FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALPHA VENTURE CAPITAL PARTNERS LP; CARACCIOLO FAMILY TRUST; GREGORY A. GOULD; LAW OFFICES OF KENNETH E. CHYTEN 401(K) PROFIT SHARING PLAN; GAVIN MYERS; MARTIN PETERSON, derivatively on behalf of CytoDyn Inc, *Plaintiffs-Appellants*, v. NADER Z. POURHASSAN; CYTODYN, INC., Nominal; a Delaware corporation, *Defendants-Appellees.*	No. 21-35274 D.C. No. 3:20-cv-05909-JLR OPINION

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Submitted February 11, 2022*
Seattle, Washington

Filed April 8, 2022

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: Jay S. Bybee, Carlos T. Bea, and Morgan Christen, Circuit Judges.

Opinion by Judge Bea

SUMMARY**

Securities

The panel affirmed the district court's dismissal of an action brought by shareholders of CytoDyn, Inc., alleging that a corporate insider violated § 16(b) of the Securities Exchange Act of 1934 by failing to disgorge to the corporation all profits made from a short-swing transaction in which he bought and then sold company securities within a six-month period.

The panel held that defendant Nader Pourhassan was not required to disgorge to CytoDyn his short-swing profits from exercising options and warrants granted by CytoDyn, entitling him to purchase and later sell CytoDyn shares. The panel held that the short-swing transaction fell within an exemption, set forth in SEC Rule 16b-3(d)(1), because the option and warrant award was "approved by the board of directors" of CytoDyn. The panel concluded that the affirmative votes of three of CytoDyn's five board members, at a meeting where only four board members were present, was sufficient, and a unanimous decision was not required

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

under either the plain text of Rule 16-3(d)(1), Delaware corporate law, or CytoDyn's bylaws.

COUNSEL

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Thomas R. Johnson, Perkins Coie LLP, Portland, Oregon, for Defendant-Appellee Nader Z. Purhassan.

Ian Christy, Miller Nash LLP, Portland, Oregon, for Nominal Defendant-Appellee CytoDyn, Inc.

OPINION

BEA, Circuit Judge:

CytoDyn, Inc. is a publicly traded corporation incorporated in the state of Delaware. Appellee Nader Pourhassan is (and was, at all relevant times) CytoDyn's Chief Executive Officer (CEO) and a member of its board of directors. In late 2019, CytoDyn granted Pourhassan options and warrants entitling him to purchase several million CytoDyn shares at certain, specified prices. In mid-2020, about five months after that option and warrant award, Pourhassan exercised those options and warrants and then sold the resulting CytoDyn stock at a profit. Appellants

here—several shareholders of CytoDyn (the "Shareholders")—sued Pourhassan, alleging that he violated Section 16(b) of the Securities Exchange Act of 1934. Section 16(b) requires corporate insiders like CEO Pourhassan to disgorge to the corporation all profits the insiders make from buying and then selling (or selling and then buying) company securities within any six-month period (a so-called "short-swing" transaction).

The district court dismissed the Shareholders' complaint, finding that Pourhassan need not disgorge his short-swing profits to CytoDyn because his short-swing transaction fell within an exemption to the federal rule because the option and warrant award was "approved" by CytoDyn's board of directors. We affirm.

I. BACKGROUND

A. Statutory Background

Section 16(b) of the Securities Exchange Act of 1934 is meant to prevent corporate insiders (*i.e.*, corporate executives, officers, and directors) from "exploit[ing] information not generally available to others to secure quick profits." *Kern Cnty. Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 592 (1973). In Congress's view, short-swing transactions by corporate insiders pose an "intolerably great" risk of this type of exploitation. *Dreiling v. Am. Express Co.*, 458 F.3d 942, 947 (9th Cir. 2006) (quoting *Kern*, 411 U.S. at 592). So, to prevent potential abuse by corporate insiders, Section 16(b) requires such insiders to return to the corporation any profits they realize from short-swing transactions. *See* 15 U.S.C. § 78p(b). Section 16(b) "imposes strict liability regardless of motive," requiring all corporate insiders to disgorge their profits from all short-

swing transactions, even those transactions "not actually based on inside information." *Dreiling*, 458 F.3d at 947.

Recognizing Section 16(b)'s broad reach, Congress authorized the Securities and Exchange Commission to issue rules exempting from Section 16(b) certain transactions that the SEC deemed unlikely to involve inside information. *See* 15 U.S.C. § 78p(b). Under that rulemaking authority, the SEC issued rules creating several exemptions from Section 16(b). As relevant here, SEC Rule 16b-3(d) exempts from Section 16(b) any "transaction . . . involving an acquisition from the issuer" (*i.e.*, an acquisition from the insider's corporation itself) so long as the transaction was either: 1) "approved by the board of directors of the issuer" (here, the issuer is CytoDyn); 2) approved by "a committee of the board of directors that is composed solely of two or more Non-Employee Directors"; or 3) approved by a shareholder vote. 17 C.F.R. § 240.16b-3(d)(1), (2). In the SEC's view, an insider's acquisition of securities from the issuer does not "present the same opportunities for insider profit on the basis of non-public information as do" other types of transactions. *Dreiling*, 458 F.3d at 948 (quoting Ownership Reports and Trading by Officers, Directors and Principal Security Holders, 61 Fed. Reg. 30,376, 30,377 (June 14, 1996)). "[W]here the issuer, rather than trading markets, is on the other side of an officer or director's transaction in the issuer's equity securities, any profit obtained is not at the expense of uninformed shareholders and other market participants of the type contemplated by [Section 16(b)]." *Id.* (quoting Ownership Reports and Trading, 61 Fed. Reg. at 30,377).

The first of these exemptions—the board approval exemption—is the exemption at issue here. Under that exemption, an insider's acquisition of securities from the

issuer are exempt from Section 16(b) if the acquisition was "approved by the board of directors of the issuer." 17 C.F.R. § 240.16b-3(d)(1). So, under this exemption, a corporate insider can obtain corporate securities from the issuer with board approval and then re-sell those securities within six months without triggering Section 16(b)'s profit-remission requirements.[1]

B. Factual Background

In December 2019, CytoDyn granted Pourhassan stock options giving him the right to purchase 2,000,000 shares of CytoDyn stock and warrants giving him the right to purchase an additional 2,000,000 CytoDyn shares.[2] The same day, CytoDyn's board of directors met. Of the five board members, four were present at the meeting; one was absent. Of the four members present, three voted to approve the award of options and warrants to Pourhassan; Pourhassan himself was present but did not cast a vote. Under CytoDyn's bylaws, the four board members present at the December 2019 meeting constituted a "quorum for the

[1] The parties do not contest that the board of directors need only approve the insider's acquisition of securities from the issuer and need not also approve the insider's subsequent sale of those securities. So we assume without deciding that the parties are correct. *See also Gryl ex rel. Shire Pharms. Grp. PLC v. Shire Pharms. Grp.*, 298 F.3d 136, 140–46 (2d Cir. 2002) (affirming a lower court ruling that the 16b-3(d)(1) exemption applied because the board approved a compensation plan that "precisely delimited the securities grants that the individual defendants would ultimately receive" without inquiring whether the plan also specified how the defendants were to sell the securities).

[2] Warrants are similar to stock options in that they entitle the warrant-holder to purchase shares of stock of a specified company at a specific exercise price, usually within a specified time period. *See* Warrant, *Black's Law Dictionary* (11th ed. 2019).

transaction of business" and the affirmative vote of three directors—a majority of the directors present—"constitute[d] action by the Board of Directors."

In late April and early May 2020, less than six months after the December 2019 option and warrant award and board meeting, Pourhassan exercised the options that he held to buy 2,000,000 shares of CytoDyn stock and sold nearly 5,000,000 shares of CytoDyn stock, making a significant profit. Soon thereafter, some CytoDyn shareholders demanded that Pourhassan disgorge to CytoDyn the profits that he made from selling the shares of CytoDyn stock that he obtained through the 2019 option and warrant award. The Shareholders argued that because the 2019 award and the subsequent sales were within six months of one another, they were a short-swing transaction under Section 16(b) of the Exchange Act.[3] CytoDyn responded that the option and warrant award was exempt under SEC Rule 16b-3(d)(1), relieving Pourhassan of his obligation to disgorge his profits to CytoDyn. After several fruitless back-and-forths between the Shareholders and CytoDyn, the Shareholders sued.

In the district court, Pourhassan moved to dismiss the Shareholders' complaint on the grounds that Rule 16b-3(d)(1)'s board approval exemption applied to the 2019 option and warrant award. The Shareholders argued that the 16b-3(d)(1) exemption did not apply because, in their view, the relevant insider-issuer transaction must be approved by "the company's 'full board' of directors—all directors, not

[3] The parties do not contest that Pourhassan's acquisition of the options and warrants was a "purchase" of securities under Section 16(b), so we assume without deciding that the parties are correct on this matter. *See also Gryl*, 298 F.3d at 141 ("[F]or purposes of the rules promulgated under Section 16(b) the acquisition of a securities option is deemed to be equivalent to the acquisition of the security underlying that option.").

merely a majority." And here, the parties agree that, of CytoDyn's five board members, only four attended the meeting to approve the option and warrant award and only three voted to approve that award. The district court dismissed the Shareholders' complaint, finding no support for the Shareholders' argument in the applicable caselaw or the text of Rule 16b-3(d). The Shareholders timely appealed.

II. STANDARD OF REVIEW

We review de novo a district court's decision to dismiss a complaint under Fed. R. Civ. P. 12(b)(6). *See Dreiling*, 458 F.3d at 946 n.2. We may consider documents referred to in the complaint or any matter subject to judicial notice, including SEC filings. *See id.*

III. DISCUSSION

The parties dispute only whether the Rule 16b-3(d)(1) board approval exemption applies to Pourhassan's 2019 option and warrant award.[4] Specifically, the parties dispute the meaning of the phrase "approved by the board of directors" as used in that rule. The Shareholders argue that 16b-3(d)(1) requires approval by the "full board" of directors. On that theory, the affirmative votes of three of CytoDyn's five board members, at a meeting where only four board members were present, does not constitute "approv[al] by the board of directors" of CytoDyn under Rule 16b-3(d)(1). Pourhassan disagrees. In his view, because the CytoDyn board approved the 2019 option and warrant award by a majority vote "in compliance with

[4] The parties do not dispute that Pourhassan, as CytoDyn's CEO, is a corporate executive subject to Section 16(b).

Delaware law and CytoDyn's bylaws," the board "approved" the award under 16b-3(d)(1). The district court agreed with Pourhassan. With jurisdiction under 28 U.S.C. § 1291, we affirm.

Recall that Rule 16b-3(d)(1) exempts from Section 16(b) any transactions that involve a corporate insider's acquisition of securities from the issuer if the acquisition was "approved by the board of directors" of the issuer (here, CytoDyn). 17 C.F.R. § 240.16b-3(d)(1). In plain English, if a corporation's board "approve[s]" the corporation's decision to give securities to an insider, the insider can re-sell those securities within six months without having to disgorge his profits to the corporation under Section 16(b). The operative text from the rule is "approved by the board of directors"; the two component phrases are "approved" and "board of directors." Neither phrase supports the Shareholders' proposed unanimity requirement.

First is the word "approved." "Approved" is the past tense of the verb "approve," which means to "give formal sanction to" or to "confirm authoritatively." Approve, *Black's Law Dictionary* (11th ed. 2019). "Approved" by itself does not prescribe any particular form of approval or process for obtaining approval. Approval does not inherently require unanimity, a supermajority, a particular quorum, or any other specific steps. A complete but non-unanimous body can give approval, as can a body missing some of its members. *Cf., e.g.*, *Crawford v. Bd. of Educ.*, 458 U.S. 527, 532 n.5 (1982) (noting that "[t]he State Senate [of California] approved the Proposition by a vote of 28 to 6" though the California Senate had (and has) 40 seats); *Trunk v. City of San Diego*, 629 F.3d 1099, 1104 (9th Cir. 2011) (noting that the U.S. House of Representatives

"approved the bill by a vote of 349 to 74" though the House has 435 members).

Next is the phrase "board of directors." That phrase means the "governing body of a corporation, partnership, association, or other organization, elected by the shareholders or members to establish policy, elect or appoint officers and committees, and make other governing decisions."[5] Board of Directors, *Black's Law Dictionary* (11th ed. 2019). Nothing in this definition supports the unanimity requirement either. A board of directors certainly differs from a "committee of the board of directors" and from an individual director. But a board of directors does not cease to be a board of directors if a member is absent or non-voting any more than the United States Senate ceases to be the United States Senate if a Senator is absent or non-voting. *Cf. Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 110 (2d Cir. 2008) ("The full Senate rejected this measure by a vote of 62–22."); *Rosado v. Civiletti*, 621 F.2d 1179, 1187 (2d Cir. 1980) ("Following extensive hearings in the Senate Foreign Relations and Judiciary Committees, the full Senate unanimously approved the treaty by a vote of 90 to 0 on July 21, 1977."). So by its plain terms, Rule 16b-3(d)(1)'s text—"approved by the board of directors"—places no limits on how a board of directors must "approve[]" insider-issuer transactions like Pourhassan's 2019 option and warrant

[5] The law of Delaware, the state where CytoDyn is incorporated, has an analogous understanding. Boards of directors are groups of "1 or more members, each of whom shall be a natural person," and "[t]he business and affairs of every corporation [incorporated in Delaware] shall be managed by or under the direction of" that corporation's board. 8 Del. Code. § 141(a), (b).

award. Rule 16b-3(d)(1) has no embedded requirements of unanimity, a supermajority, or a particular quorum.

So, if Rule 16b-3(d)(1) sets out no specific procedure for how a board must approve an insider-issuer securities acquisition, where do we find any procedural requirements? The specific context here—corporate boards of directors—provides the answer. In situations like this, the Supreme Court has recognized that the "gaps" in the federal laws "bearing on the allocation of governing power within [a] corporation" should generally be "filled with state law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). Here, state law fills the gap well. State corporate codes, supplemented by the articles of incorporation and corporate bylaws of individual corporations, typically specify the procedures that a corporate board must follow to "approve" corporate decisions. For instance, the corporate law of Delaware, CytoDyn's state of incorporation and the home of most American corporations, explains that the "vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors." 8 Del. Code § 141(b). In turn, Delaware defines a quorum as a "majority of the total number of directors." *Id.* Note the precise language in the statute: a board decision made by majority of a quorum of a board constitutes an "act of the board of directors," not an act of just *part* of the board. *Id.* So, for Delaware corporations like CytoDyn, a quorum of the board can take action by a majority vote.[6] Here,

[6] Delaware law does permit corporations to specify, through their bylaws or articles of incorporation, different procedures that their boards can use. Corporations may, for instance, require a larger or smaller number of directors than a simple majority for a quorum, or may require an affirmative vote by more than a simple majority of directors for the vote to be an "act of the board of directors." *See* 8 Del. Code § 141(b). CytoDyn elected to retain Delaware's default rules, such that a

Delaware law thus fills the gap left by Rule 16b-3(d)(1). Delaware state law controls the specific procedures that CytoDyn's board must follow to "approve[]" insider-issuer security transactions under Rule 16b-3(d)(1).

The appellant Shareholders disagree. They argue that under Rule 16b-3(d)(1), "the board of directors" means the "full board" such that each and every board member must vote to approve an insider-issuer transaction for that transaction to be "approved by the board of directors." But the word "full" appears nowhere in Rule 16b-3(d)(1). And as just explained, the rule's actual text—"approved by the board of directors"—does not support the Shareholders' unanimity requirement.

Recognizing that Rule 16b-3(d)(1)'s text cuts against them, the Shareholders cite several sources that do use the phrase "full board" when discussing Rule 16b-3(d)(1)'s board approval exemption. First are a few SEC writings that discuss Rule 16b-3(d)(1). *E.g.* Ownership Reports and Trading, 61 Fed. Reg. at 30,381 ("When the rule requires 'Non-Employee Director,' full board or shareholder approval, the Commission intends that the approval relate to specific transactions rather than the plan in its entirety." (footnote omitted)); *Exchange Act Section 16 and Related Rules and Forms*, U.S. SEC (Aug. 11, 2010), https://www.sec.gov/divisions/corpfin/guidance/sec16interp.htm ("[A]n amendment to a material term of a security acquired pursuant to the full board, Non-Employee Director or

"majority" of CytoDyn's board of directors "constitute[s] a quorum" and "the vote of a majority of the directors present . . . constitute[s] action by [CytoDyn's] Board of Directors."

shareholder approval conditions of Rule 16b-3(d) would require further approval . . . .").

The SEC writings cited by the Shareholder do not persuade. At the outset, the Ownership Reports and Trading source is the SEC release containing the text of the final Rule 16b-3(d)(1). But the Shareholders quote from the Rule's preamble, not from the text of the Rule itself. As noted above, Rule 16b-3(d)(1) itself omits the word "full," and when a rule conflicts with its own preamble, the rule controls. *See El Comite Para El Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1070 (9th Cir. 2008). More pointedly, we have already rejected an argument nearly identical to the Shareholders' here. In *WildEarth Guardians v. Provencio*, we refused to modify an agency rule's meaning with the word "sparingly" because "the word 'sparingly' d[id] not appear in the Rule, but instead in its preamble." 923 F.3d 655, 667 (9th Cir. 2019). Here, as in *WildEarth*, "the preamble does not 'impose a duty above and beyond the actual terms of the regulation.'" *Id.*

More broadly, the SEC writings cited by the Shareholders are better interpreted as consistent with Rule 16b-3(d)(1), not in conflict with it. The writings each use the phrase "full board" in the same sentence as descriptions of other forms of approval that can exempt an insider-issuer securities acquisition from Section 16(b) disgorgement. For instance, the Rule preamble notes that Rule 16b-3(d) requires the "approval of either the full board, the committee of Non-Employee Directors or shareholders," Ownership Reports and Trading, 61 Fed. Reg. at 30,382, referring to the three exemptions set out in 17 C.F.R. § 240.16b-3(d). Further, the writings nowhere define the board approval exemption as, or limit that exemption to, approval by a unanimous corporate board.

With these facts in mind, the SEC writings do not appear to use the phrase "full board" to imply that the board approval exemption requires the assent of each and every board member. Rather, the writings are better understood as using "full board" to distinguish between the different Rule 16b-3(d) approval exemptions, one of which requires approval from the "board of directors" as a whole and another of which requires approval from a constituent part of the board of directors: a "committee of the board." 17 C.F.R. § 240.16b-3(d)(1). So the SEC writings neither contradict Rule 16b-3(d)(1)'s plain text nor support the Shareholders' unanimity requirement. A "full" board of directors (as opposed to a "committee of the board") is still the "full" board (again, as opposed to a "committee" thereof) even if some members are absent or not voting. *Cf. Dow Chem. Co.*, 517 F.3d at 110 ("The *full* Senate rejected this measure by a vote of 62–22." (emphasis added)); *Rosado*, 621 F.2d at 1187 ("Following extensive hearings in the Senate Foreign Relations and Judiciary Committees, the *full* Senate unanimously approved the treaty by a vote of 90 to 0 on July 21, 1977." (emphasis added)).

Next, the Shareholders cite a few federal court opinions that also use the "full board" language, but these also provide the Shareholders no support. *Dreiling* did not address the question on appeal here—what form of "approv[al]" is necessary to trigger Rule 16b-3's board approval exemption—and it uses the phrase "full board" only in passing and only as part of two direct quotations of the SEC writings just described.[7] 458 F.3d at 949, 954 (twice quoting Ownership Reports and Trading, 61 Fed. Reg. at 30,381). Similarly, *Gryl ex rel. Shire Pharmaceuticals Group PLC v.*

[7] So too with *Atl. Tele-Network v. Prosser*, 151 F. Supp. 2d 633 (D.V.I. 2000). *See id.* at 638, 639.

Shire Pharmaceuticals Group PLC uses the phrase "full board" just once and does so whilst citing those same SEC writings. 298 F.3d at 141 n.2 (citing Ownership Reports and Trading, 61 Fed. Reg. at 30,381). If the SEC writings' use of the phrase "full board" does not support the Shareholders' position, then neither do cases that cite those writings without adding any additional exposition or interpretation. Further impugning the Shareholders' argument, *Gryl* affirmed that the Rule 16b-3(d)(1) exemption applied without bothering to analyze whether the relevant board vote was unanimous or whether the board meeting in question was attended by every board member. *See Gryl*, 298 F.3d at 144.

Third, the Shareholders point to a variety of sources, including Delaware state law, decisions of Delaware state courts, and CytoDyn's own corporate bylaws, that distinguish between the "whole board" or "full board" on one hand and a "majority" of the board of directors on another. *See, e.g.*, *In re Oracle Corp. Derivative Litig.*, No. 2017-0337, 2018 WL 1381331, at *22 n.287 (Del. Ch. Mar. 19, 2018); 8 Del. Code § 312(h). But like the SEC writings and the federal case law cited by the Shareholders, these sources are unpersuasive. A mere "majority" of a corporate board and the "whole board" (defined in CytoDyn's bylaws as "the total number of authorized Directors") are plainly different concepts. But this distinction is unhelpful here because Rule 16b-3(d) does not contain the words "whole," "full," or "majority." Rather, 16b-3(d)(1) simply says that for insider-issuer security transactions to be exempt from Section 16(b), the transactions must be "approved by the board of directors." And for the reasons given above, this language imposes no specific procedural requirements on how the board must give that approval.

Last, the Shareholders object that Pourhassan's interpretation of Rule 16b-3(d)(1) creates an "illogical" "loophole." If Rule 16b-3(d)(1) permits corporate boards to approve insider-issuer security transactions in any way that complies with corporate bylaws and Delaware state law, the Shareholders complain that the level of board support necessary to approve such a transaction turns on the "form of the approval in question." What the Shareholders mean is that had CytoDyn's board approved Pourhassan's 2019 option and warrant award without a board meeting but by the written approval of the directors, the board would have needed to act unanimously. But because the board acted during an actual meeting, the board needed only a majority vote under Delaware law. *Compare* 8 Del. Code § 141(b) ("The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors . . . ."), *with id.* § 141(f) (providing that a board of directors can take action "without a meeting if all members of the board . . . consent thereto in writing").[8] But this is not a "loophole." This is how corporate law works. Delaware state law deliberately imposes stricter-than-usual requirements on corporate boards when they act by written consent, a process that lacks the deliberation and procedural formalities inherent in a board meeting. The distinction that Delaware draws between board approval at a meeting and board approval by written consent is, as they say, not a bug but a feature.

With the above in mind, we agree with the district court that Rule 16b-3(d)(1) exempts Pourhassan's 2019 option and warrant award from Section 16(b). Taking as true the allegations in paragraphs 31 and 32 of the Shareholders' complaint, a quorum of CytoDyn's board met and approved

[8] CytoDyn's corporate bylaws draw the same distinction.

that award by a majority vote, in compliance with both Delaware corporate law and CytoDyn's bylaws. *See* 8 Del. Code § 141(b). This is sufficient under Rule 16b-3(d)(1). Pourhassan thus was not required to disgorge to CytoDyn his profits when he sold stock less than six months after receiving the 2019 option and warrant award. *See* 15 U.S.C. § 78p(b); 17 C.F.R. § 240.16b-3(d)(1). The Shareholders' complaint was properly dismissed.

* * *

While this case turns on discrete questions of regulatory and statutory interpretation, it is just a part of a larger balancing act between federal securities law and state corporate law. As the Supreme Court observed decades ago, corporations are "creatures of state law." *Santa Fe Indus. v. Green*, 430 U.S. 462, 479 (1977) (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975)). Investors thus "commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." *Id.* (quoting *Cort*, 422 U.S. at 84).

Here, no federal law expressly requires us to federalize the state rules governing corporate boards' internal affairs. SEC Rule 16b-3(d)(1) exempts insider-issuer acquisitions from Section 16(b) of the Securities Exchange Act if a corporate board of directors "approve[s]" those acquisitions, but the rule's text does not require the board to follow any particular procedure or process when giving that approval. 17 C.F.R. § 240.16b-3(d). Mindful of the careful balance between federal securities law and state corporate law, we leave the determination of what a corporate board must do to approve insider-issuer acquisitions to the laws of the state where the corporation is incorporated. *See Kamen*, 500 U.S.

at 99. When it comes to the precise procedure that a corporate board of directors must follow to satisfy Rule 16b-3(d)(1), federal securities law defers to—and does not displace—the state laws governing corporate boards.

IV. CONCLUSION

The district court's ruling is **AFFIRMED**.

Exchange Act Section 16 and Related Rules and Forms

Last Update: August 11, 2010

These interpretations replace the Section 16 interpretations in the July 1997 Manual of Publicly Available Telephone Interpretations, the March 1999 Supplement to the Manual of Publicly Available Telephone Interpretations, the Section 16 Electronic Reporting Frequently Asked Questions and the November 2002 Sarbanes-Oxley Act Frequently Asked Questions. Some of the interpretations included herein were originally published in the sources noted above, and have been revised in some cases. The bracketed date following each interpretation is the latest date of publication or revision.

QUESTIONS AND ANSWERS OF GENERAL APPLICABILITY

Section 101. Section 16 – General Guidance

Question 101.01

Question: A company reincorporated from Canada to Delaware, thus losing its "foreign private issuer" status (see Exchange Act Rule 3b-4). Before the reincorporation, an officer of the company purchased shares of company common stock, which he sold after the reincorporation but within six months of his purchase. Would the officer's purchase be subject to Section 16?

cited in Alpha Venture Capital Partners v. Pourhassan 21-35274 archived on April 5, 2022

Answer: Yes. The officer's purchase would be subject to Section 16, and the officer would be required to file a Form 3 within 10 days of the reincorporation and a Form 4 reporting both the purchase and sale of the common shares following the sale of those shares. While the staff is of the view, generally, that transactions effected by officers and directors of a foreign company before the loss of "foreign private issuer" status are not subject to Section 16 (see Question 110.03), this position has not been applicable if the event that culminated in the loss of "foreign private issuer" status also involved the company's initial registration of equity securities under Exchange Act Section 12 (cf. Question 110.04). In such event, Rule 16a-2(a) would be applicable, which subjects to Section 16 transactions effected by a director or officer in the six months before the initial Section 12 registration. In the staff's view, for purposes of Section 16, a reincorporation by a foreign company that causes it to lose its "foreign private issuer" status is analogous to a company's initial registration of equity securities under Section 12 because, in each event, the change in the company's "foreign private issuer" status was within the control of the company and insiders should have been aware of the change sufficiently in advance to take potential Section 16 responsibilities into account when buying and selling the company's equity securities. [Aug. 11, 2010]

Question 101.02

Question: Exchange Act Rule 3b-4(c) provides that a foreign issuer determines whether it is a foreign private issuer as of the last business day of its most recently completed second fiscal quarter (the "determination date"). Under Rule 3b-4(e), if a foreign issuer with securities registered under Exchange Act Section 12 does not qualify as a foreign private issuer as of the determination date, it must begin using the forms prescribed for domestic

companies and complying with Section 16, starting on the first day of the fiscal year following the determination date. In this situation, when must a Form 3 be filed?

Answer: A Form 3 must be filed on or before the first day of the fiscal year following the determination date. [Aug. 11, 2010]

Section 102. Section 16(a)

Question 102.01

Question: If an insider purchases units consisting of common stock and debentures of the insider's company, must the insider file a Section 16(a) report covering the acquisition of the stock?

Answer: Yes. An insider who purchases units consisting of common stock and debentures of the insider's company must file a Section 16(a) report covering the acquisition of the stock. The debentures need not be reported unless they are also deemed to be equity securities, as would occur, for example, if they were convertible into common stock. [May 23, 2007]

Question 102.02

Question: Section 16(a)(3)(B) of the Exchange Act, as amended by the Sarbanes-Oxley Act of 2002, states, in part, that Forms 4 and 5 "shall indicate ownership by the filing person at the date of filing." Does this mean that an insider must report ownership of all classes of equity securities of the issuer each time the insider files a Form 4 or 5?

Answer: When an insider files a Form 4 or 5, the insider need only report ownership after the transaction or at the end of the fiscal year, respectively, of the class(es) of equity securities of the issuer as to which the insider reports a transaction. Because Section 16 contained the same language before the statutory amendment, the amendment did not expand an insider's obligation to report post-transaction ownership. [May 23, 2007]

cited in Alpha Venture Capital Partners v. Pourhassan
21-35274 archived on April 5, 2022

Question 102.03

Question: Can an issuer satisfy its Web site posting obligation if it posts forms directly in PDF only?

Answer: Assuming an issuer otherwise satisfies the Web site posting requirements, it is permissible to post forms directly in PDF only if the Web site explains clearly the need to use Adobe Acrobat to access the forms and provides clear directions on how to download it easily and without cost using a readily accessible link provided on the issuer's Web site. [May 23, 2007]

Section 103. Section 16(b)

Question 103.01

Question: Will the Division staff express a view as to whether a particular transaction involves a "purchase" or "sale" for purposes of Section 16(b)?

Answer: No. Since the enforcement of Section 16(b) is left to private parties and the courts, the Division staff ordinarily will not express a view as to whether a particular transaction involves a "purchase" or "sale" for purposes of this section. [May 23, 2007]

Section 104. Section 16(c)

None

Section 105. Section 16(d)

None

Section 106. Section 16(e)

Question 106.01

Question: Section 16(e) exempts foreign and domestic arbitrage transactions from the other provisions of Section 16. Rule 16e-1 provides that the Section 16(e) exemption does not apply to such arbitrage transactions by officers and directors. Will the Division staff express a view as to whether any particular transaction qualifies for the Section 16(e) exemption?

Answer: No. In Release No. 34-26333 (Dec. 2, 1988), the Commission noted that Section 16(e) "gives the Commission rulemaking authority to define 'bona fide arbitrage,' but the Commission has not exercised this authority, opting instead to leave such interpretation to the courts." In Release No. 34-26333, the Commission solicited comment on "whether further guidance in this area is needed" without proposing any additional Section 16(e) rules. Because the Commission did not subsequently adopt any rules defining "bona fide arbitrage" or otherwise address the subject, the Release No. 34-26333 statement about leaving such interpretation to the courts remains the Commission's statement regarding its intentions. Accordingly, the staff will not express a view as to whether any particular transaction qualifies for the Section 16(e) exemption, but instead will direct counsel to relevant case law, e.g., Falco v. Donner, 208 F.2d 600 (2d Cir. 1953). [May 23, 2007]

Section 107. Section 16(f)

None

Section 108. Section 16(g)

None

Section 109. Rule 16a-1 – Definition of Terms

cited in Alpha Venture Capital Partners v. Pourhassan
21-35274 archived on April 5, 2022

Question 109.01

Question: Would an Assistant Secretary ordinarily be considered an officer of a company under Section 16(a)?

Answer: No. An Assistant Secretary would not ordinarily be considered an officer of a company under Section 16(a), unless such person performs any of the functions that would make such person an officer as defined in Rule 16a-1(f). [May 23, 2007]

Section 110. Rule 16a-2 – Persons Subject to Section 16

Question 110.01

Question: Where Rule 16a-2(a) makes Section 16 applicable to a transaction that occurs before the issuer's Section 12 registration, are the exemptions provided by the other rules under Section 16 available to the same extent as for any other transaction subject to Section 16?

Answer: Yes. The exemptions provided by the other rules under Section 16 should be available to the same extent as for any other transaction subject to Section 16. [May 23, 2007]

Question 110.02

Question: Rule 16a-2(c) provides that “a ten percent beneficial owner not otherwise subject to Section 16 of the Act must report only those transactions conducted while the beneficial owner of more than ten percent of a class of equity securities of the issuer registered pursuant to Section 12 of the Act.” A person is subject to Section 16 solely by being a member of a group, as described in Section 13(d)(3) and Rule 13d-5(b) thereunder, that beneficially owns more than 10 percent of such a class of equity security. The person no longer agrees to act together with the other group members for the purpose of acquiring, holding, voting or disposing of equity securities of the issuer.

Does Rule 16a-2(c) require the person to report his or her transactions in issuer equity securities that occur after the person ceases to act as a member of the group?

Answer: No. Group membership is construed the same way for purposes of Section 16(a) and Rule 16a-2(c) as for purposes of Section 13(d). Group membership terminates when the person no longer agrees to act together with the other group members for the purpose of acquiring, holding, voting or disposing of equity securities of the issuer. If after ceasing to act as a member of the group, the person's beneficial ownership does not exceed 10 percent of a class of issuer equity securities registered under Section 12, and the person is not otherwise subject to Section 16 with respect to the issuer, Rule 16a-2(c) does not require the person to report his or her transactions in issuer equity securities that occur after the person ceases to act as a member of the group. [Apr. 24, 2009]

Question 110.03

Question: If a foreign issuer with securities registered under Exchange Act Section 12 loses foreign private issuer status as described in Question 101.02, would Rule 16a-2(a) apply to make transactions effected by its officers and directors before a Form 3 is due subject to Section 16 and reportable on Form 4?

Answer: No. [Aug. 11, 2010]

Question 110.04

Question: A foreign issuer that is not a foreign private issuer files its initial registration statement to register equity securities under Exchange Act Section 12. Would Rule 16a-2(a) apply to make transactions by its officers and directors within six months before the effectiveness of the registration statement subject to Section 16 and reportable on Form 4?

Answer: Yes. [Aug. 11, 2010]

cited in Alpha Venture Capital Partners v. Pourhassan
21-35274 archived on April 5, 2022

Section 111. Rule 16a-3 – Reporting Transactions and Holdings

Question 111.01

Question: If a company otherwise maintains a dividend reinvestment plan that satisfies the exemptive conditions of Rule 16a-11, are automatic dividend reinvestments under a non-qualified deferred compensation plan also eligible for the Rule 16a-11 exemption, so that those reinvestment transactions would not be required to be reported, thus reducing the number of Forms 4 due?

Answer: Non-qualified deferred compensation plans are not Excess Benefit Plans, as defined by Rule 16b-3(b)(2) under the Exchange Act, in which transactions are exempted by Rule 16b-3(c). See interpretive letter to American Bar Association (Feb. 10, 1999, Q. 2(c)). Under Rule 16a-3(g)(1), as amended in Release No. 34-46421 (Aug. 27, 2002), each transaction in a non-qualified deferred compensation plan must be reported on a Form 4 not later than the end of the second business day following the day on which the transaction was executed. However, if a company maintains a dividend reinvestment plan that satisfies the exemptive conditions of Rule 16a-11, automatic dividend reinvestments under a non-qualified deferred compensation plan are also eligible for the Rule 16a-11 exemption. See interpretive letter to American Home Products (Dec. 15, 1992). [May 23, 2007]

Question 111.02

Question: For purposes of satisfying the affirmative defense conditions of Rule 10b5-1(c), an insider adopts a written plan for the purchase or sale of issuer equity securities. In the plan, which was drafted by a broker-dealer, the broker-dealer specified the dates on which plan transactions will be executed. Can the insider rely on Rule 16a-3(g)(2) to compute the Form 4 due date for plan transactions based on a deemed execution date?

Answer: No. By adopting a written plan that specifies the dates on which plan transactions will be executed, the insider will have selected the date of execution for plan transactions. Consequently, the insider will not be able to

rely on Rule 16a-3(g)(2) to compute the Form 4 due date for plan transactions based on a deemed execution date. [May 23, 2007]

Question 111.03

Question: Where a new beneficial owner joins an existing set of beneficial owners who file as a group, does the new beneficial owner have to file a new Form 3, even if the new owner is not adding any new securities to the group holdings?

Answer: Yes. Under Rule 16a-3(j), the new beneficial owner must file a new Form 3 even if the new owner is not adding any new securities to the group holdings. [May 23, 2007]

Question 111.04

Question: In order to reduce the number of Forms 4 due annually, an insider makes the following choices: In connection with the annual year-end election to defer some of the following year's salary into a non-qualified deferred compensation plan, the insider elects to have payroll deductions invested in the plan's interest-only account. The insider also elects for the deferred salary so invested to be "swept" on a quarterly basis into the plan's stock fund account. How should these "sweep" transactions be reported?

Answer: Each "sweep" transaction would be reportable separately on Form 4. If the "sweep" election satisfies the Rule 16b-3(f) exemptive conditions for Discretionary Transactions (as defined in Rule 16b-3(b)(1)), the "sweep" transactions would be reported using Code I. Further, if the reporting person does not select the date of execution for a "sweep" that is a Discretionary Transaction, Rules 16a-3(g)(3) and (4) would apply to determine the deemed execution date. [May 23, 2007]

cited in Alpha Venture Capital Partners v. Pourhassan
21-35274 archived on April 5, 2022

Section 112. Rule 16a-4 – Derivative Securities

None

Section 113. Rule 16a-5 – Odd-Lot Dealers

None

Section 114. Rule 16a-6 – Small Acquisitions

None

Section 115. Rule 16a-7 – Transactions Effected in Connection with a Distribution

None

Section 116. Rule 16a-8 – Trusts

None

Section 117. Rule 16a-9 – Splits, Stock Dividends, and Pro Rata Rights

Question 117.01

Question: Does Rule 16a-9(a) exempt a stock dividend payable where there is only one shareholder of the class on which the dividend is paid?

Answer: No. This position reflects the staff's concern that such a transaction would represent a manipulative use of the rule for the purpose of benefiting one shareholder. For purposes of this interpretation, a single group required to file a Schedule 13D is treated the same way as a single shareholder. [May 23, 2007]

Question 117.02

Question: Does Rule 16a-9(b) exempt from Section 16 the pro rata acquisition of rights by a shareholder who is a stand-by purchaser?

Answer: Rule 16a-9(b) exempts from Section 16 the acquisition of rights, such as shareholder or preemptive rights, pursuant to a pro rata grant to all holders of the same class of equity securities registered under Section 12. Where the distribution of rights is pro rata, the acquisition of rights so distributed is exempt, including a pro rata acquisition by a shareholder who is a stand-by purchaser. However, such stand-by purchaser's acquisition of underlying shares pursuant to the exercise of rights not exercised by other shareholders is not exempted by Rule 16a-9(b) because such acquisition is the result of an independently negotiated contract with the issuer that is not available to all shareholders on a pro rata basis. [May 23, 2007]

Question 117.03

Question: A company will effect a 1-for-4 reverse stock split for all of its outstanding common stock. Rather than issue fractional shares, the company will pay cash for the value of the fractional shares. Is this transaction exempt from Section 16?

Answer: Yes. Rule 16a-9(a) exempts from Section 16 "the increase or decrease in the number of securities held as a result of a stock split or stock dividend applying equally to all securities of a class, including a stock dividend in which equity securities of a different issuer are distributed." This rule is available to exempt the disposition of fractional shares incidental to the reverse stock split where the cash-out of fractional shares, like the reverse split itself, applies equally to all securities of the class, and there is no choice to receive fractional shares instead of cash. [Aug. 14, 2009]

Section 118. Rule 16a-10 – Exemptions under Section 16(a)

None

cited in Alpha Venture Capital Partners v. Pourhassan
21-35274 archived on April 5, 2022

Section 119. Rule 16a-11 – Dividend or Interest Reinvestment Plans

Question 119.01

Question: Rule 16a-11 exempts from Sections 16(a) and 16(b) of the Exchange Act the acquisition of securities by insiders through the reinvestment of dividends pursuant to dividend reinvestment plans that satisfy the conditions of the rule. Is the disposition of such securities also exempted by Rule 16a-11?

Answer: No. Dispositions of securities acquired by insiders through the reinvestment of dividends pursuant to dividend reinvestment plans that satisfy the conditions of the rule is not exempted by Rule 16a-11. Further, Rule 16a-11 does not exempt from the liability provisions of Section 16(b) the acquisition of additional securities through voluntary additional investments permitted by such plans. [May 23, 2007]

Question 119.02

Question: When a dividend reinvestment plan meeting the requirements of Rule 16a-11 is terminated and the stock held by the plan is distributed to participants, does the distribution of the shares of stock to persons covered by Section 16 need to be reported?

Answer: No. In this situation there is no effective change in beneficial ownership, and therefore, pursuant to Rule 16a-13, the distribution of shares to persons covered by Section 16 need not be reported as an acquisition of securities, assuming that those shares previously had been reported as indirectly beneficially owned. [May 23, 2007]

Section 120. Rule 16a-12 – Domestic Relations Orders

None

Section 121. Rule 16a-13 – Change in Form of Beneficial Ownership

None

Section 122. Rule 16b-1 – Transaction Approved by a Regulatory Authority

None

Section 123. Rule 16b-3 – Transactions Between an Issuer and Its Officers or Directors

Question 123.01

Question: Does Rule 16b-3 exempt issuer equity securities transactions between the issuer and persons who are subject to Section 16 solely because they are more than 10 percent beneficial owners?

Answer: No. Rule 16b-3 exempts issuer equity securities transactions between the issuer (including an employee benefit plan sponsored by the issuer) and an officer or director of the issuer. The rule, however, does not exempt similar transactions by persons who are subject to Section 16 solely because they are more than 10 percent beneficial owners. Rule 16b-3 is available to a more than 10 percent beneficial owner who is also subject to Section 16 by virtue of being an officer or director of the issuer (see Release No 34-37260 (May 31, 1996) at n. 42 (Part 1 and Part 2)), including a "deputized" director (see Brief of the Securities and Exchange Commission, Amicus Curiae in Roth v. Perseus, L.L.C.) [May 23, 2007]

Question 123.02

Question: Does Rule 16b-3 exempt a transaction between the issuer and (1) an officer's charitable remainder trust, or (2) an investment advisor of which a director is a principal?

Answer: No. Rule 16b-3 exempts issuer equity securities transactions between the issuer (including an employee benefit plan sponsored by the issuer) and an officer or director of the issuer. Rule 16b-3 will not exempt a transaction between the issuer and (1) an officer's charitable remainder trust, or (2) an investment advisor of which a director is a principal. However, in its interpretive letter to American Bar Association (Feb. 10, 1999), Q. 4, the Division staff has stated that Rule 16b-3 is available to exempt an officer's or director's indirect pecuniary interest in certain specific transactions. [May 23, 2007]

Cited in Alpha Venture Capital Partners v. Pourhassan
21-35274 Archived on April 5, 2022

Question 123.03

Question: For purposes of determining whether a plan is a "Stock Purchase Plan," as defined by Rule 16b-3(b)(5), how are satisfaction of the coverage and participation requirements of Internal Revenue Code Section 410 measured?

Answer: Satisfaction of the coverage and participation requirements of Internal Revenue Code Section 410 are measured by reference to employees eligible to participate, rather than employees actually participating. [May 23, 2007]

Question 123.04

Question: Does the definition of a "Stock Purchase Plan" in Rule 16b-3(b)(5), which includes employee benefit plans that satisfy the coverage and participation requirements of Sections 423(b)(3) and (b)(5) of the Internal Revenue Code, contemplate that such plans are broad-based?

Answer: Yes. While Rule 16b-3(b)(5) does not specifically indicate that such plans must also meet the broad-based plan requirements in Section 423(b)(4) of the Internal Revenue Code (because these requirements may be more restrictive than was intended for purposes of Rule 16b-3(b)(5)), Rule 16b-3(b)(5) contemplates that Stock Purchase Plans are broad-based. See footnote 50 to Release No. 34-37260 (May 31, 1996) (Part 1 and Part 2). Accordingly, a director-only or senior-executive only plan would not be a Stock Purchase Plan within the meaning of Rule 16b-3(b)(5) or Rule 16b-3(c). [May 23, 2007]

Question 123.05

Question: A Stock Purchase Plan, as defined in Rule 16b-3(b)(5), includes a dividend reinvestment feature. Would dividend acquisitions pursuant to this plan be exempted by Rule 16b-3(c)?

Answer: Yes. Dividend acquisitions pursuant to the Stock Purchase Plan are exempted by Rule 16b-3(c), because any acquisition pursuant to a Stock Purchase Plan is exempted by Rule 16b-3(c). [May 23, 2007]

Question 123.06

Question: Would a stand-alone top hat plan that qualifies for an exemption under Section 201(2) of ERISA be an Excess Benefit Plan eligible for exemption under Rule 16b-3(c)?

Answer: No. A stand-alone top hat plan that qualifies for an exemption under Section 201(2) of ERISA would not be an Excess Benefit Plan eligible for exemption under Rule 16b-3(c), because such plan would not be operated in conjunction with a Qualified Plan, as defined in Rule 16b-3(b)(4). [May 23, 2007]

Question 123.07

Question: Are the Non-Employee Director standards of Rule 16b-3(b)(3) independent of the "outside director" standards of Internal Revenue Code Section 162(m)?

Answer: Yes. Accordingly, satisfaction of the Non-Employee Director standards cannot be presumed based on satisfaction of the Section 162(m) "outside director" standards. [May 23, 2007]

Question 123.08

Question: What is the relevant date for determining Non-Employee Director status under Rule 16b-3?

Answer: The relevant date for determining Non-Employee Director status is the date such director proposes to act as a Non-Employee Director. This would be the date on which approval is obtained, even where an award is not deemed to occur until a later date, for example, upon the satisfaction of conditions (other than the passage of time and continued employment) that are not tied to the market price of an equity security of the issuer. Cf. Bioject Medical Technologies Inc. (Nov. 24, 1993). [May 23, 2007]

Cited in Alpha Venture Capital Partners v. Pourhassan
21-35274, archived on April 5, 2022

Question 123.09

Question: Rule 16b-3(b)(3)(i)(A) disqualifies for service as a Non-Employee Director any director who currently is an officer of or otherwise currently employed by the issuer, its parent or subsidiary. How is the term "subsidiary" defined for the purposes of this rule?

Answer: For the purposes of Rule 16b-3(b)(3)(i)(A), "subsidiary" would be defined pursuant to the broad standards of Rule 12b-2, i.e., as an affiliate controlled directly or indirectly through one or more intermediaries. [May 23, 2007]

Question 123.10

Question: Will a sale into the open market from a Stock Purchase Plan or other Tax-Conditioned Plan be exempt pursuant to Rule 16b-3(c)? Will such a sale be a Discretionary Transaction (as defined in Rule 16b-3(b)(1)) eligible for exemption pursuant to Rule 16b-3(f)?

Answer: No to both questions. Such transactions will not be eligible for exemption from Section 16(b) pursuant to Rule 16b-3. [May 23, 2007]

Question 123.11

Question: Would stock acquisitions through an open market purchase plan that is not a Rule 16b-3(b) Stock Purchase Plan (and hence ineligible for Rule 16b-3(c) exemption) but is "sponsored by the issuer" as interpreted in

the interpretive letter to American Bar Association (Oct. 15, 1999) be considered "acquisitions from the issuer" eligible for the Rule 16b-3(d) exemption?

Answer: No. [May 23, 2007]

Question 123.12

Question: Is a diversification transaction permitted by Section 401(a)(35) of the Internal Revenue Code a "Discretionary Transaction," as defined in Rule 16b-3(b)(1), subject to the exemptive conditions of Rule 16b-3(f)?

Answer: Yes. Section 401(a)(35) of the Internal Revenue Code provides diversification rights to qualifying participants in defined contribution plans that hold publicly-traded employer securities. Specifically, Section 401(a)(35) makes intra-plan transfers out of and back into the plan's issuer securities fund available no less frequently than quarterly. As explained in Release No. 34-37260 (May 31, 1996) (Part 1 and Part 2), periodic fund-switching transactions involving an issuer equity securities fund may present opportunities for abuse, because the investment decision is similar to that involved in a market transaction. Moreover, the plan may buy and sell issuer equity securities in the market in order to effect these transactions, so that the actual counterparty to the transaction is not the issuer, but instead is a market participant.

Rule 16b-3(b)(1)(iii) excludes from the definition of "Discretionary Transaction" a transaction "required to be made available to a plan participant pursuant to a provision of the Internal Revenue Code." This provision was adopted in 1996 to exclude:

- the diversification elections and distributions that Section 401(a)(28) of the Internal Revenue Code makes available t 10-year plan participants wh have reached age 55, and
- the distributions that Section 401(a)(9) of the Internal Revenue Code requires at the later of the employee's retirement or reaching age 70½

Cited in Alpha Venture Capital Partners v. Pourhassan
21-35274 archived on April 5, 2022

The basis for the Rule 16b-3(b)(1)(iii) exclusion was that the insider's opportunity to speculate in the context of the specified events was well circumscribed. In contrast, Section 401(a)(35) of the Internal Revenue Code, which was added by Section 901 of the Pension Protection Act of 2006, makes available the periodic fund-switching transactions for which the exemptive conditions of Rule 16b-3(f) were designed to apply. Because the Commission did not consider the later-enacted Section 401(a)(35) of the Internal Revenue Code when it adopted Rule 16b-3(b)(1)(iii), this rule should not be construed to exclude Section 401(a)(35) transactions from the exemptive conditions of Rule 16b-3(f). [May 23, 2007]

Question 123.13

Question: May a plan be bifurcated so that it is eligible in part for exemption under Rule 16b-3(c)?

Answer: A plan may be bifurcated so that it is eligible in part for exemption under Rule 16b-3(c) only if it works entirely as a Tax-Conditioned Plan with respect to a segregable class of participants and entirely as a non-Tax-Conditioned Plan as to a different class of participants. [May 23, 2007]

Question 123.14

Question: Would an amendment to a material term of a security acquired pursuant to the full board, Non-Employee Director or shareholder approval conditions of Rule 16b-3(d) require further approval pursuant to any one of those approval conditions?

Answer: Yes, an amendment to a material term of a security acquired pursuant to the full board, Non-Employee Director or shareholder approval conditions of Rule 16b-3(d) would require further approval pursuant to any one of those approval conditions in order for the specific approval conditions of Note 3 to the rule to be satisfied. This is required because allowing a material term to be changed without subsequent approval would vitiate the specific approval requirement of the rule. Such further approval is required whether or not the amendment would result in

the cancellation and regrant of the security. For example, an amendment to accelerate vesting (which, pursuant to the interpretive letter to Foster Pepper & Shefelman (Dec. 20, 1991), does not effect a cancellation and regrant) would require further approval. [May 23, 2007]

Question 123.15

Question: Will initial approval of a plan satisfy the specificity requirement where the specific terms and conditions of each acquisition are fixed in advance, such as a formula plan?

Answer: Yes. [May 23, 2007]

Question 123.16

Question: Would approval of a grant that by its terms provides for automatic reloads satisfy the specificity of approval requirements under Rule 16b-3(d) for the reload grants?

Answer: Yes. Approval of a grant that by its terms provides for automatic reloads would satisfy the specificity of approval requirements under Rule 16b-3(d) for the reload grants, unless the automatic reload feature permitted the reload grants to be withheld by the issuer on a discretionary basis. The same result applies under Rule 16b-3(e) where the automatic feature is a tax- or exercise-withholding right. [May 23, 2007]

Question 123.17

Question: Could the six-month holding period of Rule 16b-3(d)(3) be used to exempt an officer's or director's purchase of the issuer's stock in an underwritten public offering?

Answer: No. Rule 16b-3 would not exempt this transaction, because the rule was not intended to cover a situation where someone other than the issuer controls to whom the sales are made and on what terms. For the same reasons, Rule 16b-3 would not exempt an officer's or director's purchase of the issuer's stock in a public offering pursuant to a "friends and family" allocation. [May 23, 2007]

cited in Alpha Venture Capital Partners v. Pourhassan
21-35274 archived on April 5, 2022

Question 123.18

Question: Are the dispositions of issuer securities that take place in cashless exercises through a broker eligible for exemption pursuant to Rule 16b-3(e)?

Answer: No. The dispositions that take place pursuant to these transactions are not eligible for exemption pursuant to Rule 16b-3(e) because cashless exercises through a broker do not involve a transaction with the issuer or the issuer's employee benefit plan. [May 23, 2007]

Question 123.19

Question: Is the disclosure regarding loans by a bank, savings and loan association, or broker-dealer contemplated by Instruction 4.c to Item 404(a) (loan made in ordinary course of business, on substantially same terms as for unrelated persons, no more than normal risk of collectibility, etc.) Item 404(a) disclosure that would disqualify a director from being a Non-Employee Director, as defined in Rule 16b-3(b)(3)?

Answer: No. Statements disclosed pursuant to Instruction 4.c to Item 404(a) will not be considered Item 404(a) disclosure that would disqualify a director from being a Non-Employee Director. Release No. 33-8732A, in the Item 404 discussion at Section V.A.3, characterizes this instruction as addressing a situation that "do[es] not raise the potential issues underlying our principle for disclosure."

Section 124. Rule 16b-5 – Bona Fide Gifts and Inheritance

None

Section 125. Rule 16b-6 – Derivative Securities

Question 125.01

Question: Would Rule 16b-6(b) be available to exempt the cash settlement of phantom stock?

Answer: No. Rule 16b-6(b) would not be available to exempt the cash settlement of phantom stock, because the deemed sale of the underlying stock following exercise of the phantom stock is outside the exemptive scope of Rule 16b-6(b). In contrast, Rule 16b-6(b) would be available to exempt the stock settlement of phantom stock because such transaction involves only the exercise of a derivative security. [May 23, 2007]

Section 126. Rule 16b-7 – Mergers, Reclassifications and Consolidations

None

Section 127. Rule 16b-8 – Voting Trusts

None

Section 128. Rule 16c-1 – Brokers

None

Section 129. Rule 16c-2 – Transactions Effected in Connection with a Distribution

None

Section 130. Rule 16c-3 – Exemption of Sales of Securities to be Acquired

None

cited in Alpha Venture Capital Partners v. Pourhassan
21-35274 archived on April 5, 2022

Section 131. Rule 16c-4 – Derivative Securities

None

Section 132. Rule 16e-1 – Arbitrage

None

Section 133. Forms 3, 4 and 5 – General

Question 133.01

Question: What information does an insider report for the issuer's ticker or trading symbol (Item 3 of Form 3, and Item 2 of Forms 4 and 5) if there is none?

Answer: The insider should enter "NONE." [May 23, 2007]

Question 133.02

Question: Does an insider need to file a power of attorney with the filing?

Answer: If the Form is signed on behalf of an individual by another person, the power of attorney establishing the authority of such person to sign the Form must be filed in an exhibit to the Form or as soon as practicable in an amendment to the Form, unless a previously filed paper or electronic power of attorney is still in effect. The power of attorney need only indicate that the reporting person authorizes and designates the named person or persons to sign and file the Form on the reporting person's behalf and state its duration. [May 23, 2007]

Question 133.03

Question: How should an insider sign the document when it uses a power of attorney?

Answer: The staff recommends that the document signature be the typed signature of the person holding the power of attorney. The remainder of the signature line would then indicate that the person is signing on behalf of the named officer, director or more than 10 percent shareholder under a power of attorney. For example, "John Jones, by power of attorney," where John Jones holds power of attorney for insider Susan Smith. [May 23, 2007]

Question 133.04

Question: How can a filer indicate the title of the person filing the Form?

Answer: The title of the person may be included on the same line as the signature. [May 23, 2007]

Question 133.05

Question: Do all officers and directors need filing codes?

Answer: Yes. Each officer, director and more than 10 percent shareholder will need his/her own CIK, CCC and Password codes. The codes are needed whether the insider is filing as an individual or as part of a group. It is very important to use the insider's CIK rather than, for example, the issuer's CIK, so that users can readily identify the insider filing the form (if the wrong CIK has been used, file a new form with the correct CIK). Only one set of codes is permitted even if the filer is an officer, director, or more than 10 percent shareholder of more than one company. We strongly recommend that companies applying for codes on behalf of their insiders verify that the persons do not already have codes assigned to them. [May 23, 2007]

Question 133.06

Question: When reporting derivative securities on Table II of Form 4 or Form 5, are options that have different economic characteristics (such as exercise price and expiration date) considered different classes of securities?

cited in Alpha Ventures Capital Partners v. Pourhassan
21-35274 archived on April 5, 2022

Answer: Yes. General Instruction 4(a)(i) to Form 4 requires an insider to "report total beneficial ownership following the reported transaction(s) for each class of securities in which a transaction was reported." In reporting derivative securities on Table II, options that have different economic characteristics (such as exercise price and expiration date) are considered different classes of options. For example, in reporting the grant of options with an exercise price of $10 per share and an expiration date of March 1, 2014, the holdings column should show the total number of options with the same terms, and should not include the insider's holdings of options with an exercise price of $8 per share and an expiration date of November 1, 2012. On a voluntary basis, the insider may report on a separate line(s) holdings of options that are of a different class(es) than the options transaction reported. General Instruction 4(a)(iii) to Form 5, which requires an insider to "report total beneficial ownership as of the end of the issuer's fiscal year for all classes of securities in which a transaction was reported," is construed the same way. [May 23, 2007]

Question 133.07

Question: Column 8 of Table II in Form 4 and Form 5 requires disclosure of the "Price of Derivative Security." Does this column require the exercise price of the derivative security, the fair market value of the underlying security on the date of the reported transaction, or some other price?

Answer: The "Price of Derivative Security" required in Column 8 of Table II is the price, if any, that the insider paid to acquire the derivative security (where an acquisition is reported) or received when disposing of the derivative security (where a disposition is reported). It is not the exercise price of the derivative security (which is reportable in Column 2) or the fair market value of the underlying security on the date of the reported transaction. [May 23, 2007]

Question 133.08

[Reserved]

Section 134. Form 3

Question 134.01

Question: Must an estate that holds more than 10 percent of a class of an issuer's equity securities file a Form 3 to report its holdings?

Answer: Yes. An estate that holds more than 10 percent of a class of an issuer's equity securities must file a Form 3 to report its holdings. Rule 16a-2(d), which permits an executor not to report transactions in securities held by an estate for the first 12 months following appointment as an executor, does not apply to the reporting of holdings on a Form 3. However, if the executor is already an insider (e.g., by virtue of being an officer of the issuer), in accordance with Rule 16a-3(b)(2) the executor need not file an additional Form 3 in the capacity of executor. Rather, when the executor next files a Form 4 (e.g., in the executor's individual capacity or for the estate after the 12 month period has elapsed), the executor would indicate the additional capacity in Box 5. [May 23, 2007]

Section 135. Form 4

Question 135.01

Question: May an officer of a company whose securities are registered under Section 12(g) of the Exchange Act file a Form 4 report solely to indicate the officer's resignation?

Answer: Yes. An officer of a company whose securities are registered under Section 12(g) of the Exchange Act may, but is not legally required to, file a Form 4 report, checking the exit box, solely to indicate the officer's resignation. [May 23, 2007]

Question 135.02

Question: On Form 4, what date should be entered for Item 3 (Date of Earliest Transaction Required to be Reported)?

cited in Alpha Venture Capital Partners v. Pourhassan 21-35274 archived on April 5, 2022

Answer: The date in Item 3 should be the transaction date of the earliest transaction reported that you are required to report on Form 4. This is the same date you enter in Column 2 of Table I (or Column 3 of Table II), not the Deemed Execution Date you would enter in Column 2A of Table I (or Column 3A of Table II). Where the transactions reported on the Form 4 include a transaction that the insider previously failed to report timely on Form 4, the transaction date for that transaction should be entered in Item 3. [May 23, 2007]

Question 135.03

Question: What date should be entered for Item 3 on a Form 4 filed solely to report voluntarily a transaction that is eligible for deferred reporting on Form 5, such as a Rule 16b-5 gift or a Rule 16a-6(a) small acquisition?

Answer: Enter the transaction date reported in Column 2 of Table I (or Column 3 of Table II). In reporting the transaction, make sure that "V" is designated in Column 3 of Table I (or Column 4 of Table II). [May 23, 2007]

Section 136. Form 5

Question 136.01

Question: Are Discretionary Transactions required to be reported on Form 5 individually, rather than on an aggregate basis, even when they are "same way" rather than "opposite way" transactions?

Answer: Yes. Discretionary Transactions are required to be reported individually, rather than on an aggregate basis, even when they are "same way" rather than "opposite way" transactions. [May 23, 2007]

INTERPRETIVE RESPONSES REGARDING PARTICULAR SITUATIONS

Section 201. Section 16 – General Guidance

None

Section 202. Section 16(a)

202.01 In connection with a bank holding company formation, in which jurisdiction over a Section 12(g) entity passes from a banking agency to the Commission, officers, directors and more than 10 percent shareholders are not required to file either a Form 3 or Form 4 with the Commission to reflect the transaction establishing the holding company. However, in the interest of ownership reporting continuity, the next filing on Form 4 or Form 5 by an insider reporting a change in his or her ownership of equity securities should reflect that the holding company is the issuer for purposes of filing under Section 16(a). [May 23, 2007]

Section 203. Section 16(b)

None

Section 204. Section 16(c)

None

Section 205. Section 16(d)

205.01 A broker-dealer that had ceased making a market in a public company's securities cannot rely upon the Section 16(d) exemption with respect to sales of securities remaining in its inventory. Furthermore, even if the cessation was only temporary, the broker-dealer would not regain eligibility for the exemption unless it resumed market-making activities on a bona fide basis, i.e., the broker-dealer cannot re-register as a market maker simply to liquidate its inventory. [May 23, 2007]

cited in Alpha Venture Capital Partners v Pourhassan
21-35274 archived on April 5, 2022

Section 206. Section 16(e)

None

Section 207. Section 16(f)

None

Section 208. Section 16(g)

None

Section 209. Rule 16a-1 – Definition of Terms

209.01 For purposes of the various ownership tests of Rule 16a-1, a limited liability company should be treated consistently as a general partnership, limited partnership or a corporation, depending on which form of organization it more closely resembles. [May 23, 2007]

209.02 Following a company's buy-back of its stock, a person who previously owned less than 10 percent of the company's stock may own more than 10 percent of the stock without having purchased additional shares. If, before the buy-back, the person is aware that the buy-back will occur and will have this result on his or her holdings, the person should file a Form 3 within 10 days after the buy-back. If the person does not have advance awareness of the buy-back and/or its consequences, he or she would need to determine whether he or she is a more than 10 percent beneficial owner and satisfy any obligation to file a Form 3 within ten days after information in the company's most recent quarterly, annual or current report indicates the amount of securities outstanding following the buy-back. [May 23, 2007]

209.03 In connection with termination of employment, an officer was awarded options that would become exercisable (in installments) when the issuer's stock reached and maintained specified price levels for a period of 30 days, conditioned on the terminated officer's continued provision of services as a consultant. These options would be derivative securities under Rule 16a-1(c) and thereby subject to Section 16 upon grant because their exercisability would not be subject to conditions (other than the passage of time and continued employment) that are not tied to the market price of an equity security of the issuer. Cf. Certilman Balin Adler & Hyman (April 20, 1992). [May 23, 2007]

209.04 Rule 16a-1(c)(3) excludes from "derivative security" rights or obligations to surrender a security, or have a security withheld, upon the receipt or exercise of a derivative security or the receipt or vesting of equity securities, in order to satisfy the exercise price or tax withholding consequences of receipt, exercise or vesting. The federal state, local and foreign taxes that may be paid through the withholding, tendering back or delivery of previously owned shares may exceed minimum withholding requirements as along as the amount withheld does not exceed the participant's estimated federal state, local and foreign tax obligations attributable to the underlying transaction. Such amount may include capital gains tax on the shares that were surrendered or withheld in settlement of the tax-withholding right or exercising the derivative security. [May 23, 2007]

209.05 A caller contemplated writing a short put option, whereby the counterparty would have the right to put the security to the writer at any point after execution of the contract. Provided that the counterparty who is "long" the put option retains its discretion as to whether and when to exercise the put option, then the writer of the put option is not deemed to beneficially own the securities underlying the put option because the right to receive the underlying securities is dependent upon factors that are not within the control of the writer of the put option. Thus, in calculating its beneficial ownership for purposes of Section 16, the party that is short the put option should not count the underlying securities. [May 23, 2007]

cited in Alpha Venture Capital Partners v. Pourhassan
21-35274 archived on April 15, 2022

Section 210. Rule 16a-2 – Persons Subject to Section 16

None

Section 211. Rule 16a-3 – Reporting Transactions and Holdings

211.01 A Discretionary Transaction in a phantom stock account that is exempt pursuant to Rule 16b-3(f) is reportable under Rule 16a-3(f)(1) on Table II of Form 4 on a single line using Code "I." [May 23, 2007]

211.02 Any issuer that maintains a corporate Web site must post on that Web site by the end of the business day after filing any Form 3, 4 or 5 under Section 16(a) as to the equity securities of that issuer, and must keep each such form accessible on that website for at least a 12-month period in accordance with Section 16(a)(4)(C) and Rule 16a-3(k). In a bank holding company, the bank subsidiary maintains a corporate Web site, but the bank holding company does not. The staff advised that the subsidiary Web site should be considered a corporate Web site for purposes of these posting requirements. [May 23, 2007]

211.03 One public company will acquire another public company. After the merger, the acquiring company will shut down the Web site of the acquired company. Under Rule 16a-3(k), any issuer that maintains a Web site is required to post Section 16 forms on its Web site. Because the acquired company will no longer exist, and its Web site will be shut down, the staff would not object if the acquiring company stopped posting the pre-acquisition Section 16 reports of the acquired company. [May 23, 2007]

Section 212. Rule 16a-4 – Derivative Securities

None

Section 213. Rule 16a-5 – Odd-Lot Dealers

None

Section 214. Rule 16a-6 – Small Acquisitions

None

Section 215. Rule 16a-7 – Transactions Effected in Connection with a Distribution

None

Section 216. Rule 16a-8 – Trusts

None

Section 217. Rule 16a-9 – Splits, Stock Dividends, and Pro Rata Rights

217.01 Rule 16a-9(a) exempts from Section 16 "the increase or decrease in the number of securities held as a result of a stock split or stock dividend applying equally to all securities of a class, including a stock dividend in which equity securities of a different issuer are distributed." This rule is available to exempt payment of a "pay-in-kind" dividend where there is no choice to receive the dividend in cash rather than stock. [May 23, 2007]

217.02 A limited partnership will make a pro rata distribution to its limited partners of portfolio securities that it holds. The limited partnership is subject to Section 16 with respect to the securities that will be distributed. The Division staff was asked whether Rule 16a-9(a) would exempt this distribution for the limited partnership as the distributing party. The Division staff expressed the view that Rule 16a-9(a), which exempts from Sections 16(a) and (b) "the increase or decrease in the number of securities held as a result of a stock split or stock dividend applying equally to all securities of a class, including a stock dividend in which equity securities of a different issuer are distributed," would not provide the limited partnership an exemption. Instead, the scope of Rule 16a-9(a) is limited to persons subject to Section 16 who experience an increase or decrease in the number of securities held as a result of a stock distribution or reverse stock split effected by the distributing party, and is not available to the distributing party. [May 23, 2007]

cited in Alpha Venture Capital Partners v. Pourhassan 21-35274 archived on April 5, 2022

Section 218. Rule 16a-10 – Exemptions under Section 16(a)

None

Section 219. Rule 16a-11 – Dividend or Interest Reinvestment Plans

219.01 A dividend reinvestment plan that is sponsored by a broker-dealer and available only to customers of that broker-dealer does not provide for "broad-based participation" within the meaning of Rule 16a-11. Accordingly, Rule 16a-11 is not available to exempt dividend or interest reinvestment transactions pursuant to such a plan. However, if a dividend reinvestment plan sponsored by a broker-dealer essentially mirrors a dividend reinvestment plan sponsored by the issuer that satisfies the conditions of Rule 16a-11, acquisitions pursuant to dividend reinvestment under the broker-dealer sponsored plan would be exempted by Rule 16a-11. See interpretive letter to Merrill, Lynch, Pierce, Fenner & Smith (Mar. 16, 1994). [May 23, 2007]

Section 220. Rule 16a-12 – Domestic Relations Orders

None

Section 221. Rule 16a-13 – Change in Form of Beneficial Ownership

221.01 A limited liability company ("LLC") makes a distribution of portfolio securities to its members. If the members have been relying upon Rule 16a-1(a)(2)(iii) to exclude the portfolio securities from their individual pecuniary interest (where the members do not control the LLC and do not exercise voting or investment control over the portfolio securities), Rule 16a-13 cannot be relied on to exempt (from reporting and profit liability) the distribution of the portfolio securities. [May 23, 2007]

221.02 For estate planning purposes, a director of an issuer transfers shares of that issuer to a newly created foreign domiciled mutual fund in exchange for shares of the mutual fund. The mutual fund's equity investments would be limited to the issuer's shares. While significant restrictions would likely make the mutual fund an unattractive investment to the general public, the fund would have one shareholder other than the director and would be open to investment by the general public. Rule 16a-13 would not be available for the director's transfer of the issuer's shares to the mutual fund. [May 23, 2007]

221.03 An insider is a partner in a partnership that owns securities of the issuer. The insider's Section 16 reports reported all of the issuer shares owned by the partnership, which exceeded the insider's individual pecuniary interest, and did not disclaim an interest in the excess. The insider planned to "recapitalize" the partnership by contributing cash and withdrawing more issuer shares than his individual pecuniary interest. The insider cannot rely on Rule 16a-13 with respect to the amount that he withdraws in excess of his individual pecuniary interest. [May 23, 2007]

Section 222. Rule 16b-1 – Transaction Approved by a Regulatory Authority

None

Section 223. Rule 16b-3 – Transactions Between an Issuer and its Officers or Directors

223.01 If, pursuant to the terms of a plan, a transaction to re-balance holdings among accounts other than the issuer equity securities account results in a transfer of assets into or out of an issuer equity securities account, the transaction will be a Discretionary Transaction, subject to Rule 16b-3(f). [May 23, 2007]

223.02 A rollover of funds into the issuer equity securities fund from a plan maintained by the insider's former employer will not be a Discretionary Transaction subject to Rule 16b-3(f) because it does not involve a reallocation of funds already invested in a plan of the issuer. An automatic rollover of a phantom stock account upon the issuer's abolition of the plan in which it is maintained into a restricted stock account in another plan of the issuer would not be a Discretionary Transaction. However, other rollovers or transfers between different plans sponsored by the same issuer may be Discretionary Transactions, and need to be analyzed on a case-by-case basis as to the character of the funds involved and whether the transaction is volitional to the insider. [May 23, 2007]

cited in Alpha Venture Capital Partners v. Pourhassan 21-35274 archived on April 5, 2022

223.03 Where there are two issuer equity securities funds (one containing 100 percent issuer equity securities and the other 50 percent issuer equity securities), a transfer from the 100 percent fund to the 50 percent fund would be a transfer out of an issuer equity securities fund for purposes of measuring the six-month period before the next Discretionary Transaction. Conversely, a transfer from the 50 percent fund to the 100 percent fund would be a transfer into an issuer equity securities fund for the same purpose. But a transfer out of either fund into a non-issuer equity securities fund would be a transfer out, and a transfer into either fund from a non-issuer equity securities fund would be a transfer into an issuer equity securities fund.

223.04 Under Rule 16b-3(b)(3)(i)(B), a director will not be disqualified for service as a Non-Employee Director by virtue of receiving compensation from the issuer for services rendered "in any capacity other than as a director" where the director receives a higher director's fee in consideration for service as chairman of the board or on a committee of the board. [May 23, 2007]

223.05 Rule 16b-3(b)(3)(i)(B) provides that a Non-Employee Director may not receive compensation from the issuer, its parent or subsidiary, for services in any capacity other than as a director, except for an amount that does not exceed the dollar amount for which disclosure is required under Item 404(a) of Regulation S-K. The "services" in question refer to current services or services recently provided. Accordingly, a director's receipt from the issuer of a pension that is paid as a result of the director's prior service as an employee of the issuer would not trigger disqualification under paragraph (B), without regard to amount. In contrast, a director's receipt of a severance payment, in excess of the referenced amount, would trigger disqualification to the extent it relates to recent service. [May 23, 2007]

223.06 An Internal Revenue Code Section 423 plan permits a lump sum purchase at the end of the purchase period as an alternative to payroll deductions. However, a participant must enroll at the beginning of a purchase period and elect at that time whether to use payroll deductions or the lump sum payment. Such a plan would be a Stock Purchase Plan, as defined by Rule 16b-3(b)(5) and purchases under either form of payment would be exempt under Rule 16b-3(c). [May 23, 2007]

223.07 A routine disposition of shares to fund an administrative fee assessment under a Tax-Conditioned Plan would be exempt without further condition. However, the staff is of the view that dispositions that are not similarly incidental to plan administration are outside the purview of the plan and thus not exempted by Rule 16b-3(c). See the staff interpretive letter to American Bar Association (Oct. 15, 1999). [May 23, 2007]

223.08 Under a plan that is otherwise a formula plan, following a change in control (as objectively defined in the plan) participants will receive benefits in the form of cash or stock. The decision as to whether payment is made in cash or stock is made by the issuer's compensation committee. Although issuer discretion is limited to the form of payment (rather than the amount) this issuer discretion must be exercised by the full board, the committee of Non-Employee Directors, or shareholders. Alternatively, any securities received by insiders must be held for six months for the Rule 16b-3(d)(3) exemption to apply. [May 23, 2007]

223.09 The six-month holding period Rule 16b-3(d)(3) will remain satisfied if, during the six months, the insider transfers the securities to a family trust, provided that the insider retains a pecuniary interest in the securities so transferred. In contrast, an outright transfer to a family member during the six months (either by gift or for consideration) will result in failure to satisfy the six-month holding period. [May 23, 2007]

223.10 A company grants options in reliance on the six-month holding period of Rule 16b-3(d)(3). Shortly thereafter, the company authorizes tax-withholding rights with respect to the same options pursuant to Non-Employee Director approval under Rule 16b-3(e). This bifurcated procedure should not alter the availability of Rule 16b-3(d)(3), provided that the withholding rights are not exercised before the conclusion of the six-month holding period for the related option grant. [May 23, 2007]

cited in Alpha Venture Capital Partners v. Pourbassan 21-35274 archived on April 5, 2022

223.11 Board approval of a buy-back plan providing for the issuer to buy back option shares at any time at fair market value would not satisfy the approval requirement of Rule 16b-3(e), because the resultant open-ended buy-back transactions would not have been approved with sufficient specificity. [May 23, 2007]

223.12 Consistent with the staff interpretive letter to American Bar Association (Dec. 20, 1996), an insider elects to defer salary into a phantom stock account in a single fund plan, and at the same time makes an election to receive the ultimate cash payout at a fixed date more than six months following the election. The payout election will not be subject to the conditions applicable to Discretionary Transactions under Rule 16b-3(f). [May 23, 2007]

223.13 A deferred compensation plan allows deferrals to either a phantom stock account or a cash account. Transfers between the phantom stock account and cash account are permitted. At the time a participant elects to defer compensation, the participant determines that the balance of both accounts will be paid in cash at a fixed date more than six months following the election. Because of the transfer feature, the plan is treated as a multi-fund deferral plan under Q. 4(c) of the staff interpretive letter to American Bar Association (Dec. 20, 1996), rather than a single-fund deferral plan under Q. 4(b) of that interpretive letter. A cash-out from the phantom stock account pursuant to the election described above would be a Discretionary Transaction, eligible for exemption under Rule 16b-3(f). Because the transfer feature permits assets to be transferred between the accounts, the balance of assets that will be in the phantom stock account at the fixed date payout cannot be determined until the fixed date occurs. Therefore, for purposes of Rule 16b-3(f) the fixed date payout election will be deemed to occur on the fixed date. The fixed date payout is not eligible for exemption under Rule 16b-3(e). [May 23, 2007]

223.14 A deferred compensation plan allows deferrals to either a phantom stock account or a cash account (which is credited with interest at the market rate). No transfers between the phantom stock account and the cash account are permitted, except that if a participant elects a payout in installments, the participant may make a one-time election (effective simultaneously with commencement of payouts) to transfer all or part of the phantom stock

account balance to the cash account. Because of this transfer feature, pursuant to the staff interpretive letter to American Bar Association (Dec. 20, 1996) Q. 4(c), the plan is treated as a multi-fund deferral plan, rather than as a single-fund deferral plan. Generally, a transfer pursuant to this feature would be a Discretionary Transaction, eligible for exemption under Rule 16b-3(f). However, where such a transaction is not a Discretionary Transaction (for example, where it is in connection with the participant's death, disability or retirement, as provided by Rule 16b-3(b)(1)), it is eligible for exemption under Rule 16b-3(e). In that case, if the participant irrevocably elects to make such a transfer at the time he or she elects to defer funds, the approval requirement of Rule 16b-3(e) and Note 3 may be satisfied by approval of the plan. Cf. staff interpretive letter to American Bar Association (Dec. 20, 1996) Q. 4(b). However, if the election is made at a later point, approval of the individual transaction is necessary. [May 23, 2007]

223.15 If an election to effect a Discretionary Transaction is revocable until a specified date, such specified date should be used as the date of the election for purposes of measuring the six-month period before election of the next "opposite way" Discretionary Transaction eligible for exemption under Rule 16b-3(f). [May 23, 2007]

Section 224. Rule 16b-5 – Bona Fide Gifts and Inheritance

None

Section 225. Rule 16b-6 – Derivative Securities

None

Section 226. Rule 16b-7 – Mergers, Reclassifications and Consolidations

None

cited in Alpha Venture Capital Partners v. Pourhassan
21-35274 archived on April 5, 2022

Section 227. Rule 16b-8 – Voting Trusts

None

Section 228. Rule 16c-1 – Brokers

None

Section 229. Rule 16c-2 – Transactions Effected in Connection with a Distribution

None

Section 230. Rule 16c-3 – Exemption of Sales of Securities to be Acquired

None

Section 231. Rule 16c-4 – Derivative Securities

231.01 Rule 16c-4 provides that establishing or increasing a put equivalent position will be exempt from the Section 16(c) prohibition against short sales so long as the amount of securities underlying the put equivalent position does not exceed the amount of underlying securities otherwise owned. The insider had issued DECS (put equivalents) backed by issuer common stock. The insider proposed to sell all its issuer common stock in excess of the minimum amount deliverable in settlement of the DECS at maturity, and asked the Division staff to concur that the insider would continue to satisfy Rule 16c-4 following such sale. The Division staff did not agree because if a price decline occurred prior to maturity the insider would need to deliver a greater number of shares, at which point the insider would be short (in violation of Section 16(c)) and would be benefited by a stock decline so that it could go into the market and cover. Rule 16c-4 is construed to apply during the entire lifetime of the put equivalent so that at any such time the insider would have no net benefit resulting from a price decline in the issuer's shares. [May 23, 2007]

Section 232. Rule 16e-1 – Arbitrage

None

Section 233. Forms 3, 4 and 5 – General

233.01 Phantom stock is a derivative security reportable on Table II of Forms 4 and 5. Accordingly, in reporting an open market purchase of common stock, an insider would not need to update phantom stock holdings. The exception to this position is where phantom stock units that settle automatically on a one-for-one basis in common stock have been reported on Table I as common stock, in reliance on the staff interpretive letters to Lincoln National Corporation (Mar. 20, 1992), Q. 3 and American Bar Association (Dec. 20, 1996), Q. 4(d)(3). [May 23, 2007]

233.02 An insider may rely in good faith on the last plan statement in reporting holdings pursuant to 401(k) plans and other plans eligible for the Rule 16b-3(c) exemption on Forms 4 and 5, unless the insider is aware of subsequent plan transactions. [May 23, 2007]

233.03 When reporting a transaction on Form 4 or Form 5, care should be taken that the characterization of securities as "Acquired (A)" or "Disposed (D)" in Table I Column 4 or Table II Column 5 is consistent with the transaction code reported in Table I Column 3 or Table II Column 4. For example, a transaction coded "P" should not report "D" in Table I Column 4 or Table II Column 5, because a purchase is not a disposition. [May 23, 2007]

Section 234. Form 3

None

Section 235. Form 4

235.01 An insider planned to file a Form 4 to report the sale of securities of a closed-end investment company. Each shareholder in the investment company owns one share of stock, but a shareholder's voting interest is tied to its economic interest, rather than the number of shares of stock held. The staff advised that the insider must include information that would convey the amount of equity sold or purchased in the transaction. Specifically, while the insider may report on the Form 4 that one share was involved in the transaction, the insider should also include a footnote to explain the amount of equity involved in the transaction, stating: (1) the percentage held before transaction; (2) the percentage sold/purchased in the transaction; and (3) the percentage held after the transaction. [May 23, 2007]

cited in Alpha Venture Capital Partners v. Pourhassan 21-35274 archived on April 5, 2022

Section 236. Form 5

None

Modified: Aug. 11, 2010

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send an email or letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista (maria.b.evangelista@tr.com));
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to *(party name(s))*:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

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Principal Brief(s) *(Opening Brief; Answering Brief; 1st, 2nd , and/or 3rd Brief on Cross-Appeal; Intervenor Brief)*			$	$
Reply Brief / Cross-Appeal Reply Brief			$	$
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Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee / Appeal from Bankruptcy Appellate Panel Docket Fee				$
			TOTAL:	$

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:*
No. of Copies: 4; Pages per Copy: 500; Cost per Page: $.10 (or actual cost IF less than $.10);
TOTAL: 4 x 500 x $.10 = $200.

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