

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 239 and 249

[Release No. 33-8090; 34-45742; File No. S7-09-02]

RIN 3235-A143

Form 8-K Disclosure of Certain Management Transactions

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments that would require some public companies to file current reports describing: directors' and executive officers' transactions in company equity securities, directors' and executive officers' arrangements for the purchase and sale of company equity securities, and loans of money to a director or executive officer made or guaranteed by the company or an affiliate of the company. The purpose of the proposed amendments is to provide investors with prompt disclosure of this information, so that investors will be able to make investment and voting decisions on a better-informed and more timely basis.

DATES: Comments should be received on or before June 24, 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. All comment letters should refer to File No. S7-09-02; 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, at (202) 942-2900, or Mark A. Borges, Special Counsel, at (202) 942-2910, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0312.

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 proposing amendments to Form 8-K² under the Securities Exchange Act of 1934 ("Exchange Act"),³ and related amendments to Rule 144⁴ and Forms S-2,⁵ S-3,⁶ and S-8⁷ under the Securities Act of 1933 ("Securities Act").⁸

I. Executive Summary

In order to keep current the information required to be included in the registration statement under Section 12 of the Exchange Act,⁹ Exchange Act Section 13(a)¹⁰ requires every issuer of a security registered under Section 12 to file such information as the Commission may prescribe by rule "as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security." For these purposes, our rules require annual reports on Forms 10-K and 10-KSB,¹¹ quarterly reports on Forms 10-Q and 10-QSB,¹² and current reports on Form 8-K.¹³ Similar disclosure must be provided in the proxy statement for the annual meeting at which directors are elected required by the rules under Exchange Act 14(a)¹⁴ because it is material to shareholders' voting decisions. We also require reporting companies to file these reports and proxy statements in electronic format.¹⁵

We propose to amend Form 8-K under the Exchange Act to require companies with a class of equity

securities registered under Exchange Act Section 12 to report information about:

- Directors' and executive officers' transactions in company equity securities (including derivative securities transactions and transactions with the company);
- Directors' and executive officers' arrangements for the purchase or sale of company equity securities intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c);¹⁶ and
- Loans of money to directors and executive officers made or guaranteed by the company or an affiliate of the company.

Reports of transactions and loans with an aggregate value of \$100,000 or more would be due within two business days.

Reports of transactions and loans with a smaller aggregate value, grants and awards pursuant to employee benefit plans, and Rule 10b5-1 arrangements generally would be due by the close of business on the second business day of the following week. However, reports of transactions and loans with an aggregate value less than \$10,000 would be deferrable until the aggregate cumulative value of those unreported events for the same director or executive officer exceeds \$10,000.

II. Background

A company's registration statement on Form 10 or Form 10-SB¹⁷ to register a class of equity securities under Section 12 of the Exchange Act must identify management and include information about management's business experience, executive compensation, management's security ownership, and management's transactions with and indebtedness to the company.¹⁸ This required disclosure provides investors with information about:

- Executive compensation paid in the form of securities;
- The extent to which management's economic interests are aligned with those of shareholders through ownership of company equity securities; and
- Management's transactions with and relationships to the company

¹⁶ 17 CFR 240.10b5-1(c).

¹⁷ 17 CFR 249.210 and 17 CFR 249.210b, respectively. Form 8-A [17 CFR 249.208a] is available for the same purpose for an issuer that is already subject to a reporting requirement under Section 13 or Section 15(d) of the Exchange Act. Form 8-A is an abbreviated form that does not require these issuers to repeat information they previously filed.

¹⁸ Items 401, 402, 403, and 404 of Regulations S-K [17 CFR 229.401, 402, 403, and 404] and S-B [17 CFR 228.401, 402, 403, and 404]. Respectively, they comprise Items 5, 6, 4, and 7 of Form 10 and Form 10-SB.

² 17 CFR 249.308.

³ 15 U.S.C. 78a *et seq.*

⁴ 17 CFR 230.144.

⁵ 17 CFR 239.12.

⁶ 17 CFR 239.13.

⁷ 17 CFR 239.16b.

⁸ 15 U.S.C. 77a *et seq.*

⁹ 15 U.S.C. 78l.

¹⁰ 15 U.S.C. 78m(a).

¹¹ 17 CFR 249.310 and 17 CFR 249.310b, respectively. Generally, Exchange Act Rules 13a-1 [17 CFR 240.13a-1] and 15d-1 [17 CFR 240.15d-1] require issuers with securities registered under Section 12 of the Exchange Act and issuers subject to the reporting requirements of Section 15(d) of the Exchange Act [15 U.S.C. 78o(d)] to file such annual reports.

¹² 17 CFR 249.308a and 17 CFR 249.308b, respectively. Generally, Exchange Act Rules 13a-13 [17 CFR 240.13a-13] and 15d-13 [17 CFR 240.15d-13] requires issuers with securities registered under Section 12 of the Exchange Act and issuers subject to the reporting requirements of Section 15(d) of the Exchange Act to file such quarterly reports.

¹³ Generally, Exchange Act Rule 13a-11 [17 CFR 240.13a-11] requires issuers with securities registered under Section 12 of the Exchange Act to file a current report on Form 8-K within the period specified by the form, unless the issuer previously reported substantially the same information. Exchange Act Rule 15d-11 [17 CFR 240.15d-11] generally applies the same requirement to issuers subject to the reporting requirements of Section 15(d) of the Exchange Act.

¹⁴ 15 U.S.C. 78n(a), which authorizes Regulation 14A [17 CFR 240.14a-1 *et seq.*].

¹⁵ Rule 101(a)(1)(iii) of Regulation S-T [17 CFR 232.101(a)(1)(iii)].

beyond the scope of employment that could affect management's performance of its duties.

Changes in securities ownership and some management transactions that are disclosed also can provide information regarding management's view of the company's performance and prospects.

Under current regulations, the information must be updated annually in the company's annual report on Form 10-K or Form 10-KSB.¹⁹ The information may be incorporated by reference from the company's definitive proxy statement for the annual meeting at which directors are elected, where similar disclosure also is required because it is material to shareholders' voting decisions.²⁰ We do not propose to revise those disclosure requirements in this rulemaking.

However, advances in technology and the increased dependence on the ready availability of current corporate information have reshaped the way our markets operate. Technological developments that significantly reduce timeframes for the capture and analysis of information necessitate a new consideration of the timing of mandated disclosure to the markets. We believe it would enable investors to make investment and voting decisions on a more timely and better informed basis, provide more timely information regarding management's view of company performance or prospects, protect investors, and promote fair dealing in company equity securities if companies were required to report additional information related to these subjects on a more current basis. To this end, we propose to amend Form 8-K.

Some of the information that a company would report with respect to directors' and executive officers' transactions in company equity securities also is reportable by officers and directors under Section 16(a) of the Exchange Act.²¹ However, Section 16(a) requires disclosure that may be filed too slowly for the public to obtain the maximum benefit from the information,²² and the reports are not

always readily accessible because they are not required to be filed electronically.²³ As described below, the proposal would require the company to report electronically significant information concerning transactions that may reveal directors' and executive officers' views as to company prospects.²⁴ We believe that these proposed reports would protect investors and promote fair dealing in the company's securities by enabling investors to make informed decisions on a more timely basis. As proposed, the categories of transactions to be reported currently on Form 8-K would not replicate all the transactions that officers and directors must report under Section 16(a), but only those most related to the purpose of the newly proposed current disclosure.

Moreover, the Section 16(a) filings do not report two categories of information—directors' and executive officers' arrangements under Exchange Act Rule 10b5-1 and their receipt of loans from, or guaranteed by, the company or an affiliate of the company—that we believe also are of significant informational value and should be reported on a current basis.²⁵ Because this information, like information concerning directors' and executive officers' transactions, relates to both the market for company equity securities and directors' and executive officers' relationship to the company, we propose to require companies to report this information on Form 8-K.

Reports on Form 5 [17 CFR 249.105], which applies to most transactions between an officer or director and the company, are due within 45 days after the company's fiscal year end, creating a delay of up to 410 days between a reportable transaction and filing. Exchange Act Rule 16a-3(f)(1) [17 CFR 240.16a-3(f)(1)].

²³ The Commission has permitted voluntary EDGAR filing of these reports since 1995. Securities Act Release No. 7231 (Oct. 5, 1995) [60 FR 53474]. In Securities Act Release No. 7803 (Feb. 25, 2000) [65 FR 11507], the Commission stated that it intends to engage in future rulemaking to make the filing of Section 16(a) forms on EDGAR mandatory.

²⁴ The relationship between management's transactions and company equity securities performance has been the subject of significant study. See J. Lakonishok and I. Lee, "Are Insiders' Trades Informative?," Review of Financial Studies, Vol. 14, Issue 1 (Spring 2001).

²⁵ Item 404 of Regulations S-K and S-B requires disclosure of any director or executive officer's indebtedness to the company or its subsidiaries at any time since the beginning of the company's last fiscal year in an amount in excess of \$60,000. This disclosure, which is filed annually on Form 10-K or Form 10-KSB and the proxy statement for the annual meeting at which directors are elected, does not address issues involving use of company equity securities as collateral.

III. Proposed Changes

A. Addition of New Form 8-K Item

We propose to amend the current report on Form 8-K to add Item 10, which would require companies with a class of equity securities registered under Section 12 to report on Form 8-K:

- Each director's and executive officer's transactions in company equity securities (whether or not of the class registered under Section 12), including the acquisition and disposition of derivative securities, and the exercise, termination or settlement of derivative securities;
- Each director's and executive officer's adoption, modification or termination of a contract, instruction or written plan for the purchase or sale of company equity securities intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c);²⁶ and
- Each loan of money to a director or executive officer made or guaranteed by the company or an affiliate of the company.

Current reports of information regarding changes in directors' and executive officers' holdings of company equity securities might in some cases reveal shifts in the alignment between management's and shareholders' economic interests. Such reports, particularly with respect to derivative securities used by directors and executive officers for hedging purposes, also could disclose in some cases transactions by directors and executive officers that might be construed as severing the link between executive compensation and company equity securities performance.

Moreover, current reports of information regarding directors' and executive officers' transactions in company equity securities would provide public investors timely disclosure of potentially useful information as to management's views of the performance or prospects of the company. Many public investors take

²⁶ For purposes of insider trading liability under Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Exchange Act Rule 10b-5 [17 CFR 240.10b-5], Rule 10b5-1 provides that "a purchase or sale of a security of an issuer is 'on the basis of' material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale." Compliance with the affirmative defense conditions of Rule 10b5-1(c) allows a person to plan securities transactions in advance while not aware of material nonpublic information, and later execute the transactions as planned without Section 10(b) and Rule 10b-5 liability, even if aware of material nonpublic information at the time a planned transaction occurs.

¹⁹ Items 10, 11, 12, and 13 of Form 10-K and Items 9, 10, 11, and 12 of Form 10-KSB.

²⁰ Items 6, 7, and 8 of Schedule 14A [17 CFR 240.14a-101]. The proxy statement also includes additional executive compensation disclosure that addresses the relationship between executive compensation and a company's equity securities performance. This information is not deemed incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent specifically incorporated by reference.

²¹ 15 U.S.C. 78p(a).

²² Section 16(a) establishes that reports on Form 4 [17 CFR 249.104] are due within 10 days after the close of the month in which the reportable transaction occurs, creating a delay of 10 to 40 days.

the position that timely disclosure of these transactions is necessary for them to make informed investment decisions.²⁷

Similarly, current reports disclosing that a director or executive officer has entered into, modified or terminated a Rule 10b5-1 contract, instruction or written plan for the purchase or sale of company equity securities may provide investors with more extensive disclosure of potentially useful information as to management's views of the performance and prospects of the company. Finally, current reports of company (or company affiliate) loans and guarantees of third-party loans to directors and executive officers would inform investors of financial arrangements not generally available to shareholders that may result in the receipt of *de facto* additional compensation by the director or executive officer.

1. Covered Directors and Executive Officers

A company would be required to report under Item 10 with respect to all directors and executive officers. For purposes of the proposal, "executive officer" would be defined by Exchange Act Rule 3b-7.²⁸ This is the same definition that applies for purposes of management disclosure in Forms 10, 10-SB, 10-K, 10-KSB, and Schedule 14A.

For purposes of Section 16, our rules define "officer" similarly.²⁹ However, Section 16 "officers" also specifically include principal financial officers and principal accounting officers (or controllers where there is no principal accounting officer), and officers of the company's parent(s) or subsidiaries if they perform significant policy-making functions for the issuer.

Unlike other company disclosure obligations and insiders' Section 16(a) reporting obligations, the proposed Item 10 reports would apply only with respect to directors and executive officers, and not to principal security holders. In contrast, a company must report share ownership by persons who

beneficially own more than five percent of any class of the registrant's voting securities³⁰ in the registration statement on Form 10 or Form 10-SB,³¹ update it annually in the annual report on Form 10-K or Form 10-KSB,³² and include it in the definitive proxy statement for the annual meeting at which directors are elected.³³ Beneficial owners of more than ten percent of a class of equity securities registered under Section 12³⁴ are subject to Section 16 of the Exchange Act.

However, these beneficial owners may not be subject to the same fiduciary duties to the company as directors and executive officers, and do not receive compensation from the company. Further, the company's relationship to these beneficial owners, which in some cases may even be hostile, does not necessarily facilitate current reporting by the company. Accordingly, the proposal would not require a company to report transactions in company equity securities (or other Item 10 events) by major shareholders who are not also directors or executive officers.

Questions regarding what persons' Item 10 events should be reported:

- Is the Rule 3b-7 definition the appropriate definition of "executive officer" for purposes of the proposal?
- In practice, do companies generally identify principal financial officers, principal accounting officers, and controllers as Rule 3b-7 "executive officers"?
- If not, should companies also be required specifically to report with respect to these officers under Item 10?
- Should Item 10 reporting apply with respect to directors who are not also executive officers?
- Are investors as interested in transactions by these directors? What about their Rule 10b5-1 arrangements and loans made to them (or guaranteed by) the company or its affiliates?
- Does reporting with respect to these directors provide additional concerns for issuers?
- Does Section 16 reporting by these directors provide sufficiently timely information for issuers?

²⁷ See, e.g., J. Moreland, "Two Modest Proposals for Fixing Insider Trading Rules," *TheStreet.Com* (Feb. 11, 2002); T. Mulligan, "Calls for Faster, Fuller Disclosure by Insiders," *Los Angeles Times* (Mar. 3, 2002); A. Sloan, "One Enron Lesson: Some Insider Trading Falls Outside the Timely-Reporting Rule," *Washington Post* (Mar. 5, 2002); and A. Beard, "Insiders' Trades Spark Outsiders' Interest," *Financial Times* (Apr. 8, 2002).

²⁸ 17 CFR 240.3b-7.

²⁹ Exchange Rule 16a-1(f) [17 CFR 240.16a-1(f)]. Further, a note to Rule 16a-1(f) establishes a presumption that a person whom the company identifies as an "executive officer" pursuant to Item 401(b) of Regulation S-K is an "officer" for purposes of Section 16.

³⁰ Beneficial owners of more than five percent of a class of equity securities registered under Section 12 are subject to the reporting requirements of Section 13(d) of the Exchange Act [15 U.S.C. 78m(d)].

³¹ Item 403 of Regulations S-K and S-B, and Item 4 of Forms 10 and 10-SB.

³² Item 12 of Form 10-K and Item 11 of Form 10-KSB.

³³ Item 6 of Schedule 14A.

³⁴ As defined in Exchange Act Rule 16a-1(a)(1) [17 CFR 240.16a-1(a)(1)].

• Do investors need to know about more than ten percent beneficial owners' transactions earlier than those transactions are reportable under Section 16(a)?

—Would companies reasonably be able to implement procedures and systems to report with respect to more than ten percent beneficial owners under Item 10?

—What would be the impact on more than ten percent beneficial owners of extending the Item 10 requirement with respect to them?

• Are there any other persons whose transactions and other events should be expressly included in (or excluded from) the proposal?

2. Reporting Deadlines

As proposed, most Item 10 events would be reportable early in the week following the event. However, events that would be of heightened significance to investors would be reportable on an accelerated basis, and *de minimis* events would be reportable on a deferred basis. Specifically:

- An Item 10 Form 8-K would be due within two business days following a transaction or loan with an aggregate value of \$100,000 or more with respect to a director or executive officer, other than a grant or award pursuant to an employee benefit plan.
- Employee benefit plan grants and awards, transactions and loans with an aggregate value less than \$100,000, and Rule 10b5-1 arrangements generally would be reportable not later than the close of business on the second business day of the week following the week in which the event occurred.
- The report of a transaction or loan with an aggregate value not exceeding \$10,000 could be deferred until the aggregate cumulative value of unreported transactions and loans with respect to the same director or executive officer exceeds \$10,000.

The date of a reportable event would be the date on which the parties enter into an agreement. For example, in the case of a sale of securities to the company or a loan from the company, the date would be the date of the agreement and not the date of completion of the sale or making of the loan. In the case of a line of credit or similar lending arrangement, both the date of entering into the arrangement and the date of a loan under that arrangement would be reportable. In the case of an open market securities transaction, the date would be the trade date and not the settlement date. In the case of a Rule 10b5-1 arrangement, the date would be the date on which the

arrangement is made, modified or terminated.

The proposed deadlines are designed to balance the significance to investors of the reportable information and the company's reporting burden. The two business day accelerated deadline is intended to provide investors with rapid disclosure of the most significant events, while allowing the company sufficient time to compile the required information. The next week deadline is intended to provide investors with timely disclosure, while facilitating the company's ability to report on a single Form 8-K multiple events in the same time frame with respect to more than one director or executive officer. The deferred deadline would allow the company to defer reporting events that, by virtue of relatively low aggregate value, would presumably be less significant to investors. All transactions reportable on the same day could be filed on a single Form 8-K under Item 10.

The \$100,000 and \$10,000 thresholds would apply to the aggregate value of the reportable transaction or loan. These dollar thresholds are intended to tailor the reporting requirements based upon the size of the event and the presumed significance of the information to investors. The thresholds would apply to employee benefit plan transactions other than grants and awards, such as option exercises, volitional intra-plan transfers involving a company equity securities fund, and deferral of cash compensation in phantom stock units. For physically-settled derivative securities, the aggregate value would be computed by reference to the market value of the underlying securities on the date of the transaction. For cash-settled derivative securities, the aggregate value would be computed based on the transaction's notional value.³⁵ Where exercise or tax withholding rights or other net settlement procedures are used in the exercise, conversion or other settlement of a derivative security, the aggregate value would be computed on a gross basis.

As a practical matter, a company would need to institute procedures and systems to assure Item 10 compliance. The general instruction would include a Commission finding that it is not in the public interest to impose any sanction on a company, notwithstanding a violation, that demonstrates that:

(1) At the time of the violation, it had designed procedures and a system for applying such procedures sufficient to

provide reasonable assurances that Item 10 events are timely reported;

(2) At the time of the violation, the company followed those procedures; and

(3) As promptly as reasonably practicable, the company made a filing to correct any violation.³⁶ This provision is intended to provide protection against sanctions for companies that experience isolated failures to comply notwithstanding appropriate procedures. Repeated or systemic violations or those that otherwise are not isolated would suggest deficiencies in procedures or their application that would be inconsistent with availability of the provision. In addition, where the company makes the demonstration described above, the Commission nevertheless could proceed against a director or executive officer. As with other Section 13(a) violations, a private right of action would not arise.

Questions regarding implementation and costs:

- Will companies subject to Item 10 be able to implement reasonable procedures to prepare and file Item 10 Forms 8-K under these proposed deadlines?

- To what extent will companies be able to make use of existing procedures to compile and report directors' and executive officers' transaction information?

- What additional costs will companies incur to compile information and convert it into electronic format for filing?

Questions regarding appropriateness of proposed reporting deadlines and dollar thresholds:

- Do the proposed deadlines and thresholds appropriately balance investors' informational needs and the company's reporting burden?

- Is \$100,000 with respect to transactions by or loans to a single director or executive officer an appropriate threshold for requiring reporting within two business days?

- Would either a higher or lower dollar threshold, such as \$60,000³⁷ or \$150,000, better quantify events of sufficient significance to investors to warrant accelerated reporting?

- Should the proposed two business days deadline be either shorter or longer (such as one or three business days)?

- Are there criteria other than aggregate dollar value that should

determine what events should be reported within the accelerated deadline?

- For example, should the accelerated deadline always apply regardless of dollar value if the reportable event is a transaction with the company or a loan from (or guaranteed by) the company?

- Should foreclosure on or forgiveness of a loan from (or guaranteed by) the company always be reportable within two business days?

- Should aggregate dollar value determine the reporting deadline for additional events?

- Should the deadline for reporting a Rule 10b5-1 arrangement be determined based on the aggregate proposed transaction price or aggregate market value of the securities subject to purchase or sale under the arrangement, in the same manner as proposed for transactions and loans?

- Similarly, should the deadline for reporting grants and awards under employee benefit plans be based on the aggregate value of the grant or award?

- Should the close of business on the second business day of the week following the event be the deadline for more (or all) Item 10 reports?

- Are there employee benefit plan transactions other than grants and awards for which this deadline would be appropriate?

- Should this deadline be shorter or longer, such as the first or third "rather than the second" business day of the week following the event?

- Are there any events for which a longer period, such as five business days after the event, would be an appropriate reporting deadline?

- Is \$10,000 an appropriate threshold for permitting deferred reporting of smaller events?³⁸

- Would a different amount, such as \$20,000 or \$30,000, better quantify *de minimis* events which might not be of significant interest to investors?

- Should this dollar threshold vary depending on whether the reportable event is a transaction with or a loan from (or guaranteed by) the company?

- Should there be a maximum aggregation period for smaller events beyond which reporting could no longer be deferred? If so, what would be an appropriate period?

³⁶ Proposed amendment to General Instruction B.1 to Form 8-K.

³⁷ Item 404(a) of Regulations S-K and S-B generally requires disclosure of a company's transactions with management in which the amount involved exceeds \$60,000.

³⁸ The proposed \$10,000 threshold is similar to the \$10,000 threshold for deferred reporting of small acquisitions under Exchange Act Rule 16a-6 [17 CFR 240.16a-6]. However, the proposed Item 10 deferred reporting threshold would not be limited to acquisitions.

³⁵ Notional value generally refers to the gross value of the securities or other assets from which the cash-settlement value is calculated.

- Instead should reports of all transactions less than \$100,000 be deferred until their aggregate cumulative value equals \$100,000?
- Are there any categories of events that should be ineligible for deferred reporting?

As a general matter, would the clarity provided by establishing reporting deadlines based on aggregate value outweigh the administrative burden of tracking aggregate value?

Questions regarding application of dollar thresholds to specific transactions:

- To prevent evasion, should transactions or loans that occur within the same two business day period be considered together for purposes of computing the dollar threshold for reporting under the earlier deadline?
- Should there be a longer (or shorter) aggregation period?

• Where the exercise of an option is followed by a disposition of the underlying securities, should the aggregate value be computed by reference solely to the disposition, rather than by adding the fair market value of the acquired securities to the dollar amount of the disposition?

Questions regarding proposed Commission finding:

- Does the proposed finding appropriately address company liability for violations?
- Should companies be required to disclose, for example in the annual report on Form 10-K, any director's or executive officer's failure to comply with procedures that the company has implemented to provide reasonable assurances that Item 10 events are timely reported?

3. Covered Companies

As proposed, only issuers with a class of equity securities registered under Section 12 would be subject to Item 10. These companies comprise a significant portion of U.S. equity markets. Moreover, these would be the same companies whose officers, directors, and more than ten percent beneficial owners are required to report transactions in company equity securities pursuant to Section 16(a). Many of these companies help their officers and directors fulfill their Section 16(a) reporting obligations, and accordingly already may have procedures in place that would assist them in providing Item 10 disclosure.³⁹

³⁹ For example, these companies are likely to have established procedures to comply with their obligation to disclose Section 16 reporting persons' failure to timely file Section 16(a) reports. This reporting obligation is set forth in Item 405 of

Such procedures, including in some cases requirements that directors and executive officers give advance notice or receive advance approval of transactions, would help companies keep track of transactions that would be reportable under Item 10.

Questions regarding covered companies:

- Should companies required to report with respect to a class of equity securities solely under Section 15(d) also be subject to Item 10 reporting?
- Is Item 10 information necessary for timely, well-informed investment decisions with respect to equity securities of these issuers?
- Alternatively, should small business issuers⁴⁰ with a class of equity security registered under Section 12 be exempted from Item 10 because compliance would impose excessive burdens?

4. Filed Status of Reports

As proposed, Item 10 Forms 8-K would be considered "filed" for purposes of liability under Section 18 of the Exchange Act.⁴¹ Consequently, Item 10 information would be incorporated by reference in Securities Act registration statements on Forms S-2, S-3, S-8, and S-4 (where Form S-2 or S-3 level disclosure is used).⁴² However, we are proposing amendments to the applicable registration statement form instructions and Securities Act Rule 144 so that an Item 10 Form 8-K delinquency would not affect form eligibility or the company's current reporting status under Rule 144(c).⁴³

As proposed, Item 10 Forms 8-K would be subject to General Instruction B.3 to Form 8-K. This instruction provides that if substantially the same information required by Form 8-K has been previously reported by the

Regulations S-K and S-B [17 CFR 229.405 and 17 CFR 228.405, respectively], and is required disclosure in the annual report on Form 10-K or Form 10-KSB and the proxy statement for the annual meeting at which directors are to be elected.

⁴⁰ Exchange Act Rule 12b-2 [17 CFR 240.12b-2] defines a "small business issuer" as a U.S. or Canadian issuer, other than an investment company, that has revenues of less than \$25 million, if the aggregate market value of its outstanding voting and non-voting common equity held by non-affiliates is not \$25 million or more. If the issuer is a majority-owned subsidiary, it is not a small business issuer unless the parent corporation also is a small business issuer.

⁴¹ 15 U.S.C. 78r.

⁴² 17 CFR 239.25.

⁴³ Proposed amended General Instruction I.C to Form S-2, General Instruction I.A.3 to Form S-3, General Instruction A.1 to Form S-8, and Securities Act Rule 144(c).

company, an additional report need not be made on Form 8-K.⁴⁴

Questions regarding "filed" status of reports:

- Should Item 10 Forms 8-K not be considered "filed" (and hence not subject to Section 18 liability) unless the company specifically states that the information is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or Exchange Act?⁴⁵
- Alternatively, if an Item 10 Form 8-K is considered "filed" as proposed, should a delinquency adversely affect either the company's eligibility to use short-form Securities Act registration statements or its current reporting status under Rule 144(c)?
- Are there circumstances in which application of the Form 8-K instruction regarding previously reported information would undercut the purpose of Item 10, which is to make the reportable information readily available to the public? Would the relatively short reporting deadlines applicable to Item 10 reports make it less likely for Item 10 information to be previously reported?

B. Application to Transactions

The transactions subject to reporting under paragraph (a) of Item 10 would include transactions in any class of company equity security (whether or not registered under Section 12), including derivative securities with respect to company equity securities (whether or not the derivative securities were issued by the company). The company would report any transaction in which the director or executive officer has a pecuniary interest,⁴⁶ including transactions with third parties as well as transactions with the company. As proposed, the company would not need to report trust transactions that would not be reportable by the director or executive officer under Section 16(a).⁴⁷

⁴⁴ For this purpose, "previously reported" is defined in Rule 12b-2 [17 CFR 240.12b-2] to mean previously filed with, or reported in a statement under Section 12 of the Exchange Act, a report under Section 13 or 15(d) of the Exchange Act, a definitive proxy statement or information statement under Section 14 of the Exchange Act, or a registration statement under the Securities Act.

⁴⁵ General Instruction B.2 to Form 8-K provides this treatment for current Item 9 Forms 8-K. These forms report information that a company elects to disclose through Form 8-K pursuant to Regulation FD [17 CFR 243.100-243.103].

⁴⁶ Instruction 2 to proposed Item 10 applies the Exchange Act Rule 16a-1(a)(2)(i) [17 CFR 240.16a-1(a)(2)(i)] definition of "pecuniary interest," which is "the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the subject securities."

⁴⁷ Instruction 2 to proposed Item 10 refers to Exchange Act Rule 16a-8(b) [17 CFR 240.16a-8(b)],

Question regarding trust transactions:

- Should a company be required to report Section 16(a) exempt trust transactions unless the director or executive officer is unaware of the transactions because they are made through a blind trust?

1. Reportable and Exempt Transactions

A company would be required to report any transaction by a director or executive officer that is the economic equivalent of a sale. For example, we would expect the company to report as a sale a director or executive officer's pledge of company equity securities pursuant to a loan from a third party where the loan is non-recourse or there is otherwise an expectation on the part of the director or executive officer that the loan will be repaid by foreclosure or other recourse to the securities, even if there is no formal arrangement.

Reportable transactions would be substantially similar, but not identical, to those that the director or executive officer is required to report under Section 16(a).⁴⁸ For example, gifts would be reportable transactions. However, as proposed, transactions in the following categories would not be reportable under Item 10 because they do not generally appear to reflect management's views of the company's prospects or sever the link between executive compensation and company equity securities performance:

- Receipt of stock dividends (including stock splits) and pro rata rights;⁴⁹
- Acquisitions pursuant to regular reinvestment of dividends or interest through a broad-based reinvestment plan;⁵⁰

which specifies the circumstances where transactions in company securities held by a trust are reportable by an officer, director or more than ten percent beneficial owner who is the trustee, beneficiary, settlor or remainderman of the trust.

⁴⁸ The company's Form 8-K report of a transaction would not relieve an officer or director from the obligation to report that transaction under Section 16(a) on Form 4 or Form 5, or to file a notice of proposed sale on Form 144, as applicable. As discussed below, the information regarding the transaction reportable on Form 8-K would not be identical to the information reported on Form 4 or Form 5.

⁴⁹ These are the transactions exempted from Section 16(a) reporting by Exchange Act Rule 16a-9 [17 CFR 240.16a-9]. These transactions, along with other transactions described below as exempted by rule from Section 16(a), also are exempted from Section 16(b) short-swing profit recovery by Exchange Act Rule 16a-10 [17 CFR 240.16a-10].

⁵⁰ These are the transactions exempted from Section 16(a) reporting by Exchange Act Rule 16a-11 [17 CFR 240.16a-11].

- Acquisitions or dispositions pursuant to domestic relations orders;⁵¹
- Transactions as executor of an estate or similar fiduciary during the 12 months following appointment;⁵²
- Transactions that change the form of beneficial ownership without changing the director's or executive officer's pecuniary interest in the equity securities;⁵³
- Routine acquisitions (*e.g.*, through payroll deduction) pursuant to broad-based, tax-conditioned employee benefit plans and related excess benefit plans;⁵⁴
- Transfers by will or the laws of descent and distribution;⁵⁵
- Acquisitions or dispositions pursuant to holding company formations and similar corporate reclassifications and consolidations;⁵⁶ and
- Deposits or withdrawals of equity securities from voting trusts.⁵⁷

Questions regarding proposed exempt transactions:

- Should transactions in any of the proposed exempt categories be subject to Item 10 current reporting?
- Have we chosen the proper criteria for selecting exempt categories of transactions?
- For example, because deposit or withdrawal of securities from a voting trust may affect voting control, should the company make current disclosure of these transactions?

⁵¹ These are the transactions exempted from Section 16(a) reporting by Exchange Act Rule 16a-12 [17 CFR 240.16a-12].

⁵² These are the transactions exempted from Section 16(a) reporting by Exchange Act Rule 16a-2(d) [17 CFR 240.16a-2(d)].

⁵³ These are the transactions exempted from Section 16(a) reporting by Exchange Act Rule 16a-13 [17 CFR 240.16a-13].

⁵⁴ These are the transactions exempted from Section 16(b) short-swing profit recovery by Exchange Act Rule 16b-3(c) [17 CFR 240.16b-3(c)]. Exchange Act Rule 16a-3(f)(1)(i)(B) [17 CFR 240.16a-3(f)(1)(i)(B)] exempts these transactions from Section 16(a) reporting. However, Instruction 3 to proposed Item 10 would require reporting of volitional intra-plan transfers involving an issuer equity securities fund, or a cash distribution funded by a volitional disposition of an issuer equity security, unless the transaction is made in connection with the director's or executive officer's death, disability, retirement or termination of employment, or is required to be made available to plan participants pursuant to the Internal Revenue Code. These transactions, which are "discretionary transactions," as defined in Exchange Act Rule 16b-3(b)(1) [17 CFR 240.16b-3(b)(1)], may reflect a director's or executive officer's views as to the company's prospects.

⁵⁵ These transactions are some of the transactions exempted from Section 16(b) short-swing profit recovery by Exchange Act Rule 16b-5 [17 CFR 240.16b-5].

⁵⁶ These are the transactions exempted from Section 16(b) short-swing profit recovery by Exchange Act Rule 16b-7 [17 CFR 240.16b-7].

⁵⁷ These are the transactions exempted from Section 16(b) short-swing profit recovery by Exchange Act Rule 16b-8 [17 CFR 240.16b-8].

- Are there any other categories of transactions that should be excluded from Item 10 current reporting?
- Does a director's or executive officer's decision to dispose of equity securities by gift reflect a view as to the company's prospects?
- Should gifts be exempted where the director or executive officer is the donee rather than the donor?

2. Content and Format of Reports

With respect to an acquisition or disposition of company equity securities, the company would be required to report:

- The name and title of the director or executive officer;
- The date of the transaction;
- The title and number of securities acquired or disposed of;
- The per share acquisition or disposition price, if any;
- The aggregate value of the transaction;
- The nature of the transaction (*e.g.*, open market sale or purchase, sale to or purchase from the registrant, gift); and
- Any other material information regarding the transaction.

As proposed, the information would be reported in any narrative or tabular format that provides a clear, accurate description of the transaction.⁵⁸ Given the rapid due date(s) that would apply, we do not propose to require the company to reconcile and report a director's or executive officer's holdings following a transaction. On a voluntary basis, the company could include additional information concerning the transaction.

Questions regarding content and format:

- Should a specified tabular format be required to facilitate comparisons and reference by investors?
- Is it necessary to include holdings information to make the proposed reports useful to investors?
- If so, would its inclusion substantially increase the cost of compliance?
- Would any particular additional information be necessary to make the proposed reports useful to investors?
- For example, should events be coded by type for ease of identification?
- If so, should the same codes used for purposes of Section 16(a) reporting be used where applicable?
- If the transaction is pursuant to a Rule 10b5-1 arrangement, should this be noted?
- If so, should the Rule 10b5-1 arrangement be identified?

⁵⁸ In Section V, below, we have provided sample disclosure, which illustrates a tabular format for paragraph (a) transactions.

- Would identifying transactions in this manner enhance the proposed Form 8-K disclosure of Rule 10b5-1 plans?
- Would this identification enable investors to better analyze the possible "market signal" value of the reported transactions?

Questions regarding relationship to Section 16(a) reports:

- Assuming proposed Item 10 is adopted, would it be feasible and desirable to permit officers and directors to satisfy their Section 16(a) reporting obligations by attaching a Form 4 to the company's Item 10 Form 8-K reporting the same transaction?

—Should we adopt a pilot program in which companies could voluntarily enroll to use this procedure?

- Conversely, should the company be able to satisfy its Item 10 Form 8-K reporting obligation by adding Form 8-K header information to an officer's or director's Form 4?

- Should Form 4 include disclosure of when the transaction was reported on Form 8-K?

- Transactions between officers or directors and the company that are exempted from Section 16(b) short-swing profit recovery currently may be reported within 45 days after the company's fiscal year end on Form 5.⁵⁹ Should we instead require officers and directors to report some or all of these transactions earlier on Form 4? Are there any other transactions currently reportable on Form 5 that should instead be reported on Form 4?

3. Derivative Securities

For purposes of Item 10, "derivative securities" would be defined the same as in Rule 16a-1(c), but without regard to the exclusion for rights with an exercise or conversion privilege at a price that is not fixed.⁶⁰ Although Exchange Act Rule 16a-1(c)(6)⁶¹ excludes these instruments from the application of Section 16 because the opportunity to profit from them is not fixed, as described above the purposes

of proposed Item 10 disclosure are different and do not involve profit recapture. As proposed, transactions in instruments such as preferred stock convertible into common stock at a floating exercise price⁶² and performance-based units⁶³ would be reportable under Item 10. Reportable derivative securities also would include security-based swap agreements⁶⁴ and, when authorized for trading, security futures products.⁶⁵

In addition to the information described above for other equity securities transactions, reports of acquisitions or dispositions of derivative securities would include:

- The per share exercise or conversion price (or other price, such as a notional price, used in the terms of the derivative security);
- The date(s) on which each derivative security becomes exercisable (or subject to termination), and its date of expiration (or final termination);
- The title and number of underlying securities (or cash equivalent) that would be acquired or disposed of upon exercise, conversion, termination or settlement;
- The nature of the transaction (e.g., option grant, sale or purchase of call option, sale or purchase of put option, entering into a swap or futures contract), indicating whether the transaction involves a collar or other hedge, and if so describing all material terms;⁶⁶ and
- Any other material information regarding the transaction, including contingencies applicable to exercise.

⁶² See *Morgan Capital, L.L.C. v. Medtox Scientific, Inc.*, 258 F.3d 763 (8th Cir. 2001), cert. denied, 122 S.Ct. 1065, 151 L.Ed. 2d 969, 70 U.S.L.W. 3374 (Feb. 19, 2002) (No. 01-739).

⁶³ These instruments are not considered "derivative securities" under Exchange Act Rule 16a-1(c) because their exercisability is subject to conditions (other than the passage of time and continued employment) that are not tied to the market price of a company equity security. Staff interpretive letter to Certilman Balin Adler & Hyman (Apr. 20, 1992).

⁶⁴ This term, which is used in Sections 16(a) and (b), is defined in Section 206B of the Gramm-Leach-Bliley Act.

⁶⁵ Section 16(f) applies the provisions of Section 16 to ownership of and transactions in these products. Section 3(a)(56) of the Exchange Act [15 U.S.C. 78c(a)(56)] defines "security futures product" as "a security future or any put, call, straddle, option, or privilege on any security future." Section 3(a)(55)(A) of the Exchange Act [15 U.S.C. 78c(a)(55)(A)] defines a "security future" generally as a contract of sale for future delivery of a single security or of a narrow-based security index.

⁶⁶ In Exchange Act Release No. 34514 (Aug. 10, 1994) [59 FR 42449], the Commission described the derivative securities analysis for reporting equity swaps and instruments with similar characteristics under Section 16(a). In Exchange Act Release No. 37260 (May 31, 1996) [61 FR 30376], the Commission further addressed this analysis and adopted Code K for reporting these transactions.

For purposes of Item 10, entering into a contract that involves a derivative security would be reportable as an acquisition or disposition of a derivative security, in the same manner as under Section 16(a). As proposed, Item 10 would require disclosure of option grants pursuant to employee benefit plans sponsored by the company, the surrender of those options, and the issuance of replacement grants. The disclosure also is intended to capture option repricings.

Reports of exercises, conversions, terminations or settlements of derivative securities would include:

- The date of the exercise, conversion, termination or settlement;
- The per share price used for exercise, conversion, termination or settlement;
- The title and number of underlying securities (or cash equivalent) acquired or disposed of;
- The nature of the transaction (e.g., exercise of option, settlement of swap agreement), indicating whether the transaction involves a collar or other hedge, and if so describing all material terms; and
- Any other material information regarding the transaction.

As proposed, Item 10 would require disclosure of the expiration of a derivative security.

Questions regarding derivative securities reporting:

- Is the proposed definition of "derivative security" appropriate for Item 10 purposes?

—If not, what different definition should be used?

- Should instruments such as preferred stock convertible into common stock at a floating exercise price and performance-based units be reportable under Item 10, as proposed?

- Should any other transactions that do not involve derivative securities reportable under Section 16(a), such as tax withholding rights or stock-for-stock exercise withholding rights,⁶⁷ also be reportable under Item 10?

- Is information concerning employee benefit plan option grants of sufficient value to investors to warrant Item 10 disclosure?

- Would the proposed categories of information about derivative securities transactions satisfy investors' needs?

—What, if any, additional information should be required?

- For example, should Item 10 require reporting of other material

⁶⁷ Exchange Act Rule 16a-1(c)(3) [17 CFR 240.16a-1(c)(3)] excludes these rights from "derivative securities."

⁵⁹ Rules 16b-3(d) and 16b-3(e) exempt grants, awards and other acquisitions from the issuer, and dispositions to the issuer, respectively. Rule 16a-3(f)(1)(i) allows these and most other transactions exempt from Section 16(b) to be reported on Form 5.

⁶⁰ Proposed Instruction 1 to Item 10.

⁶¹ "Derivative securities" are defined in Exchange Act Rule 16a-1(c) [17 CFR 240.16a-1(c)] as "any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security," with certain exceptions. Subparagraph (6) of this rule excludes from that definition "rights with an exercise or conversion privilege at a price that is not fixed."

modifications to derivative securities?

—Alternatively, are any of the proposed categories not necessary?

- For example, is information concerning expirations of derivative securities of sufficient value to investors to warrant Item 10 disclosure? Does the answer differ depending upon the type of derivative security?

C. Application To Exchange Act Rule 10b5-1 Arrangements

Under paragraph (b) of Item 10, a company would be required to report that a director or executive officer has entered into a contract, instruction or written plan for the purchase or sale of company equity securities intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c). This disclosure, like paragraph (a) disclosure, would apply based on the director's or executive officers' pecuniary interest in the securities subject to the contract, instruction or written plan.⁶⁸

The conditions of Rule 10b5-1(c) do not require the person who purchases or sells to make a specific filing in order to establish availability of the affirmative defense. Proposed Item 10 would not change this; the availability of the Rule 10b5-1(c) defense would not be conditioned on a company's reporting the contract, instruction or written plan on a Form 8-K. The purpose of the Form 8-K would be to disclose potential transactions under the arrangement, rather than to establish the defense.

If a transaction is executed at the time the director or executive officer provides a Rule 10b5-1(c) instruction, such as a broker-dealer's immediate execution of a limit order, the company would report the transaction under paragraph (a), noting the director's or executive officer's use of an instruction intended to satisfy the rule's affirmative defense conditions, and would not need to report the instruction separately under paragraph (b). In other circumstances, the company's report under paragraph (b) of the contract, instruction or written plan would not relieve the company from subsequent

obligations to report transactions thereunder pursuant to Item 10 paragraph (a).⁶⁹

When the director or executive officer enters into the contract, instruction or written plan, the company would report:

- The name and title of the director or executive officer;
 - The date on which the director or executive officer entered into the contract, instruction or written plan; and
 - A description of the contract, instruction or written plan, including its duration, the aggregate number of securities to be purchased or sold, and the name of the counterparty or agent.
- A company would be able to use the form to disclose voluntarily additional information about the Rule 10b5-1 arrangement.

When the director or executive officer later terminates or modifies a contract, instruction or written plan, the company would report:

- The date of the termination or modification; and
- A description of the modification, including any modification to the duration, the aggregate number of securities to be purchased or sold, the interval at which securities are to be purchased or sold, the number of securities to be purchased or sold in each interval, the price at which securities are to be purchased or sold, and the identity of the counterparty or agent.

A director's or executive officer's termination or modification of a Rule 10b5-1 arrangement may indicate a change regarding the company's prospects, and thus may be valuable information to investors. Although we have not proposed to require reports that a director or executive officer has entered into a Rule 10b5-1 arrangement to disclose the prices and intervals at which transactions would occur, or the number of securities to be purchased or sold per interval, we believe that modifications to these terms should be reportable. We would require such modifications to be reported in general terms, such as an increase in the applicable limit order price, or a decrease in the number of shares to be sold periodically under the arrangement, without requiring disclosure of the specific price, number of securities, or duration of interval.

Questions regarding disclosure of Rule 10b5-1 arrangements:

⁶⁹ The director's or executive officer's obligations to report these subsequent transactions under Section 16(a) and to file a Form 144, where applicable, would not be affected.

• Is disclosure of any additional information about these arrangements necessary for these proposed reports to be useful to investors?

- Would disclosure of any particular terms invite market manipulation?
- Is there a general expectation of privacy with respect to the terms of Rule 10b5-1 arrangements?

—Is there a specific expectation of privacy with respect to the identity of the counterparty or agent?

—Is disclosure of that identity useful where the Rule 10b5-1 plan involves the use of more than one counterparty or agent?

D. Application to Company Loans

Under paragraph (c) of Item 10, a company would be required to report any loan of money to, or lending arrangement with, a director or executive officer by the company or an affiliate of the company. The company also would need to report if it, or its affiliate, entered into a guarantee or similar arrangement in favor of a third party making such a loan to, or lending arrangement with, a director or executive officer.

These financial arrangements involve the use of company assets for arrangements that are not available to shareholders generally. Further, forgiveness of a loan (or the company's payment on its guarantee) effectively results in the company's payment to the director or executive officer of additional compensation.

When the company makes such a loan, or enters into a lending arrangement or a guarantee or similar arrangement, the company would be required to report:

- The name and title of the director or executive officer;
- The date of each such agreement (or guarantee or similar arrangement) or loan thereunder;
- The dollar amount and other material terms of the agreement or loan, and, if applicable, guarantee or similar arrangement, including interest rate, terms of repayment, and any provisions with respect to forgiveness;
- The number and class of any securities pledged as collateral; and
- The material terms of any pledge, including whether it is made with or without recourse.

When forgiveness, foreclosure or the company's payment on its guarantee occurs, the company would be required to report:

- The name and title of the director or executive officer; and
- The date on which the forgiveness, payment or foreclosure occurred, and the dollar amount of forgiveness or

⁶⁸ For example, a Rule 10b5-1 plan for the sale of securities held by a member of an executive officer's immediate family, as defined in Exchange Act Rule 16a-1(e) [17 CFR 240.16a-1(e)], sharing the same household as the executive officer would be reportable. However, Instruction 3 to proposed Item 10 would not require disclosure of a director's or executive officer's enrollment in a broad-based employee benefit plan for the acquisition of registrant equity securities through payroll deduction.

payment and the number and class of any securities foreclosed upon.

Questions regarding disclosure of company loans and guarantees:

- Should this disclosure be required only if the company's equity securities are pledged or pledged without recourse?

- Should loans of less than \$100,000 be excluded from Item 10?

- Should disclosure also apply with respect to any loan to members of the immediate family of a director or executive officer, to any corporation or organization in which a director or executive owner beneficially owns ten percent or more of any class of equity security, or to any trust or other estate in which the director or executive officer has a substantial beneficial interest or serves as trustee or in a similar capacity?⁷⁰

- Is the scope of Item 10 as proposed, including loans (and guarantees or similar arrangements) by the company and its affiliates, too broad? If so, in what manner?

- If Item 10 is adopted as proposed, requiring rapid disclosure of these loans and guarantees, should the Commission consider rescinding any portion of other disclosure requirements regarding management indebtedness?

E. Anticipated Transition

Assuming proposed Item 10 is adopted, we will need to provide for a transition. We expect that the proposal would become effective 60 days following **Federal Register** publication of the final rule, and that transactions occurring on and after that date would be reportable under paragraph (a).

However, because companies may need to establish procedures to capture and report information about derivative securities transactions on an accelerated basis, we would expect to delay for an additional 60 days compliance with the obligation to report these transactions within two business days if the transaction's aggregate value is \$100,000 or more. For the first 60 days after the

effective date, derivative securities transactions would be reportable not later than the close of business on the second business day of the week following the week in which the transaction occurred, without regard to aggregate value.

Rule 10b5-1 arrangements and loans entered into before the effective date remaining in effect on the effective date would be of equal significance to investors as those entered into later. Accordingly, we would expect to require companies to report them under paragraphs (b) and (c), respectively, on (or within a short period after) the effective date.

Questions regarding transition:

- Would the phased-in transition schedule described above for derivative securities transactions be appropriate for these transactions or any other category of transaction?

- Were pre-existing Rule 10b5-1 arrangements entered into with privacy expectations that would warrant transition treatment different from that proposed above?

—If so, how should these arrangements be treated for transition purposes?

IV. General Request for Comment

We invite any interested person wishing to submit written comments on this proposed amendment to Form 8-K, the related amendments to Securities Act Rule 144 and Securities Act Forms S-2, S-3 and S-8, and any other matters that might have an impact on the proposed amendments, to do so. We specifically request comments from investors, companies that would be required to file Item 10 information, directors and executive officers, broker-dealers, portfolio managers, and other fiduciaries.

As described in greater detail in Section III above, we request comment regarding:

- What persons' Item 10 events should be reportable;
- What companies should be required to report;

- Implementation costs to companies;
- Appropriateness of reporting deadlines and dollar thresholds;
- Proposed Commission finding regarding company liability for violations;

- Filed status of reports and effect on Rule 144 and short-form Securities Act registration;

- Reportable and exempt transactions;

- Content and format of reports;

- Proposed Item 10's relationship to Section 16(a) reports;

- Accelerated Section 16(a) reporting of officers' and directors' transactions with the company;

- Derivative securities disclosure;

- Disclosure of Rule 10b5-1 arrangements; and

- Disclosure of company loans and guarantees.

In addition, we request your comment on the following subjects:

Questions regarding benefit and practicability:

- Will the proposal provide meaningful, timely information to investors?

- As drafted, is the proposed amendment easy to understand and practical to implement?

Questions regarding website access:

- Should the Commission encourage companies to post on their web sites the information reportable on an Item 10 Form 8-K?⁷¹

—If so, in what manner?

We will consider all comments responsive to this inquiry in complying with our responsibilities under Section 23(a) of the Exchange Act.⁷²

V. Sample Item 10 Disclosure

As an aid to explaining this proposal, we have prepared the following sample disclosure:

Item 10. Transactions by Directors and Executive Officers

(a)(1) *Acquisitions/Dispositions of Equity Securities*

Name and title of director/ executive officer	Date of trans- action	Title and number of securi- ties involved in transaction	Per share acqui- sition/disposition price	Aggregate value of transaction	Description of nature of transaction
John Jones/CEO	2/19/02	25,000 shares common stock.	\$14.10	\$352,500	Sold shares in open mar- ket transaction.
Jane Smith/Director	2/20/02	4,000 shares Series A pre- ferred stock.	30.00	120,000	Purchased shares in open market transaction.

⁷⁰ Item 404(c) of Regulation S-K, which requires disclosure of any director's or executive officer's indebtedness to the company or its subsidiaries at any time since the beginning of the company's last fiscal year in an amount in excess of \$60,000, also requires disclosure of these loans.

⁷¹ Today we also issue a companion release, Securities Exchange Act Release No. 45741 (Apr. 12, 2002), that includes, among other things, a proposal regarding website access to Forms 10-K, 10-Q and 8-K filed by certain companies. This proposal would address web site access to Item 10

Forms 8-K filed by some, but not all, companies subject to Item 10 disclosure.

⁷² 15 U.S.C. 78w(a).

(a)(2) Acquisitions/Dispositions of Derivative Securities

Name and title of director/executive officer	Date of transaction	Number of derivative securities involved in transaction	Per share exercise/conversion price	Price (if any) of derivative security	Exercisability/expiration dates of derivative security	Title and number of underlying securities	Description of nature of transaction
Norman Young/CAO.	2/19/02	(1)	14.00	(1)	Exercisable commencing 2/19/02; expiring 2/19/03.	10,000 shares of common stock.	Agreement to sell securities—hedging transactions.(1)
Theresa White/Vice President.	2/20/02	2,500	14.25	0	(2)	2,500 shares of common stock.	Received employee stock option grant.

¹ On February 19, 2002, Norman Young, the Chief Accounting Officer of the registrant, entered into a “swap” agreement with XYZ Brokerage Firm (“XYZ”) pursuant to which, on February 19, 2003, XYZ will be required to pay to Mr. Young an amount equal to the current market value of 10,000 shares of registrant’s common stock, or \$140,000, and Mr. Young will be required to pay XYZ an amount equal to the then-current market value of 10,000 shares of the registrant’s common stock. In addition, Mr. Young has agreed to pay XYZ, as a fee, an amount equal to 1/4 of one percent of the current market value of the 10,000 shares of registrant’s common stock subject to the agreement and that, to the extent that the registrant declares and pays any dividend on its common stock during the term of the agreement, any such amounts will be paid to XYZ. XYZ has agreed to pay to Mr. Young an amount equal to the “prime” interest rate on \$140,000 during the term of the agreement.

² Employee stock option is exercisable in four equal annual installments, beginning on the first anniversary of the date of grant. The option will expire on February 19, 2012.

(a)(3) Exercises/Conversions of Derivative Securities

Name and title of director/executive officer	Date of transaction	Number of derivative securities involved in transaction	Per share exercise/conversion price	Title and number of underlying securities	Description of nature of transaction
John Jones/CEO	2/19/02	5,000	\$4.50	5,000 shares of common stock.	Exercised employee stock option.

(b)(1) Rule 10b5-1 Plans

On February 20, 2002, Tom Johnson, the Chief Financial Officer of the registrant, entered into a plan with ABC Brokerage Firm, pursuant to which ABC will undertake to sell 25,000 shares of the common stock of the registrant currently owned by Johnson at specified intervals through the end of 2002.

On February 22, 2002, Donald Cummings, the registrant’s Vice-President for sales, modified a previously reported sales plan with XYZ Brokerage Firm to decrease the number of shares of registrant common stock subject to sale on a monthly basis pursuant to the plan, and to decrease the limit order price at which the shares may be sold under the plan. These modifications will reduce to 18,000 the aggregate number of shares that may be sold by Mr. Cummings pursuant to the plan.

On February 22, 2002, Patricia Brown, the registrant’s vice-president for administration, terminated her previously reported sales plan with LMN Brokerage Firm.

(c) Loans

On February 19, 2002, the registrant agreed to loan Sandra Green, a member of the registrant’s board of directors, \$50,000 for the purpose of purchasing 10,000 shares of the registrant’s common stock through the exercise of a stock option previously granted to Ms. Green on May 1, 1999. The loan, which is immediately available, will bear interest at the rate of four percent per annum and will be evidenced by a written promissory note containing the following terms. Interest will accrue during the term of the loan, which is five years. Principal and accrued interest will be due and payable at the expiration of the loan term. The loan will

be non-recourse. Under the provisions of the note, the registrant’s board of directors has the discretion to forgive any repayment of principal and interest if the board deems such action to be in the best interests of the registrant. The 10,000 shares of the registrant’s common stock to be acquired with the loan proceeds will secure repayment of the loan. These shares will be held in escrow for the benefit of the registrant pending repayment or substitution of additional or different collateral in form and amount satisfactory to the registrant.

VI. Paperwork Reduction Act

The proposed amendment to Form 8-K contains “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995⁷³ (“PRA”). We are submitting the proposed amendment to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.⁷⁴ The title for the collection of information is “Form 8-K.” An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid OMB control number.

Form 8-K (OMB Control No. 3235-0060) was adopted pursuant to Sections 13(a), 15(d), and 23 of the Exchange Act and prescribes information, such as material events or corporate changes that a company must disclose. Preparing

and filing a current report on Form 8-K is a collection of information.

A. Summary of Proposed Amendment

The proposed amendment would add a new item, Item 10, to Form 8-K. Item 10 would require companies with a class of equity securities registered under Section 12 of the Exchange Act to disclose certain information about directors’ and executive officers’ transactions in company equity securities (including derivative securities transactions and transactions with the company), directors’ and executive officers’ arrangements for the purchase or sale of company equity securities intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1, and loans of money to directors and executive officers made or guaranteed by the company or its affiliates.

Generally, current reports of transactions and loans would be due within two business days if the event has an aggregate value of \$100,000 or more. Reports of transactions and loans with a smaller aggregate value, grants and awards pursuant to employee benefit plans, and Rule 10b5-1 arrangements would be due by the close of business on the second business day of the week following the week in which the event occurred.

We are proposing this amendment to alert investors to shifts in the alignment

⁷³ 44 U.S.C. 3501 *et seq.*

⁷⁴ 44 U.S.C. 3507(d) and 5 CFR 1320.11.

between management's and shareholders' economic interests. The proposed amendment, particularly with respect to derivative securities used for hedging purposes, also would disclose transactions by directors and executive officers that in effect sever the link between executive compensation and company equity securities performance. Finally, we believe that the proposed amendment would provide investors with timely disclosure of potentially useful information as to management's views of the performance and prospects of the company, thereby enabling investors to make better informed investment decisions. The collection of information will be mandatory for all companies with a class of equity securities registered under Section 12 of the Exchange Act. There will be no mandatory retention period for the information collected. The collection of information will not be kept confidential.

B. Reporting and Cost Burden Estimates

The reporting and cost burden estimates for the proposed collection of information are based on the following assumptions. The likely respondents that will be subject to the proposed collection of information include entities with a class of equity securities registered under Section 12 of the Exchange Act. We estimate that there are approximately 10,100 entities that fit this description.⁷⁵ We estimate that, as a result of the proposed amendment, each respondent will make approximately 21 disclosures per year.⁷⁶

⁷⁵ This estimate is based on the total number of companies that filed proxy (9,892) or information (253) statements during the 2000 fiscal year, which are required of all issuers registered under Section 12 of the Exchange Act.

⁷⁶ This estimate is based on (a) a review of the number of reports filed by officers and directors under Section 16(a) of the Exchange Act during the period February–December 2000 (projected over a 12-month period), (b) consultations with several law firms who advise registrants on compliance with Exchange Act Rule 10b5-1, and (c) a review of related-party transactions disclosed in proxy and information statements filed during the 2001 fiscal year. This review leads to the following estimates. First, approximately 200,000 transactions in company equity securities by executive officers and directors would be subject to disclosure under Item 10 of Form 8-K. (This estimate is based upon assumptions that (i) the 69,900 transactions in excess of \$100,000 would each require a separate Form 8-K, (ii) the 62,550 transactions with a value less than \$10,000 would be reported on a deferred basis, with 20% of these transactions included on Forms 8-K filed to disclose other transactions and the remaining 80% reported in groups of three, and (iii) the remaining 186,000 transactions would generate 113,250 Forms 8-K after taking into account that generally option grants are made on the same date, option exercise and sale activity tends to occur during corporate trading periods, and option exercises and sales by individual officers and directors tend to occur on successive days (all

Based on a burden hour estimate of three hours,⁷⁷ we estimate that each respondent will incur 63 burden hours⁷⁸ to prepare and file the required disclosures and that, in the aggregate, all respondents will incur 636,300 burden hours⁷⁹ to prepare and file the required disclosures.

We anticipate that respondents will retain outside counsel to assist in the preparation and filing of the required disclosures.⁸⁰ Of the total burden resulting from the proposed amendments, seventy-five percent is reflected as burden hours and the remainder is reflected in the total cost of complying with the information collection requirements. We estimate that the total dollar cost of complying with Item 10 Form 8-K, including outside counsel costs, will be \$70,756,500, an increase of \$47,722,500 from the current annual burden of \$23,034,000 for Form 8-K.

C. Request for Comment

We request comment in order to (a) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility, (b) evaluate the

of which would be multiple transactions to be disclosed on a single Form 8-K.) Second, approximately 7,600 transactions by executive officers and directors involving Exchange Act Rule 10b5-1 arrangements would be subject to disclosure under Item 10 of Form 8-K. (This estimate is based upon a sampling of press releases for 23 registrants, of whom approximately 50% disclosed Exchange Act Rule 10b5-1 arrangements covering 39 officers and directors. These figures were then projected on the total number of companies with a class of securities registered under Section 12 of the Exchange Act—10,100—to produce 5,050 companies with an average of three disclosures each year. The resulting total was reduced by 50% to reflect that many of these disclosures would be reported on the same Form 8-K.) Finally, approximately 7,900 company loans to executive officers and directors would be subject to disclosure under Item 10 of Form 8-K. (This estimate is based upon a sampling of 50 proxy statements, of which 26% reflected corporate loans covering 39 separate transactions with executive officers and directors. These figures were then projected on the total number of companies with a class of securities registered under Section 12 of the Exchange Act—10,100—to produce 2,626 companies with an average of three loans each.) Distributed across the number of companies with a class of equity securities registered under Section 12 of the Exchange Act, this results in an average of 21 disclosures per company (215,500/10,100).

⁷⁷ This estimate is based on consultations with several law firms and other persons who regularly complete Forms 8-K and/or Forms 4 and 5.

⁷⁸ (21 disclosures × three hours).

⁷⁹ (10,100 companies × 63 hours).

⁸⁰ We have used an estimated hourly rate of \$300.00 to determine the estimated cost to respondents of the disclosure prepared by outside counsel. We arrived at this hourly rate estimate after consulting with several private law firms. (10,100 × 63 hours × 25% × \$300.00 = \$47,722,500).

accuracy of our estimate of the burden of the proposed collection of information, (c) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected, and (d) evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology.⁸¹

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Commenters may wish to consider whether the proposed collection of information with respect to directors' and executive officers' transactions could reduce collection of information burdens with respect to reporting those transactions under Section 16(a) of the Exchange Act. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street NW, Washington, DC 20549-0609, with reference to File No. S7-09-02. Requests for materials submitted to the OMB by us with regard to this collection of information should be in writing, refer to File No. S7-09-02 and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street NW, Washington, DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

VII. Costs and Benefits

A. Background

The current system of federal securities regulation is based on full disclosure; an approach that provides a cost-effective means for markets to allocate capital. In order to function effectively, however, there must be full, clear and timely disclosure to support the market's allocation decisions. Investors should have access to important corporate information when it would be of greatest benefit to them.

⁸¹ Comments are requested pursuant to 44 U.S.C. 3506(c)(2)(B).

Under current regulations, information about the relationship between executive compensation and company securities performance, the extent to which management's economic interests are aligned with those of shareholders through ownership of company equity securities, and management's transactions with and relationships to the company beyond the scope of employment that could affect management's performance of its fiduciary duties must be updated annually in the company's annual report on Form 10-K or Form 10-KSB. In addition, information about directors' and officers' transactions in company equity securities is reportable by the directors and officers under Section 16(a) of the Exchange Act within 10 days after the close of the month in which the reportable transaction occurs or, in some instances, within 45 days after a company's fiscal year end.

Technological developments that have significantly reduced timeframes for the capture and analysis of information necessitate a new consideration of the timing of mandated disclosure to the markets. The proposed amendment would add a new item, Item 10, to Form 8-K. Item 10 would require companies with a class of equity securities registered under Section 12 of the Exchange Act to disclose certain information about directors' and executive officer's transactions in company equity securities (including derivative securities transactions and transactions with the company), directors' and executive officers' arrangements for the purchase or sale of company equity securities intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1, and loans of money to directors and executive officers made or guaranteed by a company or its affiliate.

Generally, current reports of transactions and loans would be due within two business days if the event has an aggregate value of \$100,000 or more. Reports of transactions and loans with a smaller aggregate value, grants and awards pursuant to employee benefit plans, and Rule 10b5-1 arrangements would be due by the close of business on the second business day of the week following the week in which the event occurred.

B. Benefits

Requiring companies to file current reports disclosing information about directors' and executive officers' transactions, Rule 10b5-1 arrangements, and loans (or loan guarantees) by the company or its affiliates should enable investors to make investment and voting

decisions on a more timely and better-informed basis, protect investors, and promote fair dealing in company equity securities. Current information regarding changes in directors' and executive officers' holdings of company equity securities would reveal shifts in the alignment between management's and shareholders' economic interests. Such current information, particularly with respect to derivative securities used for hedging purposes, would disclose transactions by directors and executive officers that in effect sever the link between executive compensation and company equity securities performance.

Making available current information regarding directors' and executive officers' transactions in company equity securities also would provide public investors timely disclosure of potentially useful information as to management's views of the performance and prospects of the company. Many public investors believe that such current disclosure is necessary for them to make informed investment decisions.⁸²

Similarly, current disclosure that a director or executive officer has entered into, modified or terminated a Rule 10b5-1 contract, instruction or written plan for the purchase or sale of company equity securities would provide public investors with more complete disclosure of useful information as to the performance and prospects of the company. Finally, current disclosure of loans (and loan guarantees) by the company or its affiliates to directors and executive officers would inform investors of financial arrangements not generally available to shareholders that may result in the receipt of *de facto* additional compensation by the director or executive officer.

Currently, it is difficult for investors to ascertain whether a director or executive officer has engaged in a transaction involving company equity securities until 10 days after the end of the month in which the transaction occurred or, in some instances, until 45 days after the end of the fiscal year in which the transaction occurred. Further, currently there are no disclosure requirements with respect to Rule 10b5-1 arrangements and loan guarantees, and only limited disclosure concerning company loans to directors and executive officers. Current disclosure of information about these events would enhance investor confidence in the markets. Thus, we believe that the proposed amendment will increase

market transparency, encouraging continued widespread investor participation in our markets, which will enhance market efficiency and liquidity. These benefits are difficult to quantify, but are viewed by many investors and investor groups as significant.

C. Costs

The proposed amendment would impose additional costs on companies with a class of equity securities registered under Section 12 of the Exchange Act. Those companies would be required to file additional current reports on Form 8-K to disclose information each time a director or executive officer engaged in a transaction in company equity securities or similar disclosable events. A company would be required to compile the relevant information and prepare and file the required Form 8-K.

The proposed amendment also may lead to increased costs for companies resulting from new or enhanced systems and procedures for disclosure practices. Companies that do not currently assist their officers and directors to comply with Section 16(a) of the Exchange Act may need to develop practices and procedures for compiling information about corporate securities transactions by their directors and executive officers. While we believe that many companies already have internal procedures for identifying and reporting these transactions, some companies would need to institute appropriate procedures. These costs are difficult to quantify. We do not have data to quantify the cost of implementing, or enhancing and strengthening existing, internal monitoring procedures, and we seek your comments and supporting data on these costs.

The required disclosure will provide investors both with new information and with an alternative, accelerated, and more readily accessible source for currently available information. Because the size and scope of compliance is likely to vary among companies, it is difficult to provide an accurate cost estimate with which all parties will agree. We believe that a company's internal professional staff will expend approximately 75% of the burden hours associated with compliance and that the remaining 25% will be expended by outside counsel. Assuming a cost of \$85.00 per hour for in-house professional staff and \$300.00 per hour for outside counsel, we believe that the total cost will be approximately \$416.00

⁸² See n. 27, above.

per filing.⁸³ For purposes of the PRA we estimated that there will be approximately 215,255 Item 10 Form 8-K reports filed each year.⁸⁴ Thus, based on these assumptions, the aggregate cost of the proposed amendments will be approximately \$89,546,000 each year.

D. Request for Comments

Throughout this release we have solicited comment on variations to this proposal that would alter the scope of the proposal, including the affected parties and the burdens placed on them. We request comment on all aspects of this cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the proposed amendment. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VIII. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis, or IRFA, has been prepared in accordance with the Regulatory Flexibility Act.⁸⁵ This IRFA involves a proposed amendment to Form 8-K that would expand the disclosure requirements with respect to directors' and executive officers' transactions in company equity securities and certain similar events. Specifically, the proposed amendment would add a new item, Item 10, to Form 8-K. Item 10 would require companies with a class of equity securities registered under Section 12 of the Exchange Act to disclose information about directors' and executive officers' transactions in company equity securities (including derivative securities transactions and transactions with the company), directors' and executive officers' arrangements for the purchase or sale of company equity securities intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1, and loans of money to directors and executive officers made or guaranteed by a company or its affiliates.

A. Reasons for, and Objectives of, Proposed Amendment

The proposed amendment addresses investor concerns about a lack of timely access to information about directors' and executive officers' transactions involving company equity securities, and other events relating to the market for company equity securities, the relationship between executive

compensation and company securities performance and the relationship between management and the company. These concerns may be especially acute for investors in small entities, where this information may be difficult to obtain. Advances in technology and the increased dependence on the ready availability of current corporate information have reshaped the way our markets operate. The proposed amendment enhances rapid access to this information, thereby protecting investors by enabling them to make informed investment decisions and promoting fair dealing in a company's equity securities. By addressing these issues, the proposed amendment would enhance investor confidence in the fairness and integrity of the securities markets.

B. Legal Basis

We are proposing the amendment to Form 8-K under the authority set forth in Sections 12, 13(a), 15(d), and 23(a) of the Exchange Act. Related amendment to Securities Act Rule 144 and Securities Act Forms S-2, S-3, and S-8 are proposed under the authority set forth in Sections 3(b) and 19(a) of the Securities Act.

C. Small Entities Subject to the Proposed Amendment

The proposed amendments would affect companies that have a class of equity securities registered under Section 12 of the Exchange Act that are small businesses. Exchange Act Rule 0-10(a)⁸⁶ defines the term "small business" to be an issuer that, on the last day of its most recent fiscal year, has total assets of \$5 million or less.⁸⁷ We estimate that there are approximately 2,500 companies subject to the reporting requirements of Section 13 of the Exchange Act that have assets of \$5 million or less.⁸⁸ We further estimate that approximately 1,800 of these companies have a class of equity security registered under Section 12 of the Exchange Act.⁸⁹

D. Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendment would impose new reporting requirements by requiring the filing of an Item 10 Form

8-K by all companies with a class of equity securities registered under Section 12 of the Exchange Act, including "small businesses," when any of their directors or executive officers engage in a transaction involving company equity securities or similar disclosable events. Generally, an Item 10 Form 8-K would be due within two business days following a reportable transaction or loan with an aggregate value of \$100,000 or more with respect to an individual director or executive officer. Transactions and loans with a lower dollar value, grants and awards pursuant to employee benefit plans, and Rule 10b5-1 arrangements would be reportable not later than the close of business on the second business day of the week following the event. Consequently, the proposed amendment would increase the costs associated with compliance with companies' Exchange Act reporting obligations.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that duplicate, overlap or conflict with the proposed amendment, except as follows. A significant portion of the information that would be reported by a company, specifically directors' and executive officers transactions in company equity securities, is reportable by directors and officers under Section 16(a) of the Exchange Act. However, these reports are filed too slowly for the public to obtain the maximum benefit from the information disclosed, and are not always readily accessible because they need not be filed electronically.⁹⁰ Further, Section 16(a) filings do not report two categories of information—directors' and executive officers' Rule 10b5-1 arrangements and their receipt of loans (or loan guarantees) from the company or its affiliates—that we believe are of equal market value and also should be reported on a current basis. Currently, information about management indebtedness to the company is disclosable by the company annually. However, this information also is filed too slowly for the public to obtain the maximum benefit from the information disclosed, and does not address company (or company affiliate) guarantees of third-party loans.

We have requested comment whether it would be feasible or desirable to permit officers and directors to satisfy their Section 16(a) reporting obligations by attaching a Form 4 to the company's Item 10 Form 8-K reporting the same

⁸³ (Three hours per response \times 75% \times \$85.00 = \$191.25) + (three hours per response \times 25% \times \$300.00 = \$225.00).

⁸⁴ See n. 76 above and the accompanying text.

⁸⁵ 5 U.S.C. 603.

⁸⁶ 17 CFR 240.0-10(a).

⁸⁷ A similar definition is provided under Securities Act Rule 157 [17 CFR 230.157].

⁸⁸ This estimate is based on filings with the Commission.

⁸⁹ This estimate is based on a comparison of the number of issuers that filed annual reports on Form 10-K (10,381) and 10-KSB (3,641) during the 2001 fiscal year and the number of issuers that filed proxy (9,892) or information (253) statements during the 2001 fiscal year.

⁹⁰ With respect to transactions that involve sales, notices of proposed sales also may be required on Form 144 [17 CFR 239.144].

transaction, and whether we should adopt a pilot program in which companies could voluntarily enroll to use this procedure. We have requested comment whether a company should be able to satisfy its Item 10 Form 8-K reporting obligation by adding Form 8-K header information to an officer's or director's Form 4. We also have requested comment whether any portions of current management indebtedness disclosure should be rescinded.

F. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish the stated objective, while minimizing adverse impact on small entities. In that regard, we are considering the following alternatives: (a) Differing compliance or reporting requirements that take into account the resources of small entities, (b) the clarification, consolidation or simplification of compliance and reporting requirements under the rule for small entities, (c) the use of performance rather than design standards, and (d) an exemption from the coverage of the proposed amendment for small entities.

The proposed amendment is intended to elicit information that would be useful to investors in evaluating the relationship between executive compensation and company securities performance, the extent to which management's economic interests are aligned with those of shareholders through ownership of company equity securities, and management's transactions with and relationships to the company beyond the scope of employment that could affect management's performance of its fiduciary duties.

We have solicited comment as to whether small business issuers should be excluded from the proposed amendment. It is possible, however, that different compliance or reporting requirements for small entities may not be appropriate because this disclosure is important to investors in small, as well as large, entities. Also, it may not be feasible to further clarify, consolidate or simplify the proposed amendment for small entities because, as contemplated, the proposed amendment requires only minimal information about directors' and executive officers' transactions in company equity securities. Finally, for the reasons just discussed, it may be inconsistent with the purposes of the Exchange Act to use performance standards to specify different requirements for small entities or to

exempt small entities from the coverage of the proposed amendment.

G. Request for Comments

We encourage the submission of comments with respect to any aspect of the IRFA. In particular, we request comment on the number of small businesses that would be affected by the proposed amendment, the nature of the impact, how to quantify the number of small businesses that would be affected, and how to quantify the impact of the proposed amendment. Commenters are requested to describe the nature of any effect and provide empirical data and other factual support for their views to the extent possible. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendment is adopted, and will be placed in the same public file as comments on the proposed amendment.

IX. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"⁹¹ we must advise the Office of Management and Budget as to whether the proposed amendment constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in

- An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries;
- or
- Significant adverse effects on competition, investment or innovation.

Where a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review. We request comment on the potential impact of the proposed amendment on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

X. Consideration of Burden on Competition

Section 23(a)(2) of the Exchange Act⁹² requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or

appropriate in furtherance of the purposes of the Exchange Act.

The proposed amendment is intended to improve the quality and timeliness of information available to investors about directors' and executive officers' transactions in company equity securities and certain related transactions. We do not believe that the proposed amendment would impose any burden on competition, except as follows. Companies will incur costs in complying with the proposed amendment. These costs will include preparation and filing expenses. These costs also may include expenses associated with establishing practices and procedures to ensure compliance. The proposed amendment may impose a significantly disproportionate cost on smaller businesses, thereby placing them at a competitive disadvantage. We request comment on whether the proposed amendment, if adopted, would impose a burden on competition. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

XI. Promotion of Efficiency, Competition and Capital Formation

Section 3(f) of the Exchange Act⁹³ requires 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 proposed amendment is intended to improve the quality and timeliness of information available to investors about directors' and executive officers' transactions in company equity securities and similar disclosable events. We believe that the availability of this information to investors should bolster investor confidence in the securities markets. Increasing the transparency of director and executive officer securities transactions should result in better monitoring by investors. This may result in better corporate governance, thereby increasing the efficiency of the company. This should promote capital formation. In addition, the availability of enhanced, more timely disclosure should lead to a more efficient market.

We do not believe that the proposed amendment would impose any burden on competition, except as follows. Companies would incur costs in complying with the proposed amendment. These costs will include preparation and filing expenses. These

⁹¹ Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

⁹² 15 U.S.C. 78w(a).

⁹³ 15 U.S.C. 78c(f).

costs also may include expenses associated with establishing practices and procedures to ensure that companies compile information regarding reportable events on a timely basis. The proposed amendment may impose a significantly disproportionate cost on smaller businesses, thereby placing them at a competitive disadvantage. We request comment on whether the proposed amendment, if adopted, would promote efficiency, competition and capital formation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

XII. Statutory Authority

The amendments contained in this release are being proposed under the authority set forth in Sections 3(b) and 19(a) of the Securities Act and Sections 12, 13(a), 15(d) and 23(a) of the Exchange Act.

Text of Proposed Amendments

List of Subjects in 17 CFR Parts 230, 239 and 249

Securities.

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

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The general authority citation for Part 230 is revised to read as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77sss, 77z-3, 78c, 78d, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 79t, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30 and 80a-37, unless otherwise noted.

* * * * *

2. The authority citations following § 230.144 are removed.

3. Section 230.144 is amended by adding a sentence at the end of paragraph (c)(1) to read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * * *

(c) *Current public information.* * * *

(1) *Filing of reports.* * * * For purposes of this paragraph, an issuer will be considered as having filed all of the reports required to be filed under Section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m and 78o(d)) notwithstanding that the issuer may not have timely filed one or more current reports on Form 8-K (§ 249.308 of this chapter) required to be filed solely to disclose the occurrence of

an event or events specified in Item 10 of the form.

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

4. The authority citation for Part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll(d), 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t, 80a-8, 80a-24, 80a-29, 80a-30 and 80a-37, unless otherwise noted.

* * * * *

5. Section 239.12 is amended by revising paragraph (c) to read as follows:

§ 239.12 Form S-2, for registration under the Securities Act of 1933 of securities of certain issuers.

* * * * *

(c) The registrant:

(1) Has been subject to the requirements of section 12 or 15(d) of the Exchange Act (15 U.S.C. 78l or 78o(d)) and has filed all the material required to be filed pursuant to section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for a period of at least thirty-six calendar months immediately preceding the filing of the registration statement on this Form; and

(2) Has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement and, if the registrant has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) § 240.12b-25(b) of this chapter under the Exchange Act with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that section. For purposes of this paragraph, a registrant will be considered as having filed all the material required to be filed under section 13 or 15(d) of the Exchange Act and as having filed in a timely manner all reports required to be filed notwithstanding that the registrant may not have timely filed one or more current reports on Form 8-K (§ 249.308 of this chapter) required to be filed solely to disclose the occurrence of an event or events specified in Item 10 of Form 8-K; and

* * * * *

6. Form S-2 (referenced in § 239.12) is amended by adding a sentence at the end of General Instruction I.C to read as follows:

Note— The text of Form S-2 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S-2

Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

I. Eligibility Requirements for Use of Form S-2

* * * * *

C. * * * For purposes of (1) and (2) in the preceding sentence, a registrant will be considered as having filed all the material required to be filed under section 13 or 15(d) and as having filed in a timely manner all reports required to be filed notwithstanding that the registrant may not have timely filed one or more current reports on Form 8-K (§ 249.308 of this chapter) required to be filed solely to disclose the occurrence of an event or events specified in Item 10 of Form 8-K.

* * * * *

7. The authority citations following § 239.13 are removed.

8. Section 239.13 is amended by revising paragraph (a)(3) to read as follows:

§ 239.13 Form S-3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.

* * * * *

(a) Registrant requirements. * * *

(3) The registrant:

(i) Has been subject to the requirements of section 12 or 15(d) of the Exchange Act (15 U.S.C. 78l or 78o(d)) and has filed all the material required to be filed pursuant to sections 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for a period of at least twelve calendar months immediately preceding the filing of the registration statement on this Form; and

(ii) Has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement and, if the registrant has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) § 240.12b-25(b) of this chapter with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that section. For purposes of this paragraph, a registrant will be considered as having filed all the material required to be filed under section 13 or 15(d) of the Exchange Act and as having filed in a timely manner all reports required to be filed notwithstanding that the registrant may not have timely filed one or more current reports on Form 8-K (§ 249.308 of this chapter) required to be filed solely to disclose the occurrence of an

event or events specified in Item 10 of Form 8-K; and

* * * * *

9. Form S-3 (referenced in § 239.13) is amended by adding a sentence at the end of General Instruction I.A.3 to read as follows:

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

Form S-3

Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

I. Eligibility Requirements for Use of Form S-3

* * * * *

A. Registrant Requirements.

* * * * *

3. * * * For purposes of (a) and (b) in the preceding sentence, a registrant will be considered as having filed all the material required to be filed under section 13 or 15(d) of the Exchange Act and as having filed in a timely manner all reports required to be filed notwithstanding that the registrant may not have timely filed one or more current reports on Form 8-K (§ 249.308 of this chapter) required to be filed solely to disclose the occurrence of an event or events specified in Item 10 of Form 8-K.

* * * * *

10. Section 239.16b is amended by revising the introductory text of paragraph (a) to read as follows:

§ 239.16b Form S-8, for registration under the Securities Act of 1933 of securities to be offered to employees pursuant to employee benefit plans.

(a) Any registrant that, immediately prior to the time of filing a registration statement on this form, is subject to the requirement to file reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)), and has filed all reports and other materials required to be filed by such requirements during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials), may use this form for registration under the Securities Act of 1933 (the “Act”) of the securities listed in paragraphs (a)(1) and (a)(2) of this section. For purposes of this paragraph, a registrant will be considered as having filed all reports and other materials required to be filed by the requirements of Sections 13 or 15(d) notwithstanding that the registrant may not have timely filed one or more current reports on Form 8-K (§ 249.308 of this chapter) required to be filed solely to disclose the occurrence of an

event or events specified in Item 10 of Form 8-K:

* * * * *

11. Form S-8 (referenced in § 239.16b) is amended by revising the introductory text of General Instruction A.1. to read as follows:

Note—The text of Form S-8 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S-8

Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

A. Rule as to Use of Form S-8

1. Any registrant that, immediately prior to the time of filing a registration statement on this Form, is subject to the requirement to file reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (the “Exchange Act”), and has filed all reports and other materials required to be filed by such requirements during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials), may use this Form for registration under the Securities Act of 1933 (“Act”) of the securities listed in paragraph 1(a). For purposes of this paragraph 1, a registrant will be considered as having filed all reports and other materials required to be filed by the requirements of Sections 13 or 15(d) of the Exchange Act notwithstanding that the registrant may not have timely filed one or more current reports on Form 8-K (§ 249.308 of this chapter) required to be filed solely to disclose the occurrence of an event or events specified in Item 10 of Form 8-K:

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

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

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

* * * * *

13. Form 8-K (referenced in § 249.308) is amended by adding six sentences to the end of paragraph 1 of General Instruction B and by adding Item 10 under “Information to Be Included in the Report” to read as follows:

Note—The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8-K

Current Report

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

* * * * *

General Instructions

* * * * *

B. Events To Be Reported and Time for Filing of Reports

1. * * * Item 10 applies only to registrants with a class of equity security (as defined in § 240.3a11-1 of this chapter) registered under Section 12 of the Act. A registrant must file a report of any event specified in paragraphs (a) and (c) of Item 10 with an aggregate value of \$100,000 or more (other than a grant or award pursuant to an employee benefit plan) within two business days. The registrant must file a report of any grant or award pursuant to an employee benefit plan, any event specified in paragraphs (a) and (c) of Item 10 with an aggregate value less than \$100,000, and any event specified in paragraph (b) of Item 10 not later than the close of business on the second business day of the week following the week in which the event occurred. However, the registrant may defer reporting any event specified in paragraphs (a) and (c) with an aggregate value not exceeding \$10,000 until the aggregate cumulative value of those unreported events with respect to the same executive officer or director exceeds \$10,000. The Commission hereby finds that it is not in the public interest to impose any sanction on a registrant, notwithstanding a violation, that demonstrates that (1) at the time of the violation, it had designed procedures and a system for applying such procedures sufficient to provide reasonable assurances that Item 10 events are timely reported, (2) at the time of the violation, the registrant followed those procedures, and (3) as promptly as reasonably practicable, the registrant made a filing to correct any violation.

* * * * *

Information To Be Included in the Report

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Item 10. Transactions by Directors and Executive Officers

(a)(1) If a director or executive officer (as defined in § 240.3b-7 of this chapter) of the registrant acquires or disposes of any equity security (as defined in § 240.3a11-1 of this chapter) of the registrant, other than a derivative security (as defined in Instruction 1 to this Item), whether or not of a class registered under Section 12 of the Exchange Act, the registrant must report with respect to each transaction:

- (i) The name and title of the director or executive officer;
- (ii) The date of the transaction;
- (iii) The title and number of securities acquired or disposed of;
- (iv) The per share acquisition or disposition price, if any;
- (v) The aggregate value of the transaction;
- (vi) The nature of the transaction (e.g., open market sale or purchase, sale to or purchase from the registrant, gift); and
- (vii) Any other material information regarding the transaction.

(2) If a director or executive officer of the registrant acquires or disposes of any derivative security (as defined in Instruction 1 to this Item) with respect to the registrant, whether or not issued by the registrant, the registrant must report with respect to each transaction:

(i) The name and title of the director or executive officer;

(ii) The date of the transaction;

(iii) The number of derivative securities acquired or disposed of;

(iv) The per share exercise or conversion price (or other price, such as a notional price, used in the terms of the derivative security);

(v) The price, if any, the executive officer or director paid or received for the derivative security;

(vi) The date(s) on which each derivative security becomes exercisable (or subject to termination) and its date of expiration (or final termination);

(vii) The title and number of underlying securities (or cash equivalent) that would be acquired or disposed of upon exercise, conversion, termination, or settlement;

(viii) The nature of the transaction (*e.g.*, option grant, sale or purchase of call option, sale or purchase of put option, entering into a swap or futures contract). If the transaction involves a collar or other hedge, the registrant must so indicate and describe all material terms; and

(ix) Any other material information regarding the transaction, including contingencies applicable to exercise.

(3) If a director or executive officer of the registrant exercises, converts, terminates or settles any derivative security (as defined in Instruction 1 to this Item) with respect to the registrant, the registrant must report with respect to each transaction:

(i) The name and title of the director or executive officer;

(ii) The date of the exercise, conversion, termination or settlement;

(iii) The per share price used for exercise, conversion, termination or settlement;

(iv) The title and number of underlying shares (or cash equivalent) acquired or disposed of;

(v) The nature of the transaction (*e.g.*, exercise of option, settlement of swap agreement). If the transaction involves a collar or other hedge, the registrant shall so indicate and describe all material terms; and

(vi) Any other material information regarding the transaction.

(b)(1) If a director or executive officer of the registrant enters into any contract, instruction or written plan for the purchase or sale of equity securities of the registrant (including derivative securities as defined in Instruction 1 to this Item) intended to satisfy the affirmative defense conditions of § 240.10b5-1(c) of this chapter, the registrant must report:

(i) The name and title of the director or executive officer;

(ii) The date on which the director or executive officer entered into the contract, instruction or written plan; and

(iii) A description of the contract, instruction or written plan, including its duration, the aggregate number of securities to be purchased or sold, and the name of the counterparty or agent.

(2) If a director or executive officer of the registrant terminates or modifies any contract, instruction or written plan for the purchase or sale of equity securities of the registrant (including derivative securities as defined in Instruction 1 to this Item) intended to satisfy the affirmative defense conditions of § 240.10b5-1(c) of this chapter, the registrant must report:

(i) The name and title of the director or executive officer;

(ii) The date on which the director or executive officer terminated or modified the contract, instruction or written plan; and

(iii) A description of the modification to the contract, instruction or written plan, including any modification to its duration, the aggregate number of securities to be purchased or sold, the interval at which securities are to be purchased or sold, the number of securities to be purchased or sold in each interval, the price at which securities are to be purchased or sold, and the identity of the counterparty or agent.

(c)(1) If the registrant or an affiliate of the registrant agrees to lend or lends money to a director or executive officer of the registrant, or enters into a guarantee or similar arrangement in favor of another person who agrees to lend or lends money to the director or executive officer, the registrant must report:

(i) The name and title of the director or executive officer;

(ii) The date of each such agreement (or guarantee or similar arrangement) or loan thereunder;

(iii) The dollar amount and other material terms of the agreement or loan, and, if applicable guarantee or similar arrangement, including the interest rate, terms of repayment, and any provisions with respect to forgiveness;

(iv) The number and class of any registrant securities pledged as collateral; and

(v) The material terms of any pledge, including whether it is made with or without recourse.

(2) If any loan described in paragraph (c)(1) to this Item is forgiven, if the registrant or its affiliate makes payment on its guarantee or similar arrangement, or if any collateral is foreclosed upon, the registrant must report:

(i) The name and title of the director or executive officer; and

(ii) The date on which the forgiveness, payment or foreclosure occurred, and the dollar amount of forgiveness or payment and the number and class of any securities foreclosed upon.

Instructions.

1. For purposes of this Item, "derivative security" includes instruments defined as "derivative securities" in § 240.16a-1(c), as well as rights with a value derived from the value of an equity security that have an exercise or conversion privilege at a price that is not fixed.

2. The registrant's disclosure obligations under paragraph (a) of this Item apply to any transaction in which the director or executive officer has a pecuniary interest, as defined in § 240.16a-1(a)(2)(i), other than transactions that satisfy the exemptive conditions of § 240.16a-2(d), § 240.16a-3(f)(1)(i)(B), § 240.16a-9, § 240.16a-11, § 240.16a-12, § 240.16a-13, § 240.16b-7, and § 240.16b-8 of this chapter, and transfers by will or the laws of descent and distribution. The registrant is not required to disclose trust transactions that the director or executive officer is not required to report pursuant to § 240.16a-8.

3. The disclosure obligations of paragraph (b) of this Item apply to any contract, instruction or written plan for the purchase or sale of equity securities of the registrant in which the director or executive officer has a pecuniary interest, as defined in § 240.16a-1(a)(2)(i), other than a director's or executive officer's enrollment in a broad-based employee benefit plan for the acquisition of registrant equity securities through payroll deduction. However, paragraph (a) disclosure is required of transactions in these plans that are volitional intra-plan transfers involving an issuer equity securities fund, or a cash distribution funded by a volitional disposition of an issuer equity security, unless the transaction is made in connection with the director's or executive officer's death, disability, retirement or termination of employment, or is required to be made available to plan participants pursuant to the Internal Revenue Code.

Dated: April 12, 2002.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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