who is an officer, director, member of an advisory board, investment adviser, or affiliated person of an investment adviser of such a company shall in respect of his transactions in any securities of such company (other than short-term paper) be subject to the same duties and liabilities as those imposed by section 16 of the Securities Exchange Act of 1934 upon certain beneficial owners, directors, and officers in respect of their transactions in certain equity securities." Accordingly, the Act's amendments also accelerate the deadline for change of beneficial ownership reports required pursuant to Section 30(h).

¹⁶ For example, if a transaction is executed any time on Tuesday, September 3, the Form 4 will be due by the close of business (5:30 p.m. Eastern time) at the Commission on Thursday, September 5. Because the Act does not change the due date for Form 3, situations may arise where a reporting person is required to file a Form 4 before the Form 3 is due. In this situation, we encourage the reporting person to file the Form 3 along with the Form 4 at the time the Form 4 is due.

¹⁷ Exchange Act Release No. 46313 (Aug. 6, 2002) [67 FR 51900]. Comment letters relating to that release refer to File No. S7-31-02. Comment letters are available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW, Washington, DC 20549. Electronically submitted comment letters are posted on the Commission's Internet Web Site (<http://www.sec.gov>).

- Amend Rules 16a-3(f) and 16a-6(a) so that transactions between officers or directors and the issuer exempted from Section 16(b)¹⁸ short-swing profit recovery by Rule 16b-3¹⁹ previously reportable on an annual basis on Form 5²⁰ will be required to be reported within two business days on Form 4.
- Amend Rule 16a-3(g) to calculate the two-business day Form 4 due date differently for the following transactions, for which we have determined that the amended Section 16(a) statutory reporting period is otherwise not feasible:²¹
- Transactions pursuant to arrangements that satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c)²² where the reporting person does not select the date of execution; and
- Discretionary Transactions pursuant to employee benefit plans where the reporting person does not select the date of execution.²³

We are not adopting any rules to calculate the Form 4 filing deadline differently based on non-feasibility for any other categories of transactions.²⁴ The amendments we adopt today will apply to transactions that occur on or after August 29, 2002. Transactions previously reportable on Form 5 that are not covered by the Rule 16a-3(f) amendments will remain reportable on Form 5 to the same extent as before, and transactions previously exempt from Section 16(a) reporting will remain exempt. An insider's failure to timely file a Section 16(a) report will remain subject to the company's disclosure obligation,²⁵ which we are not amending.

¹⁸ 15 U.S.C. 78p(b).

¹⁹ 17 CFR 240.16b-3. Rule 16b-3 is available to exempt transactions between an officer or director and the issuer (including an employee benefit plan sponsored by the issuer), subject to satisfaction of the transaction-specific conditions prescribed by the rule.

²⁰ 17 CFR 249.105. Form 5 is due within 45 days after the issuer's fiscal year end.

²¹ In Exchange Act Release No. 46313 we stated that we also would consider calculating the deadline differently for a transaction pursuant to a single market order that is executed over more than one day, but not to exceed a specified number of days. Because we believe that it is feasible to report these transactions as they are executed, we are not modifying the calculation of the statutory two-business day deadline for these transactions.

²² 17 CFR 240.10b5-1(c).

²³ "Discretionary Transaction" is defined in Rule 16b-3(b)(1).

²⁴ However, we request comment in Section IV, below, as to whether there are other types of transactions that require regulatory changes to make it feasible for insiders to report them within the two-business day deadline.

²⁵ This obligation is set forth in Item 405 of Regulations S-K and S-B [17 CFR 229.405 and 17

II. Rule and Form Amendments

A. Conforming Amendments to Rule 16a-6 and Forms 4 and 5

We are amending Form 4 (including the General Instructions to the form) to conform all references to the applicable filing deadline to the amended statutory filing deadline, and to reflect that Form 4 is no longer a monthly form.²⁶ In particular, the revised form provides that the holdings columns must report holdings following the reported transaction(s), rather than month-end holdings.²⁷ The form also specifically provides that reportable Rule 16b-3 exempt transactions must be reported on Form 4.²⁸

In addition, we are adding new column 2A to Table I of Form 4 and column 3A to Table II to require reporting of deemed execution dates computed in accordance with the Rule 16a-3(g) amendments adopted today.²⁹ These columns, which must be completed only if such a deemed execution date applies to the transaction reported,³⁰ will enable investors and members of the Commission staff reading the form to determine if the form was filed on a timely basis as readily as with the current form. Table I column 2 and Table II column 3, which require the transaction date to be reported, will continue to require the transaction's trade date to be reported.

We also are adding new columns 2A and 3A to Form 5, so that investors and members of the Commission staff reading that form similarly will be able to determine how late a transaction was reported.³¹ Finally, we revise Form 5 to

CFR 228.405, respectively], and is required disclosure in the annual report on Form 10-K [17 CFR 249.310] or Form 10-KSB [17 CFR 249.310b] and the proxy statement for the annual meeting at which directors are to be elected [17 CFR 240.14a-101, Item 7].

²⁶ See revised Form 4 General Instruction 1(a), and Items 4 and 5.

²⁷ See revised Form 4 General Instructions 3(a)(i), 3(a)(ii), 3(a)(iii), and 4(a)(i), Table I column 5 and Table II column 9. Reporting holdings following the reported transaction(s) will satisfy the statutory requirement to report "ownership by the filing person at the date of filing" set forth in amended Section 16(a)(3)(B). In keeping with current practice, insiders will reflect changes in holdings resulting from transactions exempt from Section 16(a) in the holdings column of the next otherwise required Form 4 or 5 filed to report a transaction in securities of the same class. See Section IV.A of Exchange Act Release No. 37260. An insider may rely in good faith on the last plan statement in reporting holdings pursuant to 401(k) plans and other Rule 16b-3(c) exempt plans.

²⁸ See revised Form 4 General Instruction 4(a)(i), and amended Rules 16a-3(f)(1)(i)(A), and 16a-3(g)(1), discussed in Section II.B, below, and amended Rule 16a-6(a), discussed below in this section.

²⁹ See Section II.B, below.

³⁰ See revised Form 4 General Instruction 4(a)(ii).

³¹ See revised Form 5 General Instruction 4(a)(ii).

clarify that reportable Rule 16b-3 exempt transactions no longer may be reported on that form on a deferred basis.³²

We plan to publish new forms implementing these amendments as soon as possible. Until amended forms are available, reporting persons should continue to use the current versions, but should modify box 4 on Form 4 to state the month, day and year of the transaction. When using the current forms to report a transaction with a deemed execution date computed pursuant to amended Rule 16a-3(g), a reporting person should include an asterisk next to the trade date in the transaction date column, and add a footnote to disclose the deemed execution date.

Rule 16a-6 permits small acquisitions to be reported on Form 5, subject to specified conditions.³³ If the conditions are no longer met, so that the small acquisition no longer qualifies for deferred reporting on Form 5, it must be reported on a Form 4. We are amending the rule to conform the Form 4 due date for this purpose to the two-business day due date provided by the Act, so the Form 4 will be due two business days after the deferral conditions are no longer met.³⁴

We also are amending the rule so that it will not be available to defer reporting of small acquisitions from the issuer (including an employee benefit plan sponsored by the issuer).³⁵ This will prohibit reliance on Rule 16a-6 to report on Form 5 transactions exempted by Rule 16b-3 that will be required to be reported on Form 4, as described immediately below.

B. Amendments to Rule 16a-3

Rule 16a-3 sets forth the general reporting requirements under Section 16(a). We are amending this rule in several respects to address the reporting modifications effected by the Act.

Form 4 reporting within two business days of officers' and directors' transactions with an issuer exempted by Rule 16b-3 that previously were reportable on Form 5 is necessary to

³² See revised Form 5 General Instruction 4(a)(i)(A). We also adopt technical amendments to Form 3 General Instruction 5(b)(v), Form 4 General Instruction 4(b)(v) and Form 5 General Instruction 4(b)(v) to omit references to furnishing the Social Security Numbers of natural persons, consistent with the amendments we adopted in Securities Act Release No. 7424 (Jun. 25, 1997) [62 FR 35338].

³³ As currently provided in Rule 16a-6(a), a small acquisition is an "acquisition of an equity security not exceeding \$10,000 in market value, or of the right to acquire such securities[.]" The conditions for deferring reporting to Form 5 are set forth in Rules 16a-6(a)(1) and 16a-6(a)(2).

³⁴ Rule 16a-6(b).

³⁵ Rule 16a-6(a).

satisfy the Act's purpose to require immediate disclosure of insider transactions. Accordingly, we amend the rule to eliminate deferred reporting for these Section 16(b) exempt transactions and specifically require reporting on Form 4.³⁶ We previously solicited comment on this regulatory action.³⁷

Consequently, grants, awards and other acquisitions from the issuer exempted by Rule 16b-3(d), dispositions to the issuer exempted by Rule 16b-3(e), and Discretionary Transactions pursuant to employee benefit plans exempted by Rule 16b-3(f) no longer will be reportable on a deferred basis on Form 5, but instead must be reported on Form 4 within two business days.³⁸ Following these amendments, derivative securities transactions reportable on Form 4 will include, without limitation, issuances, exercises,³⁹ and cancellations and reprints of stock options, including repricings.

Like the other amendments we adopt today, the amendments that accelerate reporting of reportable Rule 16b-3 exempt transactions apply to transactions that occur on or after August 29, 2002.⁴⁰ The amendments do

not affect such transactions that occur before the effective date.

In requiring reporting before the end of the second business day following the day on which the transaction is executed, the Act provides the Commission rulemaking authority to calculate that deadline differently "in any case in which the Commission determines that such 2-day period is not feasible." If the trade date is considered the date of execution, we have determined that filing Form 4 within the two-business day deadline would not be feasible for two narrowly defined types of transactions where objective criteria prevent the reporting person from controlling the trade date.

The first exception relates to transactions pursuant to Rule 10b5-1(c) arrangements.⁴¹ A reporting person generally cannot know whether such a transaction will be executed immediately. Where the reporting person has not selected the date of execution, the reporting person generally knows that an order has been placed, but does not control—and may not be able reasonably to predict—when the transaction actually will occur. Instead, price movement in the market may determine the date of execution for these transactions.

The second exception addresses Discretionary Transactions, where the logistics of plan administration may prevent a reporting person from selecting the date of execution.⁴² A reporting person may not reasonably expect a Discretionary Transaction to be executed immediately, but instead at a time consistent with the plan's particular administrative procedures.

Accordingly, the new rules will define the date of execution differently for these transactions, solely for Section 16(a) reporting purposes. In light of the Act's purpose to effect immediate disclosure of reporting persons' transactions, the alternative calculations we adopt for these transactions require expeditious reporting. We are modifying the calculation of the statutory two-business day period as described below for these transactions:

- For a transaction pursuant to a contract, instruction⁴³ or written plan for the purchase or sale of issuer equity securities that satisfies the affirmative defense conditions of Exchange Act Rule 10b5-1(c) where the reporting person does not select the date of execution, the date on which the executing broker, dealer or plan administrator notifies the reporting person of execution of the transaction is deemed the date of execution, so long as the notification date is not later than the third business day following the trade date.⁴⁴

- For a Discretionary Transaction where the reporting person does not select the date of execution, the date on which the plan administrator notifies the reporting person that the transaction has been executed is deemed the date of execution, so long as the notification date is not later than the third business day following the trade date.⁴⁵

In each case, a reporting person must report the transaction on Form 4 before the end of the second business day following the deemed date of execution, as calculated under the applicable rule, for the transaction.⁴⁶ Defining the date of execution as the notification date enables a reporting person to report on Form 4 a transaction of which he or she otherwise would not have notice. However, neither exception will be available if the reporting person has selected the date of transaction execution, for example where a Rule 10b5-1(c) arrangement provides for a sale on the first business day of each month.

The three-business day period provides reasonable time for notification to be made, and is consistent with the Act's purpose to expedite reporting. For both Rule 10b5-1(c) transactions and Discretionary Transactions, we expect the reporting person will make specific arrangements for the broker, dealer or plan administrator to provide the reporting person actual notice of transaction execution as quickly as

³⁶ Rules 16a-3(f)(1)(i)(A) and 16a-3(g)(1). Rule 16a-3(g)(1) also is amended to conform with the statute by providing that Form 4 must be filed before the end of the second business day following the day on which the subject transaction has been executed.

³⁷ "Form 8-K Disclosure of Certain Management Transactions," Securities Act Release No. 8090, Exchange Act Release No. 45742 (Apr. 12, 2002) [67 FR 19914, at 19920] ("Form 8-K Release"). As we stated in Exchange Release No. 46313, in light of the statutory amendments to Section 16(a), we do not intend to consider further our proposed amendments to require companies to report on Form 8-K directors' and executive officers' transactions in company equity securities. However, we continue to consider the other amendments we proposed in the Form 8-K Release. These proposed amendments would require companies to disclose information about (1) directors' and executive officers' arrangements intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c) and (2) company loans and loan guarantees to directors and executive officers that are not prohibited by Section 402 of the Act.

³⁸ The amendment does not affect the Rule 16b-3 exemptive conditions applicable to these types of transactions, or the reporting status of any other transactions addressed by Rule 16a-3(f)(1).

³⁹ The current requirements of Rule 16a-3(f)(1)(i)(A) to report on Form 4 exercises and conversions of derivative securities that are exempt from Section 16(b) short-swing profit recovery under either Rule 16b-3 or Rule 16b-6(b) [17 CFR 240.16b-6(b)] will continue.

⁴⁰ Reporting on Form 5 of other transactions as to which deferred reporting is currently available or for which an insider failed to file a required report remains available. At their option, filing persons may continue to report earlier on Form 4 transactions that are reportable on Form 5, as provided by former Rule 16a-3(g)(2). We redesignate this rule as Rule 16a-3(g)(5) [17 CFR 240.16a-3(g)(5)] and restate it in plain English.

⁴¹ Rule 10b5-1 provides that a person trades "on the basis of" material nonpublic information when the person purchases or sells securities while aware of material nonpublic information. However, Rule 10b5-1(c) establishes affirmative defenses that permit a person to trade in circumstances where it is clear that the information was not a factor in the decision to trade. See Securities Act Release No. 7881, Exchange Act Release No. 43154 (Aug. 15, 2000) [65 FR 51716], adopting Rule 10b5-1.

⁴² A "Discretionary Transaction," which is defined in Rule 16b-3(b)(1), involves an intra-plan transfer of previously invested assets into or out of a plan issuer securities fund, or a cash-out from a plan issuer securities fund.

⁴³ Such an instruction can be in the form of a limit order.

⁴⁴ Rules 16a-3(g)(2) and 16a-3(g)(4) [17 CFR 240.16a-3(g)(2) and 17 CFR 240.16a-3(g)(4)].

⁴⁵ Rules 16a-3(g)(3) and 16a-3(g)(4) [17 CFR 240.16a-3(g)(3) and 17 CFR 240.16a-3(g)(4)].

⁴⁶ As described in Section II.A above, we are adding a column to both Tables I and II on Form 4 to report the deemed date of execution, so investors and members of the Commission staff reading the form will be able to see the applicable date for calculating the due date. We are adding the same column to Form 5, so that form will provide the same information if the transaction is reported on Form 5 because the reporting person failed to file the required Form 4.

feasible.⁴⁷ By deeming the notification date to be the third business day following the trade date if actual notification does not occur by then, the rule limits the potential delay permitted for reporting these transactions on a timely basis.⁴⁸

The broker, dealer or plan administrator may use any means of communication, including oral, paper or electronic means, to notify the reporting person that the transaction has been executed. While a broker or dealer also will have an obligation to provide the reporting person with a transaction confirmation under Exchange Act Rule 10b-10,⁴⁹ the confirmation may not arrive soon enough to give the reporting person the information he or she needs for Section 16(a) reporting purposes. For example, a confirmation sent through the mail could take several days to arrive. We would, therefore, usually expect brokers and dealers to provide the information needed for Section 16(a) reporting purposes to the reporting person either electronically or by telephone.⁵⁰

Regarding Rule 10b5-1(c) transactions, the new rule will be available broadly to any transaction that satisfies the affirmative defense conditions of Rule 10b5-1(c), including transactions pursuant to employee benefit plans and dividend or interest reinvestment plans that are not exempt from Section 16(a) reporting. Following effectiveness of Section 403 of the Act, acquisitions pursuant to Qualified Plans, Excess Benefit Plans, Stock Purchase Plans⁵¹ and the reinvestment of dividends or interest pursuant to broad-based dividend or interest reinvestment plans⁵² will remain exempt from Section 16(a) reporting. In contrast, transactions pursuant to non-qualified deferred compensation plans and other dividend or interest reinvestment plan transactions (such as

acquisitions pursuant to voluntary contributions of additional funds) will be reportable on Form 4 within two business days after the date of execution. However, to the extent that such a transaction satisfies the affirmative defense conditions of Rule 10b5-1(c), the date of execution for Form 4 reporting purposes may be calculated on the modified basis.

III. Electronic Filing and Website Posting

The Act also amends Section 16(a) to require, not later than one year following enactment, electronic filing of change of beneficial ownership reports, and website posting of such reports by both the Commission and issuers.⁵³ We have announced our intention to begin rulemaking to make the filing of Section 16(a) reports on EDGAR mandatory,⁵⁴ and are proceeding expeditiously with that rulemaking and related system programming to assure adoption within the one-year period mandated by the Act.

Meanwhile, we encourage reporting persons and companies filing Section 16(a) reports on their behalf to make these filings electronically.⁵⁵ To facilitate EDGAR conversion under the current filing system, we will accept electronically-filed Section 16(a) reports that are not presented in the standard box format and omit the horizontal and vertical lines separating information items, so long as the captions of the items and all required information are presented in the proper order. Reporting persons who plan to file their Section 16(a) reports electronically should submit Forms ID requesting EDGAR access codes as soon as possible to minimize processing delays.⁵⁶ When making a request, please indicate whether the person for whom codes are requested is a reporting person with respect to any other companies, and whether a CIK number already has been assigned to that person. We also encourage companies to post Section 16(a) reports on their websites before

the July 30, 2003 statutory implementation date.

IV. Request for Comment

We request comment on the changes we are adopting in this release. Are any other technical amendments necessary to implement Section 403 of the Act? Commenters should address whether the amendments to Rule 16a-3(g) to define the date of execution differently for specified types of transactions will make it feasible for insiders to report those transactions within the two-business day deadline. Is any additional time necessary to make Form 4 reporting feasible for these transactions? Alternatively, do the new rules allow more time than is necessary for this purpose?

Commenters also should address whether any other types of transactions require regulatory changes to make it feasible for insiders to report them within that deadline. In this regard, what factors should we consider in making a feasibility determination?

On a broader issue not otherwise addressed in this release, we seek comment whether any changes are required in the treatment of stock options under Sections 16(a) and 16(b). One set of issues involves whether and how the six-month period of Section 16(b) should be applied and calculated in connection with stock options, exercises and the sale of the underlying stock. For example, should a six-month holding period be required as a mandatory condition to exempt grants under Rule 16b-3(d), rather than be one of the alternative permissible bases for an exemption?

V. Procedural Matters

The Administrative Procedure Act generally requires an agency to publish notice of a proposed rulemaking in the **Federal Register**.⁵⁷ This requirement does not apply, however, if the agency "for good cause finds * * * that notice and public procedure are impracticable, unnecessary, or contrary to the public interest."⁵⁸

The Commission believes that it is appropriate to adopt the amendments to Rules 16a-3 and 16a-6 and Forms 4 and 5 without notice and the opportunity for public comment because they are necessary to conform the Section 16(a) rules and forms to the two-business day reporting deadline provided by the amendments to Section 16(a) enacted in Section 403 of the Act that become

⁴⁷ This may require modification of routine procedures, particularly with respect to employee benefit plans.

⁴⁸ Rule 16a-3(g)(4).

⁴⁹ 17 CFR 240.10b-10, which requires broker-dealers to disclose specified information in writing to customers at or before completion of a transaction.

⁵⁰ It is possible, however, that an electronic confirmation provided to a customer could satisfy the requirements of Rule 10b-10 as well as notification for Section 16(a) reporting purposes.

⁵¹ "Qualified Plan" is defined in Rule 16b-3(b)(4). "Excess Benefit Plan" is defined in Rule 16b-3(b)(2). "Stock Purchase Plan" is defined in Rule 16b-3(b)(5). Rule 16a-3(f)(1)(i)(B) exempts these transactions from Section 16(a) reporting because Rule 16b-3(c) exempts them from Section 16(b) short-swing profit recovery.

⁵² Rule 16a-11 [17 CFR 240.16a-11] exempts these acquisitions from Sections 16(a) and 16(b), if the conditions of the rule are met.

⁵³ Section 16(a)(4), as amended by the Act.

⁵⁴ Securities Act Release No. 7803 (Feb. 25, 2000) [65 FR 11507].

⁵⁵ For classes of securities listed on the New York Stock Exchange, the American Stock Exchange and the Chicago Stock Exchange, filing Section 16(a) reports on EDGAR satisfies the requirements of Section 16(a)(1) (as amended) and Rule 16a-3(c) to file the reports with the exchange on which the securities are listed. See staff no-action letters to New York Stock Exchange (Jul. 22, 1998), American Stock Exchange (Jul. 22, 1998) and Chicago Stock Exchange (Jan. 13, 1998).

⁵⁶ Form ID [17 CFR 239.63] is on our website at (<http://www.sec.gov/about/forms/formid.pdf>). These forms should be sent by facsimile to the Commission at (202) 504-2474 or (703) 914-4240.

⁵⁷ See 5 U.S.C. 553(b).

⁵⁸ *Id.*

effective, by their terms, on August 29, 2002.⁵⁹

Unless the rule and form amendments become effective by that date, reporting persons may be confused by the longer time period currently specified by the rules and forms. To satisfy the Act's purpose to require immediate disclosure of insider transactions, some of the amendments eliminate deferred reporting of officers' and directors' reportable transactions with an issuer exempted from short-swing profit recovery by Rule 16b-3.⁶⁰ Without these regulatory amendments, the statutory amendments will become effective without fulfilling their purpose.

The amendments to Rule 16a-3(g) implement specific rulemaking authority granted to the Commission by Section 403 of the Act to compute the two-business day deadline differently in certain narrowly-defined circumstances, based on feasibility. We do not believe Congress intended to require reporting persons to report transactions for which they had no opportunity to obtain notice of execution. Without these regulatory amendments, the statutory amendments will become effective in a manner that is not feasible for these transactions.

The technical amendments to Rule 16a-8(a)(1) implement amendments we previously adopted to provide that a trust is subject to Section 16 only if the trust is a more than ten percent beneficial owner.⁶¹ The technical amendments to the General Instructions to Forms 3, 4 and 5 to omit references to furnishing the Social Security Numbers of natural persons implement a policy that we previously adopted.⁶²

Accordingly, the Commission for good cause finds that a notice and comment period for these rules would be unnecessary, impracticable and contrary to the public interest.

The Administrative Procedure Act also generally requires that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective.⁶³ This requirement, however, does not apply if the agency finds good cause for making the rule effective

sooner.⁶⁴ For the same reasons as it is waiving notice and comment, the Commission finds good cause to make the rules effective August 29, 2002.⁶⁵ In addition, the amendments to Rule 16a-3(g) relieve a restriction.

VI. Paperwork Reduction Act

We already have control numbers for Forms 3 (OMB Control No. 3235-0104), 4 (OMB Control No. 3235-0287) and 5 (OMB Control No. 3235-0362). These forms prescribe beneficial ownership information that a reporting person must disclose. Preparing and filing a report on any of these forms is a collection of information. Consistent with the will of Congress, the amendments conform the Section 16(a) rules and forms to the two-business day reporting deadline provided by the amendments to Section 16(a) enacted in Section 403 of the Act.

Following the amendments adopted today, reporting persons will remain obligated to disclose the same information that they were previously required to report on these forms.⁶⁶ Some transactions previously reported on Form 5 instead will be reported on Form 4. Because of the expedited filing deadline, reporting persons may file Forms 4 more frequently, but each form would report fewer transactions. We therefore believe that the overall information collection burden will remain approximately the same because the same transactions will remain reportable.

VII. Costs and Benefits

The action that the Commission takes today largely represents the implementation of a Congressional mandate. We recognize that implementation of the Act will likely create costs and benefits to the economy. Costs may arise because reporting persons will be required to file Form 4 significantly more quickly after a transaction, and potentially more frequently because Form 4 no longer will be a monthly form. The increased speed of filing also may increase preparation costs. In addition, to the extent that amended Section 16(a) results in an increase in the number of

Forms 4 filed—although the total number of reportable transactions has not been changed by Section 403 of the Act or this release—the aggregate cost of providing this information may increase.

Conversely, amended Section 16(a) is likely to provide significant benefits by making information concerning insiders' transactions in issuer equity securities publicly available substantially sooner than it was before. Making this information available to all investors on a more timely basis should increase market transparency, which will likely enhance market efficiency and liquidity.

In adopting specific rules for transactions for which we have determined that filing Form 4 within the statutory two-business day deadline otherwise would not be feasible, we have considered the associated costs and benefits. The reporting rules that we adopt for these transactions generally involve instances where the reporting person does not control and cannot reasonably be expected to know immediately the precise transaction date. The rules therefore allow reasonable additional time so that reporting is feasible, while requiring expeditious reporting consistent with the Act's purpose to effect immediate disclosure of reporting persons' transactions.

VIII. Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act⁶⁷ requires us, when adopting rules under the Exchange Act, to consider the anti-competitive effective of any rules we adopt. Further, Section 3(f) of the Exchange Act⁶⁸ and Section 2(c) of the Investment Company Act⁶⁹ require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The amendments generally implement a statute that improves the timeliness of information available to investors about insiders' transactions in issuer equity securities. We are adopting rules to provide certain different calculations for the two-business day standard set by Congress. These rules should have no effect on competition and capital formation. They are

⁵⁹ In the release where we announced that we would consider adopting final rules no later than August 29, 2002, we invited public comment on the implementation of the legislative provisions relating to Section 16(a). Exchange Act Release No. 46313 (Aug. 6, 2002) [67 FR 51900].

⁶⁰ We previously solicited comment on this regulatory action in "Form 8-K Disclosure of Certain Management Transactions," Securities Act Release No. 8090, Exchange Act Release No. 45742 (Apr. 12, 2002) [67 FR 19914, at 19920].

⁶¹ Exchange Act Release No. 37260 (Jun. 14, 1996) [61 FR 30392].

⁶² Securities Act Release No. 7424 (Jun. 25, 1997) [62 FR 35338].

⁶³ See 5 U.S.C. 553(d).

⁶⁴ *Id.*

⁶⁵ This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rules to become immediately effective notwithstanding the requirements of 5 U.S.C. § 801 (if the agency finds that notice and public procedure are "impractical, unnecessary, or contrary to the public interest," the rule "shall take effect at such time as the Federal agency promulgating the rule determines").

⁶⁶ The addition of a column on each table—which requires only a date and will be used only for certain narrowly-defined transactions—is a *de minimis* change.

⁶⁷ 15 U.S.C. 78w(a)(2).

⁶⁸ 15 U.S.C. 78c(f).

⁶⁹ 15 U.S.C. 80a-2(c).

designed to increase the efficiency of insider reporting.

IX. Regulatory Flexibility Act

The Regulatory Flexibility Act⁷⁰ does not apply to the rules we adopt today. The Regulatory Flexibility Act requires agencies to prepare analyses for rulemaking only when the Administrative Procedure Act requires general notice of proposed rulemaking.⁷¹ As noted above, the Commission is not required to solicit public comment because the Commission is using the expedited rulemaking procedures under section 553(b) of the Administrative Procedure Act.⁷²

X. Statutory Authority

The amendments contained in this release are adopted under the authority set forth in Sections 3(b),⁷³ 16 and 23(a)⁷⁴ of the Exchange Act, Section 17(a) of the Public Utility Holding Company Act of 1934,⁷⁵ Section 30(h) of the Investment Company Act of 1940, and Section 3(a) of the Sarbanes-Oxley Act of 2002.

Text of Amendments

List of Subjects in 17 CFR Parts 240, 249 and 274

Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is 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, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4 and 80b-11, unless otherwise noted.

2. Section 240.16a-3 is amended by revising paragraphs (f)(1)(i)(A) and (g), to read as follows:

§ 240.16a-3 Reporting transactions and holdings.

* * * * *

(f)(1) * * *

(i) * * *

(A) Exercises and conversions of derivative securities exempt under

either § 240.16b-3 or § 240.16b-6(b), and any transaction exempt under § 240.16b-3(d), § 240.16b-3(e), or § 240.16b-3(f) (these are required to be reported on Form 4);

* * * * *

(g)(1) A Form 4 must be filed to report: All transactions not exempt from section 16(b) of the Act; All transactions exempt from section 16(b) of the Act pursuant to § 240.16b-3(d), § 240.16b-3(e), or § 240.16b-3(f); and all exercises and conversions of derivative securities, regardless of whether exempt from section 16(b) of the Act. Form 4 must be filed before the end of the second business day following the day on which the subject transaction has been executed.

(2) Solely for purposes of section 16(a)(2)(C) of the Act and paragraph (g)(1) of this section, the date on which the executing broker, dealer or plan administrator notifies the reporting person of the execution of the transaction is deemed the date of execution for a transaction where the following conditions are satisfied:

(i) the transaction is pursuant to a contract, instruction or written plan for the purchase or sale of equity securities of the issuer (as defined in § 16a-1(d)) that satisfies the affirmative defense conditions of § 240.10b5-1(c) of this chapter; and

(ii) the reporting person does not select the date of execution.

(3) Solely for purposes of section 16(a)(2)(C) of the Act and paragraph (g)(1) of this section, the date on which the plan administrator notifies the reporting person that the transaction has been executed is deemed the date of execution for a discretionary transaction (as defined in § 16b-3(b)(1)) for which the reporting person does not select the date of execution.

(4) In the case of the transactions described in paragraphs (g)(2) and (g)(3) of this section, if the notification date is later than the third business day following the trade date of the transaction, the date of execution is deemed to be the third business day following the trade date of the transaction.

(5) At the option of the reporting person, transactions that are reportable on Form 5 may be reported on Form 4, so long as the Form 4 is filed no later than the due date of the Form 5 on which the transaction is otherwise required to be reported.

* * * * *

3. Section 240.16a-6 is amended by revising paragraph (a) introductory text and paragraph (b) to read as follows:

§ 240.16a-6 Small acquisitions.

(a) Any acquisition of an equity security or the right to acquire such securities, other than an acquisition from the issuer (including an employee benefit plan sponsored by the issuer), not exceeding \$10,000 in market value shall be reported on Form 5, subject to the following conditions:

* * * * *

(b) If an acquisition no longer qualifies for the reporting deferral in paragraph (a) of this section, all such acquisitions that have not yet been reported must be reported on Form 4 before the end of the second business day following the day on which the conditions of paragraph (a) of this section are no longer met.

4. Section 240.16a-8 is amended by revising paragraph (a)(1) to read as follows:

§ 240.16a-8 Trusts.

(a) *Persons subject to section 16.* (1) *Trusts.* A trust shall be subject to section 16 of the Act with respect to securities of the issuer if the trust is a beneficial owner, pursuant to § 240.16a-1(a)(1), of more than ten percent of any class of equity securities of the issuer registered pursuant to section 12 of the Act ("ten percent beneficial owner").

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

5. The authority citation for Part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted.

* * * * *

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

6. The authority citation for Part 274 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, and 80a-29, unless otherwise noted.

7. Form 3 (referenced in § 249.103 and § 274.202) and the General Instructions thereto are amended by revising the fourth sentence of paragraph (b)(v) of General Instruction 5, to read as follows:

Note— The text of Form 3 does not and this amendment will not appear in the Code of Federal Regulations.

Form 3—Initial Statement of Beneficial Ownership of Securities

* * * * *

General Instructions

* * * * *

⁷⁰ 5 U.S.C. 601-612.

⁷¹ 5 U.S.C. 603(a).

⁷² See Section V, above.

⁷³ 15 U.S.C. 78c(b).

⁷⁴ 15 U.S.C. 78w(a).

⁷⁵ 15 U.S.C. 79q(a).

5. Holdings Required To Be Reported

* * * *

(b) Beneficial Ownership Reported (Pecuniary Interest)

* * * *

(v) * * * Indicate only the name and address of the designated filer in Item 1 of Form 3 and attach a list of the names and addresses (or, if entities, IRS identification numbers instead of addresses) of each other reporting person. * * *

* * * *

8. Form 4 (referenced in § 249.104 and § 274.203) and the General Instructions thereto are amended by:

a. Revising the first sentence of General Instruction 1(a);

b. Revising General Instructions 3(a)(i), 3(a)(ii) and 3(a)(iii);

c. Revising General Instruction 4(a)(i) and the first sentence of the Note thereto;

d. Adding a sentence at the end of General Instruction 4(a)(ii) before the Note thereto;

e. Revising the fourth sentence of General Instruction 4(b)(v); and revising Items 4 and 5 to the information preceding Table I;

f. Adding column 2A to follow column 2 in Table I;

g. Revising column 5 in Table I;

h. Adding column 3A to follow column 3 in Table II; and

i. Revising column 9 in Table II.

The revisions read as follows:

Note— The text of Form 4 does not and this amendment will not appear in the Code of Federal Regulations.

Form 4—Statement of Changes in Beneficial Ownership of Securities

* * * *

General Instructions

1. When Form Must Be Filed

(a) This Form must be filed before the end of the second business day following the day on which a transaction resulting in a change in beneficial ownership has been executed (see Rule 16a-1(a)(2) and Instruction 4 regarding the meaning of “beneficial owner,” and Rule 16a-3(g) regarding determination of the date of execution for specified transactions). * * *

* * * *

3. Class of Securities Reported

(a) (i) Persons reporting pursuant to Section 16(a) of the Exchange Act must report each transaction resulting in a change in beneficial ownership of any class of equity securities of the issuer and the beneficial ownership of that class of securities following the reported transaction(s), even though one or more of such classes may not be registered pursuant to Section 12 of the Exchange Act.

(ii) Persons reporting pursuant to Section 17(a) of the Public Utility Holding Company Act of 1935 must report each transaction

resulting in a change in beneficial ownership of any class of securities (equity or debt) of the registered holding company and all of its subsidiary companies and the beneficial ownership of that class of securities following the reported transaction(s). Specify the name of the parent or subsidiary issuing the securities.

(iii) Persons reporting pursuant to Section 30(h) of the Investment Company Act of 1940 must report each transaction resulting in a change in beneficial ownership of any class of securities (equity or debt) of the registered closed-end investment company (other than “short-term paper” as defined in Section 2(a)(38) of the Investment Company Act) and the beneficial ownership of that class of securities following the reported transaction(s).

* * * *

4. Transactions and Holdings Required To Be Reported

(a) General Requirements

(i) Report, in accordance with Rule 16a-3(g): (1) all transactions not exempt from Section 16(b); (2) all transactions exempt from Section 16(b) pursuant to § 240.16b-3(d), § 240.16b-3(e), or § 240.16b-3(f); and (3) all exercises and conversions of derivative securities, regardless of whether exempt from Section 16(b) of the Act. Every transaction must be reported even though acquisitions and dispositions are equal. Report total beneficial ownership following the reported transaction(s) for each class of securities in which a transaction was reported.

Note: The amount of securities beneficially owned following the reported transaction(s) specified in Column 5 of Table I and Column 9 of Table II should reflect holdings reported or required to be reported by the date of the Form. * * *

(ii) * * * A deemed execution date must be reported in Column 2A of Table I or Column 3A of Table II only if the execution date for the transaction is calculated pursuant to § 240.16a-3(g)(2) or § 240.16a-3(g)(3).

* * * *

(b) Beneficial Ownership Reported (Pecuniary Interest)

* * * *

(v) * * * Indicate only the name and address of the designated filer in Item 1 of Form 4 and attach a list of the names and addresses (or, if entities, IRS identification numbers instead of addresses) of each other reporting person. * * *

* * * *

Form 4

* * * *

4. Statement for Month/Day/Year

5. If Amendment, Date of Original (Month/Day/Year)

* * * *

Table I.—Non-Derivative Securities Acquired, Disposed of, or Beneficially Owned

* * * *

2A. Deemed Execution Date, If Any (Month/Day/Year)

* * * *

5. Amount of Securities Beneficially Owned Following Reported Transaction(s)

* * * *

Table II.—Derivative Securities Acquired, Disposed of, or Beneficially Owned (e.g., puts, calls, warrants, options, convertible securities)

* * * *

3A. Deemed Execution Date, if any (Month/Day/Year)

* * * *

9. Number of Derivative Securities Beneficially Owned Following Reported Transaction(s)

* * * *

9. Form 5 (referenced in § 249.105) and the General Instructions thereto are amended by:

a. Revising General Instruction 4(a)(i)(A);

b. Adding a sentence at the end of General Instruction 4(a)(ii);

c. Revising the fourth sentence of General Instruction 4(b)(v);

d. Adding column 2A to follow column 2 in Table I; and

e. Adding column 3A to follow column 3 in Table II.

The revisions read as follows:

Note— The text of Form 5 does not and this amendment will not appear in the Code of Federal Regulations.

Form 5—Annual Statement of Beneficial Ownership of Securities

* * * *

4. Transactions and Holdings Required To Be Reported

(a) General Requirements

(i) * * *

(A) Any transaction during the issuer's most recent fiscal year that was exempt from Section 16(b) of the Act, except: (1) any transaction exempt from Section 16(b) pursuant to § 240.16b-3(d), § 240.16b-3(e), or § 240.16b-3(f) (these are required to be reported on Form 4); (2) any exercise or conversion of derivative securities exempt under either § 240.16b-3 or § 240.16b-6(b) (these are required to be reported on Form 4); (3) any transaction exempt from Section 16(b) of the Act pursuant to § 240.16b-3(c), which is exempt from Section 16(a) of the Act; and (4) any transaction exempt from Section 16 of the Act pursuant to another Section 16(a) rule;

* * * *

(ii) * * * A deemed execution date must be reported in Column 2A of Table I or Column 3A of Table II only if the execution date for the transaction is calculated pursuant to § 240.16a-3(g)(2) or § 240.16a-3(g)(3).

* * * *

(b) Beneficial Ownership Reported
(Pecuniary Interest)

* * * * *

(v) * * * Indicate only the name and address of the designated filer in Item 1 of Form 5 and attach a list of the names and addresses (or, if entities, IRS identification numbers instead of addresses) of each other reporting person. * * *

* * * * *

Form 5

* * * * *

Table I.—Non-Derivative Securities
Acquired, Disposed of, or Beneficially
Owned

* * * * *

2A. Deemed Execution Date, if any (Month/
Day/Year)

* * * * *

Table II.—Derivative Securities Acquired,
Disposed of, or Beneficially Owned (e.g.,
puts, calls, warrants, options, convertible
securities)

* * * * *

3A. Deemed Execution Date, if any (Month/
Day/Year)

* * * * *

Dated: August 27, 2002.

By the Commission.

Jill M. Peterson,*Assistant Secretary.*

[FR Doc. 02-22301 Filed 8-28-02; 3:03 pm]

BILLING CODE 8010-01-P