

Question 120.23

Question: Could fund-switching transactions under the 401(k) plan described in Question 120.21 be considered "corresponding or hedging transactions" within the meaning of Rule 10b5-1(c)(1)(i)(C) with respect to payroll deduction purchases under the 401(k) plan?

Answer: Possibly, depending upon the facts and circumstances. Rule 10b5-1(c)(1)(i)(C) requires, as a condition to the exemption, that the purchase or sale be pursuant to the contract, instruction, or plan. The rule provides that a purchase or sale is not "pursuant to a contract, instruction, or plan" if, among other things, the person entered into or altered a corresponding or hedging transaction or position with respect to those securities. As a general matter, a fund-switching transaction that effects a sale could be a corresponding or hedging transaction under Rule 10b5-1(c)(1)(i)(C) with respect to a payroll deduction purchase under the 401(k) plan. If, however, the ~~person is acting in good faith and provides instructions~~instruction for the fund-switching transaction ~~at a time when she is not aware of material nonpublic information~~satisfies the conditions of Rule 10b5-1(c)(1)(i), Rule 10b5-1(c)(1)(ii)(A), and all conditions of Rule 10b5-1(c)(1)(B)-(C) applicable to the person, the fund-switching transaction would not disturb the Rule 10b5-1(c)(1) defense for a payroll deduction purchase under the 401(k) plan. [~~Mar~~Apr. 25, ~~2009~~2025]