ALERT MEMORANDUM

SEC Proposes Major Rule Changes on Trading Plans and Corporate Buybacks

December 28, 2021

On December 15, 2021, the SEC issued for public comment two separate proposals that will, if adopted, significantly affect how corporate directors, officers and employees trade securities of their companies and how companies repurchase their own shares.

- One proposal, approved unanimously by the SEC Commissioners, principally addresses the use of "10b5-1 plans" – trading plans that are designed to qualify for an affirmative defense against insider trading under Rule 10b5-1(c)(1).[1]
- The other, approved on a 3-2 vote, addresses corporate repurchases of equity securities.[2]

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

NEW YORK

Nicolas Grabar
+1 212 225 2414
ngrabar@cgsh.com

Lillian Tsu
+1 212 225 2130
ltsu@cgsh.com

The comment period for both proposals is unusually brief: 45 days from publication in the Federal Register, so probably in mid-February. It seems very possible that the proposals could be adopted later in 2022, but the proposing releases do not address how long after that they might become effective. When they take effect, they will require substantial changes in how companies and their directors, officers and employees conduct transactions in company securities.

This memorandum walks through the two proposals in turn and concludes with some general takeaways and possible issues for comment.

[1] The SEC's release (the "Trading Plans Release") for this proposal (the "Trading Plans Proposal") can be found here. The authors acknowledge the assistance of their colleague Daniel Oyolu in preparing this memorandum.
[2] The SEC's release (the "Share Repurchase Release") for this proposal (the "Share Repurchase Proposal") can be found here. The two Republican commissioners dissented.

I. The Trading Plans Proposal

A. Background: trading plans under Rule 10b5-1

Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), and Rule 10b-5 under the Exchange Act, prohibit what is loosely referred to as insider trading – very generally, trading on the basis of material nonpublic information (MNPI) in breach of a duty to the issuer, its shareholders or the source of the MNPI. Rule 10b5-1 was adopted in 2000 to clarify a point about these provisions that had led to conflicting judicial decisions and to regulatory uncertainty: when does a purchase or sale of a security occur "on the basis of" MNPI? Specifically, what connection between *possessing* MNPI about a security and *trading* on the security is required to establish a violation of Section 10(b) and Rule 10b-5?

Rule 10b5-1 does three things:

- Paragraph (b) provides that if a person is *aware* of MNPI when the person trades, that is sufficient to establish a violation.
- Paragraph (c)(1) provides an affirmative defense for a trade made under a plan established when the trader was not aware of MNPI.
- Paragraph (c)(2) provides an affirmative defense for a trade made by an entity, where the individual making the trading decision is not aware of MNPI and the organization has appropriate policies and procedures to prevent misuse of MNPI.

The two defenses established under Rule 10b5-1 have shaped market practice. (Following market practice, in this memo we use the term "safe harbor" as well as the more technically precise "defense.") The second defense, under paragraph (c)(2), is relied on by financial institutions, institutional investors, fund complexes, and others to structure information barriers or "walls" within organizations, so that knowledge at one part of the organization is not attributed to another part of the organization that makes trading decisions. The SEC's proposed amendments do not affect this defense.

The first defense under Rule 10b5-1 is widely relied on by persons that seek to trade although they are in a position to have MNPI from time to time – including directors, officers, employees and the issuer itself. Generally, the defense is available for a trade made pursuant to a contract, instruction or plan that was entered into before the person became aware of MNPI and that meets the other criteria in the Rule. (In this memo, we refer to an arrangement intended to establish this defense as a "10b5-1 Plan.")

Trading under 10b5-1 Plans has been the subject of extensive critical commentary contending that the regime doesn't work well enough and arguing that the SEC or Congress should limit its availability. Critics argue, pointing to academic research, journalistic investigations and prominent anecdotes, that the existing safe harbor permits a range of abusive practices under which insiders have been able to take advantage of "information asymmetry" to profit inappropriately from trading. The Trading Plans Release cites these criticisms as the principal basis for the proposed amendments.

B. Proposed changes to the 10b5-1 Plan defense

The proposed amendments would add the following additional conditions to the safe harbor for 10b5-1 Plans.[3] All of them reflect ideas that have featured, to varying degrees, in calls for reform of the Rule.

- Cooling-off period (director or officer plans). A director or officer (as defined in Rule 16a-1(f)) of the issuer seeking to rely on the defense may not trade until 120 days have passed since adopting the 10b5-1 Plan (or modifying it, including by canceling a trade). As proposed, the cooling-off period would not apply to others – for example, an employee who is not an officer could trade under a 10b5-1 Plan without observing a 120-day cooling-off period. For some years now many issuers, in the trading policies they prepare for use by their employees, officers and directors, have imposed cooling-off periods of varying duration for use of a 10b5-1 Plan. Many brokers also impose cooling-off periods in their standard trading policies, though often these are much shorter than the SEC's proposed 120-day period.

- Cooling-off period (issuer plans). An issuer seeking to rely on the defense may not trade until at least 30 days have passed since adopting the 10b5-1 Plan (or modifying it). The considerations regarding use of 10b5-1 Plans are different for the issuer than for individuals, and it has not always been clear whether the various calls for reform identified criticisms or abuses of issuer 10b5-1 Plans.

- Certifications. A director or officer seeking to rely on the safe harbor must furnish to the issuer a written certification that they are not aware of MNPI, and that they are adopting the 10b5-1 Plan in good faith and not as part of a plan or scheme to evade insider trading prohibitions. This requirement does not apply to employees who are not officers. The certification must be furnished on the date of adoption, and an instruction states that the director or officer should retain a copy for a period of ten years. But the certification is not required to be filed with the SEC, and the Trading Plans Release says that it is not intended to serve as a potential basis for liability.

  The Release notes that a director or officer can consult with experts or with counsel as to the meaning of MNPI, but emphasizes that they are making a personal determination based on an inherently fact-specific analysis. The certification requirement, and the related determinations about the absence of MNPI, may require new internal policies and thoughtful attention to internal controls.[4] However, directors and officers often provide similar representations on the absence of MNPI today, because brokers generally require them and many corporate policies also require them as part of the pre-clearance process.

- No multiple overlapping plans. Any person (including the issuer) seeking to rely on the safe harbor for a 10b5-1 Plan must not have any other outstanding contract, instruction or plan to trade the same class of securities in the open market. This proposal is based on the belief that a trader might enter into two or more plans with different pricing parameters and cancel those that prove unfavorable. Purchases or sales that are not in the open market (the Release cites, for example,

[3] Annex 1 to this memorandum shows the proposed changes to Rule 10b5-1.

[4] The SEC's 2020 settlement with Andeavor LLC illustrates the stakes for an issuer. Andeavor LLC, Release Nos. 34-90208, AAER-4190, File No. 3-20125 (Sec. & Exch. Comm'n, Oct. 15, 2020) (SEC charged Andeavor with failing to maintain an effective system of internal controls to determine whether the company was in possession of MNPI before commencing repurchases pursuant to a Rule 10b5-1 trading plan).

purchases from the issuer through an employee stock option plan or a dividend reinvestment plan) would not violate this condition.

The prohibited overlap is not limited to 10b5-1 Plans; it would capture any other "outstanding contract, instruction or plan," whether or not intended to qualify for the defense, and it would capture a subsequent "contract, instruction or plan." Under this language it could be hard to identify ordinary trading activity that does *not* fall within this prohibition, and the Release does not explain how to identify it. For example, if an issuer has a Rule 10b5-1 Plan in place, would open market purchases during an open window period cause the Rule 10b5-1 Plan to violate this condition?

- No multiple single-trade plans. If a 10b5-1 Plan "is designed to effect the purchase or sale of the total amount of securities as a single transaction," the person seeking to rely on the safe harbor may not have had another single-trade plan during the prior 12-month period. The Trading Plans Release says that single-trade plans "are consistently loss-avoiding and often precede stock price declines." Like the prohibition on overlapping plans, this prohibition is not limited to 10b5-1 Plans, and it may create similar difficulties in application – for example, in distinguishing ordinary trading from a single-trade non-Rule 10b5-1 arrangement.

- Good-faith operation. The existing affirmative defense requires that a 10b5-1 Plan be entered into in good faith. The proposed amendments would require also that it be "operated" in good faith, to make clear that good faith must continue throughout the operation of the plan. In particular, the Release refers to the possibility that a person might cancel or modify a 10b5-1 Plan, or influence the timing of corporate disclosures, in ways that would make the trade more profitable or avoid or reduce a loss.

- Modification or amendment of a Rule 10b5-1 Plan. The proposed amendments include an instruction that any modification or amendment of a plan is deemed to be termination of that plan and adoption of a new one.

C. Proposed new issuer disclosures

The Release proposes to require every issuer to provide annual disclosures about its insider trading policies and procedures. In addition, it proposes to require a domestic issuer (but not a foreign private issuer) to provide (a) quarterly disclosures about trading in its securities by the issuer and its officers and directors and (b). annual disclosures about the timing of option grants.

Annual disclosures on trading policies (with XBRL tagging)

The requirements for annual disclosures about trading policies would be contained in new Item 408(b) of Regulation S-K and new Item 16J of Form 20-F. For a domestic issuer, the disclosures would be required by both Item 10 of Form 10-K and Item 7 of Schedule 14A, so presumably most issuers would provide them in the proxy statement and forward incorporate in the Form 10-K. A domestic issuer must disclose whether it has adopted:

> insider trading policies and procedures governing the purchase, sale, and other dispositions of the registrant's securities by directors, officers and employees that are reasonably designed to promote compliance with insider trading laws, rules and regulations, and any listing standards applicable to the registrant[.]

The language of the requirement is identical for a foreign private issuer, except that it refers to "applicable" insider trading laws and uses "senior management" in place of the term "officers."

If the issuer has insider trading policies and procedures – as most issuers do – they must be disclosed, and the disclosure must be provided in an interactive data file using Inline XBRL. However, neither the proposed rule nor the Trading Plans Release addresses what level of disclosure the SEC is expecting. The Release makes clear that the purpose of this disclosure is to facilitate review and comparison of policies and identification of abuses or opportunities for abuse. For some other disclosures relating to corporate governance, SEC rules or exchange rules require filing an exhibit, or posting on a website, or providing a description; but here the term "disclose," together with the requirement to block tag using Inline XBRL, suggests that the SEC may expect the entire text of the policy as well as tagging of features that seem to be quantifiable or otherwise lend themselves to tagging. Including the entire policy in a proxy statement (or a 20-F) may seem like a disproportionate allocation of space, unless some incorporation by reference strategy is available. Moreover, the tagging will presumably require a taxonomy, but the Release alludes to it only in passing and does not elaborate on the process for developing it.

Quarterly disclosures on trading plans

Quarterly disclosures would be required in reports on Form 10-Q and Form 10-K, which would refer to a new Item 408(a) of Regulation S-K. The disclosures are:

- As to issuer plans: whether the issuer has adopted or terminated a plan, and a description of the material terms of any plan, including the date, duration and amount.

- As to director or officer plans: whether any director or officer has adopted or terminated a plan, and a description of the material terms of any plan, including the name and title of the person, and the date, duration and amount.

In both cases, the disclosure does not include the amount of actual purchases or sales under the plan, or pricing parameters or outcomes – but as to an issuer, the concurrent Share Repurchase Proposal would require disclosure of this information on new Form SR.

Notably, these disclosure requirements are not limited to plans intended to qualify for the safe harbor under Rule 10b5-1. They apply to "any contract, instruction or written plan for the purchase or sale of securities of the registrant *whether or not* intended to satisfy the affirmative defense" (emphasis added) under the Rule, and the Release refers to "non-Rule 10b5-1(c) trading arrangements" as well as "Rule 10b5-1(c) trading arrangements". The Release explains that this is because one effect of the amendments may be that issuers, directors and officers will trade without trying to establish reliance on the safe harbor, and the SEC believes disclosure about those practices will be useful to deter abuses. However, it does not address how to identify a "non-Rule 10b5-1(c) trading arrangement" (though it does use the word "pre-planned"). Presumably not every purchase or sale is "pre-planned" or arises from a "contract, instruction or written plan," since there is no strong reason to organize sales in that way except to seek the benefit of the safe harbor.

Annual disclosures on timing of option grants

The Release proposes to add a new paragraph (x) to S-K Item 402 to address practices it refers to as "spring-loading" – "timing option grants to occur immediately before the release of positive [MNPI]" – and "bullet-dodging" – "delay[ing] a planned option award until after the release of [adverse MNPI]." Item 402 disclosures are required in an annual report on Form 10-K and typically incorporated by reference from the proxy statement.

The required disclosure has two parts. The first consists of a discussion of the registrant's policies and procedures on the timing of equity awards "in relation to the disclosure of [MNPI]", including whether disclosures have been timed for the purpose of affecting the value of grants.

The second part consists of a table that is required if any grant has occurred with 14 calendar days of a disclosure event defined as "the filing of a periodic report on Form 10-Q or 10-K, an issuer share repurchase, or the filing or furnishing of a current report Form 8-K that discloses [MNPI] (including earnings information." (To avoid repetition, we will use the term "Disclosure Trigger" to describe a disclosure event that triggers this tabular disclosure requirement). The inclusion of issuer buybacks and at least some Form 8-K filings means that for many issuers potential Disclosure Triggers will occur regularly. This disclosure could also affect issuers that, following the option backdating controversy and to address the proxy disclosure requirements on option grant practices, adopted a practice of making annual grants on the same date each year to avoid an appearance of taking MNPI (positive or negative) into account.

The Item 402(x) table includes not only the grant details (name, date, number of shares, exercise price, grant date fair value) but also information about the market value of the underlying shares around the Disclosure Trigger. This aspect of proposed Item 402(x) would appear to require, for each grant, the aggregate market value of the shares underlying the grant, either the trading day *before* the Disclosure Trigger (if the grant was before the Disclosure Trigger) or the trading day *after* the Disclosure Trigger (if the grant was after the Disclosure Trigger). The Release implies that, since this disclosure will expose either spring-loading in the first case or bullet-dodging in the second, the requirement will deter both practices.

D. Section 16 reporting

The SEC is proposing two changes to Section 16 reporting. The first is to amend Form 4 and Form 5 so the reporting person must check a box if the reported transaction was made under a 10b5-1 Plan. If the box is checked, the date of adoption of the plan must also be disclosed. The SEC had previously proposed in 2020 to include an optional box for this purpose, and it is now proposing that the box be mandatory. (Many Form 4 filers already indicate when the reported trades are pursuant to a Rule 10b5-1 Plan.) The amendment also adds an optional box that a reporting person may check to indicate that the reported transaction was pursuant to "a contract, instruction or plan" that is not a 10b5-1 Plan.

The other change to Section 16 reporting – which is not directly related to Rule 10b5-1 Plans – concerns reporting of bona fide gifts. Bona fide gifts are exempt from the short-swing profit reporting provisions of Section 16(b), and under current rules they are not required to be reported until 45 days after fiscal year-end on Form 5. The SEC proposes to amend Rule 16a-3 to accelerate the public disclosure of gifts by requiring reporting on a Form 4 filed within two business days of the transaction. Assuming this is adopted, an issuer that permits gifts during a blackout period should consider whether to revise its trading policies in light of Form 4 reporting and to ensure that gifts are captured under its pre-clearance procedures.

II. The Share Repurchase Proposal

Concurrently with the Trading Plans Proposal, the SEC proposed the Share Repurchase Proposal to modernize and improve disclosure about issuer repurchases in equity securities registered under Section 12 of the Exchange Act. Specifically, the proposed rules would:

- Introduce new Form SR, which would require information to be furnished to the SEC on the next business day after execution of a share repurchase;

- Amend existing Item 703 of Regulation S-K (and Item 16F of Form 20-F) to require disclosures on share repurchase policies and practices in periodic reports on issuer repurchases; and

- Require information disclosed pursuant to Item 703 and Form SR to be reported in inline XBRL.

These changes seek to improve the quality and timeliness of information related to issuer share repurchases. Under current Item 703, a domestic issuer repurchasing its own securities is required to disclose information in Form 10-Q for its first three fiscal quarters and in Form 10-K for its fourth quarter. A foreign private issuer is required to disclose the same information on an annual basis in Form 20-F. The Share Repurchase Release says that the long delay and aggregated information result in advantages to the issuer and to insiders due to "information asymmetry," which may lead to insiders being able to profit inappropriately from such information.

A. Daily reporting of buybacks

New Form SR

The proposed rules require issuers, including foreign private issuers, to furnish new Form SR to the SEC before the end of the first business day following the day on which the issuer executes the share repurchase. The proposed rules clarify that the reporting is triggered upon execution (i.e., trade date) of the transaction and not upon the later settlement date. The Form SR would require tabular disclosure by date of:

- The class of securities purchased;

- Total number of shares purchased, including whether or not made pursuant to a publicly announced repurchase program;

- Average price paid per share;

- Aggregate total number of shares purchased in the ***open market;***

- Aggregate total number of shares purchased ***in reliance on Rule 10b-18***; and

- Aggregate total number of shares purchased ***pursuant to a 10b5-1 Plan***.

The Release asserts that proposed Form SR disclosure, when combined with currently required disclosures on executive compensation, under Section 16 and in financial statements, will improve the ability of investors to identify issuer repurchases potentially driven by managerial self-interest, such as seeking to increase the share price prior to an insider sale or to change the value of an option or other form of executive compensation. Further, the SEC claims that daily disclosure of repurchases "could reveal time-sensitive information about the issuer's evolving outlook on its future share price to investors in a much timelier manner. To the extent issuers' repurchase decisions tend to predict future price changes, information about the timing of recent repurchases could be valuable to investors' decisions to buy and sell the issuer's securities."

In dissenting from the Share Repurchase Proposal, Commissioner Roisman rebutted the assertion that insiders can use a share repurchase program for personal gain. He noted that the "diligence and care" issuers undertake, including securing Board approval of the decision, make it unlikely that a repurchase program is motivated by a desire of insiders to inflate share prices in order to benefit themselves. Rather, his statement stressed a potential benefit to issuers and certain shareholders of information asymmetry resulting from the current disclosure rules:

> I find another justification more compelling. This is related to a concern that issuers may initiate buybacks when (1) the board and management both believe that the company is undervalued and (2) the company may not inform the market or may provide insufficient information to the market about the buyback, in an appropriate amount of time. The issuer will therefore be able to buy its shares at a reduced price, exploiting this information asymmetry to the benefit of itself and external shareholders who do not sell (and to the detriment of those external shareholders who do decide to sell).

The proposed rules would also require issuers to disclose material errors or changes to previously reported information by furnishing an amended Form SR.

Form SR would be furnished, but not filed, with the SEC. Accordingly, issuers would not be subject to liability under Section 18 of the Exchange Act for disclosures made in the form, and the information included in Form SR would not be deemed incorporated by reference into filings under the Securities Act unless the issuer expressly incorporates such information. Late submissions of the Form SR would not affect the issuer's eligibility to use short-form registration on Form S-3.

B. New periodic disclosures

Amendments to Item 703 disclosure

The proposed rules revise Item 703 of Regulation S-K, with corresponding changes to Form 20-F, to require additional disclosure about an issuer's share repurchases. Specifically, an issuer must disclose:

- The objective or rationale for its share repurchases and the process or criteria used to determine the amount of repurchases;
- Any policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program, including any restrictions on such transactions;
- Whether the issuer made its repurchases pursuant to a Rule 10b5-1 plan, and if so, the date that the plan was adopted or terminated; and
- Whether repurchases were made in reliance on the Rule 10b-18 non-exclusive safe harbor.

The proposed rules also require an issuer to disclose if any Section 16 directors and officers purchased or sold shares that are the subject of an issuer repurchase plan or program within 10 business days before or after the announcement of the repurchase plan by checking a box before the tabular disclosure of issuer repurchases of equity securities. This new disclosure requirement is intended to obviate the need for investors to review Section 16 filings close in time to any issuer announcement of a repurchase plan to determine if any Section 16 officer or director has purchased or sold shares close in time to the announcement. The SEC also intends for investors to better understand how an issuer has structured its repurchase plan and whether it has taken steps to prevent officers and directors from potentially benefitting from stock price increases as a result of issuer repurchases.

XBRL tagging

Proposed amendments to Item 703 also require an issuer to tag information disclosed pursuant to Item 703 of Regulation S-K, Item 16E of Form 20-F and Form SR in Inline XBRL in accordance with Rule 405 of Regulation S-T and the Edgar Filer Manual. Issuers will be required to detail tag quantitative amounts included within the tabular disclosures in each of the forms and block text and detail tag narrative and quantitative information disclosed in the footnotes to the tables. The SEC claims that Inline XBRL tagging would benefit

investors by making these disclosures more readily available and easily accessible to investors for aggregation, comparison, filtering and other analysis.

III. General Takeaways

- *Phase-in considerations*. The dynamics of the current SEC suggest that these proposals could be headed for reasonably prompt adoption, and prompt effectiveness after that. Some of the new disclosure and process requirements will be difficult to implement, so an issue to watch – and to comment on – will be the amount of time between adoption and effectiveness. Another will be the extent to which a 10b5-1 Plan adopted under the current rule will still benefit from the affirmative defense after the new rule takes effect and whether, as a matter of risk management, it will be better to enter into new 10b5-1 Plans following the adoption of the new rules.

- *Review of corporate policies and procedures*. Assuming both proposals are adopted (even adjusted as a result of the comment process), they will require major changes in corporate policies and internal procedures governing securities trading, Rule 10b5-1 plans and share repurchase programs. An important part of the challenged will be developing adequate internal controls and disclosure controls and procedures.

- *Implementation challenges*. Several aspects of the proposals may be especially challenging to implement, and these deserve careful attention in the comment process. They include (a) next-day reporting of repurchases; (b) identifying non-10b5-1 Plan activity that requires quarterly disclosures or that might violate the conditions of the affirmative defense; (c) determining how much disclosure is required concerning policies and procedures on trading plans; and (d) identifying the circumstances that require disclosures on option grant timing. Many of these new measures have the potential to trip up well-intentioned issuers, directors and officers.

- *Implications for enforcement.* When the proposals are adopted, we can expect that the SEC's Division of Enforcement, consistent with its more aggressive philosophy, will be looking for opportunities to investigate failures by individuals or companies to comply with the new rules, including failures to enter into or operate plans "in good faith."

- *Focus on data (including Inline XBRL)*. Both proposals impose Inline XBRL reporting on new kinds of disclosures, for which it may be poorly adapted, and which will require that taxonomies be developed. The motivation is apparently to provide investors, academics and journalists with better data for use in identifying patterns and possibilities for abuse. The new chart on timing of option grants reflects a similar objective (although in that instance the market-value data to be reported may be particularly hard to interpret). This impulse to elicit quantifiable and comparable information can be seen as laudable, but it may result in ever more complex data from which correlations may be observed but causation will always remain uncertain.

- *Impact on specific repurchase strategies*. There are a number of common practices or strategies for corporate share repurchases that will need to be reviewed for whether and how they can work under the new rules. Examples include accelerated shares repurchases, repurchases to offset dilution from equity grants, and repurchases to cover tax withholding on equity grants. Concerns of this kind would be useful to raise in the comment process.

- *Evolution of securities trading policies*. An issuer is not legally required to establish a securities trading policy. They began as a prophylactic measure for companies to protect themselves and their

employees, and they have become very widespread. The proposed rules – although they are framed as disclosure rules only – will make them essentially mandatory, including for foreign private issuers.

- *Implications for foreign private issuers*. Most elements of the proposed amendments apply fully to a foreign private issuer. If such an issuer is also listed in another jurisdiction, it is probably also subject to rules in that jurisdiction governing insider transactions and issuer repurchases. It will be important to review foreign rules and exchange requirements that could affect a dual-listed foreign private issuer, to see how they interact with the proposed new SEC rules.

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Annex 1 – Proposed Amendments to Rule 10b5-1

§ 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) Manipulative or Deceptive Devices. ~~General. The~~ "The “manipulative ~~and~~or deceptive device~~s~~"[s] or contrivance[s]” prohibited by Section 10(b) of the Act (15 U.S.C. 78j) and § 240.10b-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) Awareness of material nonpublic information. ~~(b) Definition of "on the basis of."~~ Subject to the affirmative defenses 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:

(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 and operated in good faith and not as part of a plan or scheme to evade the prohibitions of this section~~.~~;

(B) If the person who entered into the contract, instruction, or plan is a director or officer (as defined in Rule 16a-1(f) (§ 240.16a-1(f)) of the issuer, no purchases or sales occur until expiration of a cooling-off period of at least 120 days after the date of the adoption of the contract, instruction, or plan; if the person who entered into the contract, instruction, or plan is the issuer of the securities, no purchases or sales occur until expiration of a cooling-off period of at least 30 days after the date of the adoption of the contract, instruction, or plan;

(C) If the person who entered into the contract, instruction, or plan is a director or officer (as defined in Rule 16a-1(f) (§ 240.16a-1(f)) of the issuer (or a subsidiary of such issuer) of the securities, such director or officer on the date of adoption of the contract, instruction, or plan has promptly furnished to the issuer a written certification that they are not aware of any material nonpublic information about the security or issuer or any subsidiary of the issuer; and that they are adopting the contract, instruction, or plan in good faith and not as part of a plan or scheme to evade the prohibitions of this section;

Instruction to paragraph (c)(1)(ii)(C): Officers and directors seeking to rely on the affirmative defense should retain a copy of the certification provided to the issuer for a period of ten years after providing such certification.

(D) The person who entered into the contract, instruction, or plan, has no outstanding (and does not subsequently enter into an additional) contract, instruction, or plan for open market purchases or sales of the same class of securities; and

(E) If the contract, instruction, or plan is designed to effect the 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 executed a contract, instruction, or plan that effected the purchase or sale of the total amount of securities in a single transaction.

~~(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.~~

Note to paragraph (c): Any modification or amendment to a prior contract, instruction, or written plan is deemed to be the termination of such prior contract, instruction, or written plan, and the adoption of a new contract, instruction, or written 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.