

Question 120.05

Question: At a time when he is not aware of material nonpublic information and satisfies all applicable conditions of Rule 10b5-1(c)(1)(ii), a person buys a put option, giving him the right at any time during the 12-month term of the option to sell 10,000 shares at a fixed exercise price. Two months later, he wishes to exercise the option. If he is aware of material nonpublic information at the time of exercise, can he rely on a Rule 10b5-1(c)(1) defense in exercising the option?

Answer: No. The exercise of the option is a separate investment decision from the purchase of the option. *See* [Securities Act Release No. 7881](#) (Aug. 15, 2000) at fn. 115. For a defense to be available under Rule 10b5-1(c)(1), each of the amount, price and date of the transaction must be specified or determined by formula, or all subsequent discretion over purchases and sales must be delegated to a third party who must not be aware of material nonpublic information when exercising that discretion. The person must make this specification or delegation in good faith before becoming aware of material nonpublic information.

In this example, the person has retained discretion over the timing of the option exercise. Consequently, if he is aware of material nonpublic information at the time of exercise, no defense will be available under Rule 10b5-1(c)(1). The same analysis applies whether the option is a put or a call. [~~Mar~~[Apr.](#) 25, ~~2009~~[2025](#)]