

SEC Adds 10b5-1 Guidance for 401(k) Plans with Company Stock Investment Options

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PRACTICES Employee Benefits and Executive Compensation

The SEC's Division of Corporation Finance recently added a new Exchange Act Compliance and Disclosure Interpretation ("**CDI**") clarifying that when a participant in a Section 401(k) plan who is subject to the insider trading rules sells company stock through a self-directed brokerage window, the sale must satisfy all conditions of Rule 10b5-1(c)(1), including those applicable to purchases and sales of the issuer's securities on the open market.

A self-directed brokerage window is an option offered under a Section 401(k) plan that permits participants to invest in a wider range of investments than those offered under the plan by buying and selling investments on their own through a brokerage platform. For participants who are subject to the insider trading requirements of the securities laws, the restrictions on trading in company stock also apply to stock held by the participant in his or her Section 401(k) plan account, regardless of whether the stock is offered as an investment under the plan or purchased by the participant through a self-directed brokerage window.

Many individuals subject to the insider trading rules establish "10b5-1 Plans" to help navigate the restrictions on trading. An individual who establishes a 10b5-1 Plan can continue to trade stock when they would otherwise be prohibited from trading because they held material nonpublic information. A 10b5-1 Plan creates a binding instruction to another person to execute the trade for the instructing person's account, or a written plan for the trading of securities setting forth the number of shares to be sold or purchased, the time periods for the sales or purchase, and the prices at which the sales or purchases can occur. Under Rule 10b5-1(c)(1), these plans must be adopted at a time when the person was not aware of material nonpublic information. Prior to the adoption of this new CDI, it was not clear how purchases and sales of company stock made through a self-directed brokerage window would be treated for purposes of Rule 10b5-1(c)(1).

CDI Question 120.32 is available [here](#).