

Question 120.14

Question: Assume that the written trading plan described in Question 120.11 also includes a provision requiring the number of securities to be sold during each month to be reduced, if necessary, to comply with the applicable volume limitation under Rule 144(e). What effect does this have on the availability of a Rule 10b5-1(c)(1) defense?

Answer: The analysis depends on the manner in which the adjustment is effected:

(a) First, the written plan could provide for adjustment of the amount of securities to be sold each month based on a written formula specified in the plan within the meaning of Rule 10b5-1(c)(1)(i)(B)(2). Where a written formula specifies one or more of the price, amount and dates of transactions that are all specified in a contract, instruction or written plan, the Rule 10b5-1(c)(1)(i)(B)(2) defense would apply.

(b) Alternatively, the written plan could provide for adjustment of the amount of securities to be sold each month based on a delegation of discretion to the broker. In this case, where one or more of the price, amount and dates of transactions under a contract, instruction or written plan are to be determined based on a delegation of discretion to another person, the availability of a defense depends upon satisfaction of the conditions of Rule 10b5-1(c)(1)(i)(B)(3). [~~Mar~~Apr. 25, ~~2009~~2025]