

**Changes to Rule 10b5-1; SEC Final Rules published December 14, 2022 Effective [60 days after publication of final rules in the Federal Register]**

**§ 240.10b5-1 Trading ~~“on the basis of”~~ material nonpublic information in insider trading cases.**

Preliminary Note to § 240.10B5-1:

This provision defines when a purchase or sale constitutes trading “on the basis of” material nonpublic information in insider trading cases brought under Section 10(b) of the Act and Rule 10b-5 thereunder. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b-5, and Rule 10b5-1 does not modify the scope of insider trading law in any other respect.

(a) **General**~~Manipulative or deceptive devices~~. The “manipulative ~~and~~or deceptive ~~devices~~~~device[s]~~ or contrivance[s]” prohibited by Section 10(b) of the Act (15 U.S.C. 78j) and § 240.10b-5 (Rule 10b-5) thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.

(b) **Definition**~~Awareness~~ of ~~“on the basis of”~~**material nonpublic information.** Subject to the affirmative defenses in paragraph (c) of this section, a purchase or sale of a security of an issuer is ~~“on the basis of”~~ material nonpublic information ~~about that security or issuer~~for purposes of Section 10(b) and Rule 10b-5 if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b-5, and Rule 10b5-1 does not modify the scope of insider trading law in any other respect.

(c) **Affirmative defenses. (1) (i)** Subject to paragraph (c)(1)(ii) of this section, a person’s purchase or sale is not ~~“on the basis of”~~ material nonpublic information if the person making the purchase or sale demonstrates that:

(A) Before becoming aware of the information, the person had:

(1) Entered into a binding contract to purchase or sell the security,

(2) Instructed another person to purchase or sell the security for the instructing person's account, or

(3) Adopted a written plan for trading securities;

(B) The contract, instruction, or plan described in paragraph (c)(1)(i)(A) of this ~~Section~~section:

(1) Specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold;

(2) Included a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold; or

(3) Did not permit the person to exercise any subsequent influence over how, when, or whether to effect purchases or sales; provided, in addition, that any other person who, pursuant to the contract, instruction, or plan, did exercise such influence must not have been aware of the material nonpublic information when doing so; and

(C) The purchase or sale that occurred was pursuant to the contract, instruction, or plan. A purchase or sale is not “pursuant to a contract, instruction, or plan” if, among other things, the person who entered into the contract, instruction, or plan altered or deviated from the contract, instruction, or plan to purchase or sell securities (whether by changing the amount, price, or timing of the purchase or sale), or entered into or altered a corresponding or hedging transaction or position with respect to those securities.

(ii) Paragraph (c)(1)(i) of this section is applicable only when: ~~the~~

(A) The contract, instruction, or plan to purchase or sell securities was given or entered into in good faith and not as part of a plan or scheme to evade the prohibitions of this section, and the person who entered into the contract, instruction, or plan has acted in good faith with respect to the contract, instruction or plan;

(B) If the person who entered into the contract, instruction, or plan is:

(1) A director or officer (as defined in § 240.16a-1(f) (Rule 16a-1(f)) of the issuer, no purchases or sales occur until expiration of a cooling-off period consisting of the later of: (i) Ninety days after the adoption of the contract, instruction, or plan or (ii) Two business days following the disclosure of the issuer’s financial results in a Form 10-Q (§ 249.308a of this chapter) or Form 10-K (§ 249.310 of this chapter) for the completed fiscal quarter in which the plan was adopted or, for foreign private issuers, in a Form 20-F (§ 249.220f of this chapter) or Form 6-K (§249.306 of this chapter) that discloses the issuer’s financial results (but, in any event, this required cooling-off period is subject to a maximum of 120 days after adoption of the contract, instruction, or plan);  
or

(2) Not the issuer and not a director or officer (as defined in § 240.16a-1(f) (Rule 16a-1(f)) of the issuer, no purchases or sales occur until the expiration of a cooling-off period that is 30 days after the adoption of the contract, instruction or plan;

(C) If the person who entered into a plan as described in paragraph (c)(1)(i)(A)(3) of this section is a director or officer (as defined in Rule 16a-1(f) (§ 240.16a-1(f)) of the issuer of the securities, such director or officer included a representation in the plan certifying that, on the date of adoption of the plan:

(1) The individual director or officer is not aware of any material nonpublic information about the security or issuer; and

(2) The individual director or officer is adopting the plan in good faith and not as part of a plan or scheme to evade the prohibitions of this section;

(D) The person (other than the issuer) who entered into the contract, instruction, or plan has no outstanding (and does not subsequently enter into any additional) contract, instruction, or plan that would qualify for the affirmative defense under paragraph (c)(1) of this section for purchases or sales of the issuer's securities on the open market; except that:

(1) For purposes of this paragraph (c)(1)(ii)(D), a series of separate contracts with different broker-dealers or other agents acting on behalf of the person (other than the issuer) to execute trades thereunder may be treated as a single "plan," provided that the individual constituent contracts with each broker-dealer or other agent, when taken together as a whole, meet all of the applicable conditions of and remain collectively subject to the provisions of this rule, including that a modification of any individual contract acts as modification of the whole contract, instruction of plan, as defined in paragraph (c)(1)(iv) of this section. The substitution of a broker-dealer or other agent acting on behalf of the person (other than the issuer) for another broker-dealer that is executing trades pursuant to a contract, instruction or plan shall not be a modification of the contract, instruction, or plan (as defined in paragraph (c)(1)(iv) of this section) as long as the purchase or sales instructions applicable to the substitute and substituted broker are identical with respect to the prices of securities to be purchased or sold, dates of the purchases or sales to be executed, and amount of securities to be purchased or sold; and

(2) The person (other than the issuer) may have one later-commencing contract, instruction, or plan for purchases or sales of any securities of the issuer on the open market under which trading is not authorized to begin until after all trades under the earlier-commencing contract, instruction, or plan are completed or expired without execution; provided, however, that if the first trade under the later-commencing contract, instruction, or plan is scheduled during the Effective Cooling-Off Period, the later-commencing contract, instruction, or plan may not rely on this paragraph (c)(1)(ii)(D)(2). For purposes of this paragraph (c)(1)(ii)(D)(2), "Effective Cooling-Off Period" means the cooling-off period that would be applicable under paragraph 244 (c)(1)(ii)(B) of this section with respect to the later-commencing contract, instruction, or plan if the date of adoption of the later-commencing contract, instruction, or plan were deemed to be the date of termination of the earlier-commencing contract, instruction, or plan; and (3) A contract, instruction, or plan providing for an eligible sell-to-cover transaction shall not be considered an outstanding or additional contract, instruction, or plan under paragraph (c)(1)(ii)(D) of this section, and such eligible sell-to-cover transaction shall not be subject to the limitation under paragraph (c)(1)(ii)(D) of this section. A contract, instruction, or plan provides for an eligible sell-to-cover transaction where the contract, instruction, or plan authorizes an agent to sell only such securities as

are necessary to satisfy tax withholding obligations arising exclusively from the vesting of a compensatory award, such as restricted stock or stock appreciation rights, and the insider does not otherwise exercise control over the timing of such sales; and

(E) With respect to persons (other than the issuer), if the contract, instruction, or plan does not provide for an eligible sell-to-cover transaction as described in paragraph (c)(1)(ii)(D)(3) of this section and is designed to effect the open-market purchase or sale of the total amount of securities as a single transaction, the person who entered into the contract, instruction, or plan has not during the prior 12-month period adopted a contract, instruction, or plan that:

(1) was designed to effect the open-market purchase or sale of all of the securities covered by such prior contract, instruction or plan, in a single transaction; and

(2) Would otherwise qualify for the affirmative defense under paragraph (c)(1) of this section.

(iii) This paragraph (c)(1)(iii) defines certain terms as used in paragraph (c) of this Section.

(A) Amount. “Amount” means either a specified number of shares or other securities or a specified dollar value of securities.

(B) Price. “Price” means the market price on a particular date or a limit price, or a particular dollar price.

(C) Date. “Date” means, in the case of a market order, the specific day of the year on which the order is to be executed (or as soon thereafter as is practicable under ordinary principles of best execution). “Date” means, in the case of a limit order, a day of the year on which the limit order is in force.

(iv) Any modification or change to the amount, price, or timing of the purchase or sale of the securities underlying a contract, instruction, or written plan as described in paragraph (c)(1)(i)(A) of this section is a termination of such contract, instruction, or written plan, and the adoption of a new contract, instruction, or written plan. A plan modification, such as the substitution or removal of a broker that is executing trades pursuant to a Rule 10b5-1 arrangement on behalf of the person, that changes the price or date on which purchases or sales are to be executed, is a termination of such plan and the adoption of a new plan.

(2) A person other than a natural person also may demonstrate that a purchase or sale of securities is not “on the basis of” material nonpublic information if the person demonstrates that:

(i) The individual making the investment decision on behalf of the person to purchase or sell the securities was not aware of the information; and

(ii) The person had implemented reasonable policies and procedures, taking into consideration the nature of the person's business, to ensure that individuals making investment decisions would not violate the laws prohibiting trading on the basis of material nonpublic information. These policies and procedures may include those that restrict any purchase, sale, and causing any purchase or sale of any security as to which the person has material nonpublic information, or those that prevent such individuals from becoming aware of such information.

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