

strategies.¹⁶ In August 1994, the Commission's release proposing revisions to rules under Section 16 of the Exchange Act¹⁷ included a discussion of reporting obligations arising from equity swaps and similar risk-shifting transactions. In that release, the Commission stated that Section 16 insiders must report equity swaps and similar transactions in equity securities of the issuer,¹⁸ unless the swap relates solely to interests in securities comprising part of specified market baskets or indices of stocks.¹⁹

The release provided the following example of an equity swap required to be reported. An insider agrees to pay to the counterparty for a period of three years the value of dividend payments on 100,000 shares of issuer common stock, in exchange for payment of a fixed interest rate based on the market value of the 100,000 shares of stock at the commencement of the swap term. The parties also agree that at the end of the swap term, the insider will pay to the counterparty the cash value of any appreciation on the shares during the term, or, conversely, the counterparty will pay to the insider the cash value of any depreciation. The insider retains title to and any voting rights in the securities.

The release suggested a method of reporting entering into and closing out the swap using stock appreciation and depreciation rights and deemed acquisitions and dispositions of the underlying securities. In setting forth this analysis, the Commission specially noted in the release that it was not suggesting that previously filed forms reporting swap transactions in another manner needed to be revised, or that swap transactions reported differently would be subject to disclosure pursuant to Item 405 of Regulations S-B or S-K.²⁰ The release solicited comment on whether the Commission's approach reflects economic reality and whether a

separate reporting code for equity swaps is needed. The Commission wishes to remind Section 16 insiders that reporting at the time these transactions are entered into and when they are closed out is required.²¹

III. Summary of Initial Regulatory Flexibility Analysis

The Commission has prepared an initial regulatory flexibility analysis in accordance with the Regulatory Flexibility Act.²² The analysis notes that the amendments to Rule 144 are being proposed as a result of recommendations developed at the SEC Government-Business Forums on Small Business Capital Formation. The purpose of the revisions is to remove unnecessary restrictions in the resale of securities while maintaining important protections to the investing public.

A copy of the initial regulatory flexibility analysis may be obtained from Twanna M. Young, Office of Small Business Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Stop 7-8, Washington, DC 20549, (202) 942-2950.

IV. Statutory Basis, Text of Proposal and Authority

The amendment to the Commission's rule is being proposed pursuant to sections 2(11), 4(1), 4(4) and 19(a) of the Securities Act.

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping. Securities.

For the reasons set out in the preamble, 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 authority citation for Part 230 continues to read in part, as follows:

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

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2. Section 230.144 is amended by revising paragraphs (d)(1), (e)(3)(ii), (e)(3)(iii), (e)(3)(iv) and (k) to read as follows:

²¹ To the extent settlement of the parties obligations occurs on an interim basis during the term of the swap, such as quarterly, the insider's Section 16 obligations would arise with respect to each settlement.

²² 5 U.S.C. 603.

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

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(d) *Holding period for restricted securities.* * * *

(1) *General rule.* A minimum of one year must elapse between the later of the date of the acquisition of the securities from the issuer or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities, and if the acquiror takes the securities by purchase, the one-year period shall not begin until the full purchase price or other consideration is paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer.

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(e) *Limitation on amount of securities sold.* * * *

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(3) *Determination of amount.* * * *

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(ii) The amount of securities sold for the account of a pledgee thereof, or for the account of a purchaser of the pledged securities, during any period of three months within one year after a default in the obligation secured by the pledge, and the amount of securities sold during the same three-month period for the account of the pledgor shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable;

(iii) The amount of securities sold for the account of a donee thereof during any period of three months within one year after the donation, and the amount of securities sold during the same three-month period for the account of the donor, shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable;

(iv) Where securities were acquired by a trust from the settlor of the trust, the amount of such securities sold for the account of the trust during any period of three months within one year after the acquisition of the securities by the trust, and the amount of securities sold during the same three-month period for the account of the settlor, shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable;

* * * * *

(k) *Termination of certain restrictions on sales of restricted securities by persons other than affiliates.* The requirements of paragraphs (c), (e), (f) and (h) of this section shall not apply to

¹⁶ See Rucker, "Short Interest: No More Bullish Bellow," *Barron's*, May 1, 1995.

¹⁷ Release No. 34-34514 (August 10, 1994) [59 FR 42449].

¹⁸ The term "insider" as used in this release refers to officers, directors and holders of more than ten percent of a class of equity securities who are subject to Section 16.

¹⁹ 59 FR 42449, 42457, footnote 101 and accompanying text. No Section 16 consequences would flow from a swap transaction to the extent the swap relates solely to interests in securities comprising part of a broad-based, publicly traded market basket or index of stocks, approved for trading by the appropriate federal governmental authority, that are deemed not to confer beneficial ownership for purposes of Section 16 pursuant to Rule 16a-1(a)(5)(iii) [17 CFR 240.16a-1(a)(5)(iii)] and/or are excluded from the definition of "derivative securities" pursuant to Rule 16a-1(c)(4) [17 CFR 240.16a-1(c)(4)].

²⁰ 17 CFR 228.405 and 229.405.