

LEGAL UPDATES

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SEC Eases 8-K, Form 4 Requirements

Director Resignations to Satisfy Board Governance Policies Do Not Trigger a Form 8-K

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On June 26, 2008, the SEC issued an update to its Compliance and Disclosure Interpretations relating to current disclosure on the Commission's Form 8-K. Question 117.15 was rewritten so that a company need not file a Form 8-K when a director tenders his or her resignation in advance to satisfy a corporate governance policy which requires the director to offer to leave the board if certain events should occur, such as failure to receive a majority of the votes cast in an election for directors, changing jobs or reaching a mandatory retirement age. Instead the company only has to file a Form 8-K within four days after the board decides to accept the resignation. Previously, many companies read the requirement of §5.02(b) of the Form 8-K to mandate reporting director resignations on an 8-K when the director tendered his or her resignation, even though it might never be accepted. This seemingly pointless extension of the 8-K requirement has now been removed.

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The new Q&A 117.15 adds that, in the event the board does not accept the director's resignation, the board should consider whether it needs to file a Form 8-K to disclose the extent to which the company is not in compliance with its corporate governance policies, or, alternatively, if the company believes it is following its corporate governance policies, how the company reaches that determination. Practically, the discussion of the particular governance policy in the annual meeting proxy statement should provide sufficient explanation for why the company does not file an 8-K upon receipt of these contingent advance resignations.

The full text of this new interpretation can be found at <http://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm>.

Section 16 Reporting – Aggregation of Transactions Within \$1.00 Range

On June 25, 2008, the SEC issued a no-action letter regarding reporting on Forms 4 and 5 under the Securities and Exchange Act of 1934. In response to a prior SEC interpretation on Section 16 reporting, the Society of Corporate Secretaries & Governance Professionals (the “Society”) requested that the SEC state that it will not recommend action against insiders who use broker-dealers to effect multiple same-day, same-way open market transactions and report the multiple transactions on a single line of a Form 4 or 5 even though the transactions were at slightly varying prices. The need for this interpretation arose from the common practice among brokers of breaking up larger orders to buy or sell into several transactions for smaller numbers of shares so as to minimize the impact of the insider's trade on the market price. Frequently a single purchase or sale order would be executed via as many as several dozen individual transactions, each at slightly different prices and each then requiring a separate line on the Form 4 or 5. Often there would be multiple Forms 4 or 5 for what was actually one purchase or sale. The effect was to obscure the economic reality underlying transactions by insiders—contrary to the purpose of Section 16.

In its no-action letter, the SEC stated that it will not recommend enforcement action against reporting insiders who execute trade orders through a broker-dealer for multiple same-day, same-way open market transactions (purchase or sale) and consolidate transactions within a one dollar price range on a single line of Form 4 or Form 5 as long as the reporting insider:

- reports the weighted average transaction price of those transactions within the \$1.00 range in the price column of the form
- adds a footnote to indicate that the price used is a weighted average of prices and provides the actual range of prices

- indicates in a footnote that the reporting person will provide full details of the information reported, such as the actual number of shares purchased at each price, upon a request from the Commission, the company or a shareholder

In reaching its conclusion, the SEC noted that the approach outlined is available only for open market transactions reportable under codes 'P' and 'S' and is not available to aggregate reporting of separate transactions for (i) directly and indirectly held shares or (ii) shares held in different types of indirect ownership.

The full text of the Society's request and the SEC no-action letter is at [Society of Corporate Sec'y's & Corporate Governance Prof'ls, SEC No-Action Letter, 2008 WL 2553499 \(June 25, 2008\)](#) and it can be found at <http://www.sec.gov/divisions/corpfin/cf-noaction/2008/scsgp062508-sec16.htm>.

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