

Securities and Exchange Commission

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4 and the exercise shall be eligible for exemption from section 16(b) of the Act pursuant to § 240.16b-6(b).

[56 FR 7265, Feb. 21, 1991, as amended at 61 FR 30393, June 14, 1996]

§ 240.16a-10 Exemptions under section 16(a).

Except as provided in § 240.16a-6, any transaction exempted from the requirements of section 16(a) of the Act, insofar as it is otherwise subject to the provisions of section 16(b), shall be likewise exempt from section 16(b) of the Act.

§ 240.16a-11 Dividend or interest reinvestment plans.

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

[61 FR 30393, June 14, 1996]

§ 240.16a-12 Domestic relations orders.

The acquisition or disposition of equity securities pursuant to a domestic relations order, as defined in the Internal Revenue Code or Title I of the Employee Retirement Income Security Act, or the rules thereunder, shall be exempt from section 16 of the Act.

[61 FR 30393, June 14, 1996]

§ 240.16a-13 Change in form of beneficial ownership.

A transaction, other than the exercise or conversion of a derivative security or deposit into or withdrawal from a voting trust, that effects only a change in the form of beneficial ownership without changing a person's pecuniary interest in the subject equity securities shall be exempt from section 16 of the Act.

[61 FR 30393, June 14, 1996]

EXEMPTION OF CERTAIN TRANSACTIONS FROM SECTION 16(B)

SOURCE: Sections 240.16b-1 through 240.16b-8 appear at 56 FR 7270, Feb. 21, 1991, unless otherwise noted.

§ 240.16b-1 Transactions approved by a regulatory authority.

(a) Any purchase and sale, or sale and purchase, of a security shall be exempt from section 16(b) of the Act, if the transaction is effected by an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) and both the purchase and sale of such security have been exempted from the provisions of section 17(a) (15 U.S.C. 80a-17(a)) of the Investment Company Act of 1940, by rule or order of the Commission.

(b) Any purchase and sale, or sale and purchase, of a security shall be exempt from the provisions of section 16(b) of the Act if:

(1) The person effecting the transaction is either a holding company registered under the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*) or a subsidiary thereof; and

(2) Both the purchase and the sale of the security have been approved or permitted by the Commission pursuant to the applicable provisions of that Act and the rules and regulations thereunder.

[56 FR 7270, Feb. 21, 1991, as amended at 61 FR 30404, June 14, 1996]

§ 240.16b-2 [Reserved]

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

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

(b) *Definitions.* (1) A *Discretionary Transaction* shall mean a transaction pursuant to an employee benefit plan that:

(i) Is at the volition of a plan participant;

(ii) Is not made in connection with the participant's death, disability, retirement or termination of employment;

(iii) Is not required to be made available to a plan participant pursuant to a provision of the Internal Revenue Code; and

(iv) Results in either an intra-plan transfer involving an issuer equity securities fund, or a cash distribution funded by a volitional disposition of an issuer equity security.

(2) An *Excess Benefit Plan* shall mean an employee benefit plan that is operated in conjunction with a Qualified Plan, and provides only the benefits or contributions that would be provided under a Qualified Plan but for any benefit or contribution limitations set forth in the Internal Revenue Code of 1986, or any successor provisions thereof.

(3)(i) A *Non-Employee Director* shall mean a director who:

(A) Is not currently an officer (as defined in §240.16a-1(f)) of the issuer or a parent or subsidiary of the issuer, or otherwise currently employed by the issuer or a parent or subsidiary of the issuer;

(B) Does not receive compensation, either directly or indirectly, from the issuer or a parent or subsidiary of the issuer, for services rendered as a consultant or in any capacity other than as a director, except for an amount that does not exceed the dollar amount for which disclosure would be required pursuant to §229.404(a) of this chapter;

(C) Does not possess an interest in any other transaction for which disclosure would be required pursuant to §229.404(a) of this chapter; and

(D) Is not engaged in a business relationship for which disclosure would be required pursuant to §229.404(b) of this chapter.

(ii) Notwithstanding paragraph (b)(3)(i) of this section, a *Non-Employee Director* of a closed-end investment company shall mean a director who is not an "interested person" of the issuer, as that term is defined in Section 2(a)(19) of the Investment Company Act of 1940.

(4) A *Qualified Plan* shall mean an employee benefit plan that satisfies the coverage and participation require-

ments of sections 410 and 401(a)(26) of the Internal Revenue Code of 1986, or any successor provisions thereof.

(5) A *Stock Purchase Plan* shall mean an employee benefit plan that satisfies the coverage and participation requirements of sections 423(b)(3) and 423(b)(5), or section 410, of the Internal Revenue Code of 1986, or any successor provisions thereof.

(c) *Tax-conditioned plans.* Any transaction (other than a Discretionary Transaction) pursuant to a Qualified Plan, an Excess Benefit Plan, or a Stock Purchase Plan shall be exempt without condition.

(d) *Acquisitions from the issuer.* Any transaction, other than a Discretionary Transaction, involving an acquisition from the issuer (including without limitation a grant or award), whether or not intended for a compensatory or other particular purpose, shall be exempt if:

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

(2) The transaction is approved or ratified, in compliance with section 14 of the Act, by either: the affirmative votes of the holders of a majority of the securities of the issuer present, or represented, and entitled to vote at a meeting duly held in accordance with the applicable laws of the state or other jurisdiction in which the issuer is incorporated; or the written consent of the holders of a majority of the securities of the issuer entitled to vote; *provided that* such ratification occurs no later than the date of the next annual meeting of shareholders; or

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

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(e) *Dispositions to the issuer.* Any transaction, other than a Discretionary Transaction, involving the disposition to the issuer of issuer equity securities, whether or not intended for a compensatory or other particular purpose, shall be exempt, provided that the terms of such disposition are approved in advance in the manner prescribed by either paragraph (d)(1) or paragraph (d)(2) of this section.

(f) *Discretionary Transactions.* A Discretionary Transaction shall be exempt only if effected pursuant to an election made at least six months following the date of the most recent election, with respect to any plan of the issuer, that effected a Discretionary Transaction that was:

(1) An acquisition, if the transaction to be exempted would be a disposition; or

(2) A disposition, if the transaction to be exempted would be an acquisition.

NOTES TO § 240.16b-3

NOTE (1): The exercise or conversion of a derivative security that does not satisfy the conditions of this section is eligible for exemption from section 16(b) of the Act to the extent that the conditions of § 240.16b-6(b) are satisfied.

NOTE (2): Section 16(a) reporting requirements applicable to transactions exempt pursuant to this section are set forth in § 240.16a-3(f) and (g) and § 240.16a-4.

NOTE (3): The approval conditions of paragraphs (d)(1), (d)(2) and (e) of this section require the approval of each specific transaction, and are not satisfied by approval of a plan in its entirety except for the approval of a plan pursuant to which the terms and conditions of each transaction are fixed in advance, such as a formula plan. Where the terms of a subsequent transaction (such as the exercise price of an option, or the provision of an exercise or tax withholding right) are provided for in a transaction as initially approved pursuant to paragraphs (d)(1), (d)(2) or (e), such subsequent transaction shall not require further specific approval.

[61 FR 30393, June 14, 1996, as amended at 70 FR 46089, Aug. 9, 2005]

§ 240.16b-4 [Reserved]

§ 240.16b-5 Bona fide gifts and inheritance.

Both the acquisition and the disposition of equity securities shall be exempt from the operation of section

16(b) of the Act if they are: (a) Bona fide gifts; or (b) transfers of securities by will or the laws of descent and distribution.

§ 240.16b-6 Derivative securities.

(a) The establishment of or increase in a call equivalent position or liquidation of or decrease in a put equivalent position shall be deemed a purchase of the underlying security for purposes of section 16(b) of the Act, and the establishment of or increase in a put equivalent position or liquidation of or decrease in a call equivalent position shall be deemed a sale of the underlying securities for purposes of section 16(b) of the Act: *Provided, however,* That if the increase or decrease occurs as a result of the fixing of the exercise price of a right initially issued without a fixed price, where the date the price is fixed is not known in advance and is outside the control of the recipient, the increase or decrease shall be exempt from section 16(b) of the Act with respect to any offsetting transaction within the six months prior to the date the price is fixed.

(b) The closing of a derivative security position as a result of its exercise or conversion shall be exempt from the operation of section 16(b) of the Act, and the acquisition of underlying securities at a fixed exercise price due to the exercise or conversion of a call equivalent position or the disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position shall be exempt from the operation of section 16(b) of the Act: *Provided, however,* That the acquisition of underlying securities from the exercise of an out-of-the-money option, warrant, or right shall not be exempt unless the exercise is necessary to comport with the sequential exercise provisions of the Internal Revenue Code (26 U.S.C. 422A).

NOTE TO PARAGRAPH (b): The exercise or conversion of a derivative security that does not satisfy the conditions of this section is eligible for exemption from section 16(b) of the Act to the extent that the conditions of § 240.16b-3 are satisfied.

(c) In determining the short-swing profit recoverable pursuant to section 16(b) of the Act from transactions involving the purchase and sale or sale

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and purchase of derivative and other securities, the following rules apply:

(1) Short-swing profits in transactions involving the purchase and sale or sale and purchase of derivative securities that have identical characteristics (*e.g.*, purchases and sales of call options of the same strike price and expiration date, or purchases and sales of the same series of convertible debentures) shall be measured by the actual prices paid or received in the short-swing transactions.

(2) Short-swing profits in transactions involving the purchase and sale or sale and purchase of derivative securities having different characteristics but related to the same underlying security (*e.g.*, the purchase of a call option and the sale of a convertible debenture) or derivative securities and underlying securities shall not exceed the difference in price of the underlying security on the date of purchase or sale and the date of sale or purchase. Such profits may be measured by calculating the short-swing profits that would have been realized had the subject transactions involved purchases and sales solely of the derivative security that was purchased or solely of the derivative security that was sold, valued as of the time of the matching purchase or sale, and calculated for the lesser of the number of underlying securities actually purchased or sold.

(d) Upon cancellation or expiration of an option within six months of the writing of the option, any profit derived from writing the option shall be recoverable under section 16(b) of the Act. The profit shall not exceed the premium received for writing the option. The disposition or closing of a long derivative security position, as a result of cancellation or expiration, shall be exempt from section 16(b) of the Act where no value is received from the cancellation or expiration.

[56 FR 7270, Feb. 21, 1991, as amended at 61 FR 30394, June 14, 1996]

§ 240.16b-7 Mergers, reclassifications, and consolidations.

(a) The following transactions shall be exempt from the provisions of section 16(b) of the Act:

(1) The acquisition of a security of a company, pursuant to a merger, reclassi-

sification or consolidation, in exchange for a security of a company that before the merger, reclassification or consolidation, owned 85 percent or more of either:

(i) The equity securities of all other companies involved in the merger, reclassification or consolidation, or in the case of a consolidation, the resulting company; or

(ii) The combined assets of all the companies involved in the merger, reclassification or consolidation, computed according to their book values before the merger, reclassification or consolidation as determined by reference to their most recent available financial statements for a 12 month period before the merger, reclassification or consolidation, or such shorter time as the company has been in existence.

(2) The disposition of a security, pursuant to a merger, reclassification or consolidation, of a company that before the merger, reclassification or consolidation, owned 85 percent or more of either:

(i) The equity securities of all other companies involved in the merger, reclassification or consolidation or, in the case of a consolidation, the resulting company; or

(ii) The combined assets of all the companies undergoing merger, reclassification or consolidation, computed according to their book values before the merger, reclassification or consolidation as determined by reference to their most recent available financial statements for a 12 month period before the merger, reclassification or consolidation.

(b) A merger within the meaning of this section shall include the sale or purchase of substantially all the assets of one company by another in exchange for equity securities which are then distributed to the security holders of the company that sold its assets.

(c) The exemption provided by this section applies to any securities transaction that satisfies the conditions specified in this section and is not conditioned on the transaction satisfying any other conditions.

(d) Notwithstanding the foregoing, if a person subject to section 16 of the Act makes any non-exempt purchase of a security in any company involved in

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the merger, reclassification or consolidation and any non-exempt sale of a security in any company involved in the merger, reclassification or consolidation within any period of less than six months during which the merger, reclassification or consolidation took place, the exemption provided by this section shall be unavailable to the extent of such purchase and sale.

[70 FR 46089, Aug. 9, 2005]

§ 240.16b-8 Voting trusts.

Any acquisition or disposition of an equity security or certificate representing equity securities involved in the deposit or withdrawal from a voting trust or deposit agreement shall be exempt from section 16(b) of the Act if substantially all of the assets held under the voting trust or deposit agreement immediately after the deposit or immediately prior to the withdrawal consisted of equity securities of the same class as the security deposited or withdrawn: *Provided, however,* That this exemption shall not apply if there is a non-exempt purchase or sale of an equity security of the class deposited within six months (including the date of withdrawal or deposit) of a non-exempt sale or purchase, respectively, of any certificate representing such equity security (other than the actual deposit or withdrawal).

EXEMPTION OF CERTAIN TRANSACTIONS FROM SECTION 16(C)

SOURCE: Sections 240.16c-1 through 240.16c-4 appear at 56 FR 7273, Feb. 21, 1991, unless otherwise noted.

§ 240.16c-1 Brokers.

Any transaction shall be exempt from section 16(c) of the Act to the extent necessary to render lawful the execution by a broker of an order for an account in which the broker has no direct or indirect interest.

§ 240.16c-2 Transactions effected in connection with a distribution.

Any transaction shall be exempt from section 16(c) of the Act to the extent necessary to render lawful any sale made by or on behalf of a dealer in connection with a distribution of a substantial block of securities, where the

sale is represented by an over-allotment in which the dealer is participating as a member of an underwriting group, or the dealer or a person acting on the dealer's behalf intends in good faith to offset such sale with a security to be acquired by or on behalf of the dealer as a participant in an underwriting, selling, or soliciting-dealer group of which the dealer is a member at the time of the sale, whether or not the security to be acquired is subject to a prior offering to existing security holders or some other class of persons.

§ 240.16c-3 Exemption of sales of securities to be acquired.

(a) Whenever any person is entitled, incident to ownership of an issued security and without the payment of consideration, to receive another security "when issued" or "when distributed," the sale of the security to be acquired shall be exempt from the operation of section 16(c) of the Act: *Provided, That:*

(1) The sale is made subject to the same conditions as those attaching to the right of acquisition;

(2) Such person exercises reasonable diligence to deliver such security to the purchaser promptly after the right of acquisition matures; and

(3) Such person reports the sale on the appropriate form for reporting transactions by persons subject to section 16(a) of the Act.

(b) This section shall not exempt transactions involving both a sale of the issued security and a sale of a security "when issued" or "when distributed" if the combined transactions result in a sale of more securities than the aggregate of issued securities owned by the seller plus those to be received for the other security "when issued" or "when distributed."

§ 240.16c-4 Derivative securities.

Establishing or increasing a put equivalent position shall be exempt from section 16(c) of the Act, so long as the amount of securities underlying the put equivalent position does not exceed the amount of underlying securities otherwise owned.