

SEC STAFF UPDATES RULE 10B5-1 INTERPRETATIONS

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WHAT HAPPENED

The SEC staff recently published updates to its interpretations (CDIs) for Rule 10b5-1 – the insider trading exemption for pre-established trading plans.

TAKEAWAYS

The updates contain several new or substantively changed interpretations as well as a number of technical updates.

New interpretations relate to the availability of the Rule 10b5-1 defense for:

- Self-directed “brokerage window” transactions in 401(k) plans.
- “Sell-to-cover” transactions to satisfy tax withholding payments calculated in good faith to satisfy the individual’s expected effective tax obligation.

Substantively updated interpretations relate to the availability of the Rule 10b5-1 defense for:

- Limit orders to sell.
- 401(k) plan purchases through ordinary payroll deductions.
- Fund switches in 401(k) plans.

They also clarify that the effect of plan termination on prior purchases depends on:

- Whether the plan was entered into in good faith and not as part of a scheme to evade the rule.
- Whether the individual acted in good faith with respect to the plan.

Technical updates mostly conformed existing language to the [2022 amendments to Rule 10b5-1](#).

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NEW INTERPRETATIONS

Self-Directed Brokerage Window Transactions

- [Question 120.32](#) confirms that a self-directed “brokerage window” transaction in a company 401(k) plan must satisfy the usual conditions, including those applicable to trades on the open market.

Sell-to-Cover for Expected Tax Obligations

- [Question 120.33](#) provides that, for purposes of the sell-to-cover” exception, the term “necessary to satisfy tax withholding obligations” is not limited to minimum tax withholding obligations. Instead, it refers to “tax withholding payments that are calculated in good faith to satisfy the employee or director’s expected effective tax obligation solely with respect to the vesting transaction, consistent with applicable tax law and accounting rules.”

SUBSTANTIVELY UPDATED INTERPRETATIONS

Trading Plan with Limit Order Instructions

- [Question 120.15](#) confirms that placing a discretionary market order to sell during the pendency of trading plan with limit order instructions would not affect the defense for the trading plan.
- [Question 120.16](#) confirms that modifying a limit order trading plan to increase the quantity of shares is considered a new plan that requires compliance with 10b5-1(c) requirements.

Effect of Plan Termination

- [Question 120.18](#) explains that the effect of plan termination on the availability of the defense for prior transactions depends on:
 - Whether the plan was entered into in good faith and not as part of a scheme to evade Rule 10b-5.
 - Whether the individual acted in good faith with respect to the plan.

401(k) Plan Transactions

- [Question 120.21](#) confirms the availability of the defense for ordinary 401(k) plan purchases when specified requirements are met, including the 30-day cooling off period for employees who are not directors or officers.
- [Question 120.22](#) addresses the requirements for fund switching transactions in 401(k) plans to qualify for the defense.

- [Question 120.23](#) explains that a fund-switching transaction could constitute a prohibited “corresponding or hedging transaction,” but specifies the elements of the defense that would need to be satisfied to preserve the defense.

WITHDRAWN

The SEC staff withdrew several interpretations:

- [Question 120.02](#) – formerly addressed how to modify Form 144 representations (mooted by prior changes to the Form).
- [Question 120.19](#) – formerly addressed effect of cancellation of transactions under a plan on the availability of the defense for future plan transactions (superseded by the 2022 amendments).
- [Section 220.01](#) – formerly addressed the assumption of a trading plan by a new broker after the original broker ceases business (superseded by the 2022 amendments).

MINOR UPDATES

A number of updates contained minor changes, including [Question 120.01](#), [Question 120.03](#), [Question 120.04](#), [Question 120.05](#), [Question 120.06](#), [Question 120.07](#), [Question 120.08](#), [Question 120.09](#), [Question 120.10](#), [Question 120.11](#), [Question 120.12](#), and [Question 120.14](#).

These interpretations relate to a variety of fact patterns, including sales by trusts, the effect of outside sales using Rule 144, the writing or exercise of call or put options, forced sales, discretionary brokerage sales, and limit orders.

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