

PUBLICATION

SEC Alters Position on Aggregate Price Reporting on Form 4's

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The staff of the Division of Corporate Finance of the Securities and Exchange Commission (Staff) recently issued a no-action letter to the Society of Corporate Secretaries and Governance Professionals (SCSGP) which permits corporate insiders who are subject to Section 16 of the Securities Exchange Act of 1934 (Insiders) to report same-day, same-way purchases and sales on an aggregate basis^[1]. Until now, the Staff had taken the position that each separately priced transaction had to be reported on a separate line of a Form 4, even if the trades occurred at prices separated by only a penny, or less, as evidenced by its May 23, 2007 Compliance and Disclosure Interpretations.

The SCSGP no-action request (Letter) outlined the reasons why the Staff's current position was not only an unnecessary imposition on the reporting person, but more importantly, created confusion for interested parties trying to interpret the forms. As the Letter explains, broker-dealers often execute trade orders for a relatively small number of shares in small increments and at prices that differ by only fractions of a penny. Due to the previous position taken by the Staff, reporting the sale of as little as 100 shares could require the submission of multiple Form 4's.

In essentially concurring with the Letter, the Staff enumerated specific conditions that must be met in order to take advantage of aggregate price reporting. Additionally, the Staff specifically noted the importance of the Insider undertaking to provide detailed information regarding the exact purchase or sale prices of shares for the purpose of calculating any potential short-swing profit liability under Section 16(b). As a practical note, Insiders should take care to keep detailed records of the transactions that show the exact prices and amounts of the trades. Typically, these will be available from the broker-dealer executing those trades.

The Letter permits Insiders to report same-way, same-day transactions on an aggregate basis as long as the following conditions are met:

- The trades must be open market transactions executed by a broker-dealer;
- The trades must involve securities owned in the same form (i.e., trades in indirectly owned shares may not be aggregated with trades in directly owned shares or trades in shares owned indirectly in another form);
- The trades must be reported using transaction code "P" or "S";
- The trades must occur within a one dollar price range (e.g., all trades from \$6.50 through \$7.49 may be reported on a single line, all trades from \$7.50 to \$8.49 may be reported on another line, and so on);
- The price column must report the weighted average purchase or sale price for the transactions reported on that line, with a footnote disclosing the range of prices paid or received; and
- The filer must undertake, in a footnote, to provide to the Staff, the issuer, or a security holder full information regarding the number of shares purchased or sold at each separate price upon request.