

# Securities Exchange Act of 1934

## Section 10 Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

- b. To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

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## Rules and Regulations promulgated under the Securities Exchange Act of 1934

### Rule 10b-5 Employment of Manipulative & Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- a. To employ any device, scheme, or artifice to defraud,
- b. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- c. To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

## Rule 10b5-1 Trading "on the Basis of" Material Nonpublic Information in Insider Trading Cases

- a. *General.* The "manipulative and deceptive devices" prohibited by Section 10(b) of the Act and Rule 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. *Definition of "on the basis of."* Subject to the affirmative defenses in 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 if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale.
- 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. . . .

## § 240.10b5-2 Duties of trust or confidence in misappropriation insider trading cases.

### PRELIMINARY NOTE TO § 240.10B5-2:

This [section](#) provides a non-exclusive definition of circumstances in which a person has a duty of trust or confidence for purposes of the “misappropriation” theory of insider trading under [Section](#) 10(b) of the Act and Rule 10b-5. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b-5, and Rule 10b5-2 does not modify the [scope](#) of insider trading law in any other respect.

**(a) Scope of Rule.** This [section](#) shall apply to any violation of [Section](#) 10(b) of the Act ( [15 U.S.C. 78j\(b\)](#)) and § 240.10b-5 thereunder that is based on the purchase or sale of securities on the basis of, or the communication of, [material](#) nonpublic information misappropriated in breach of a duty of trust or confidence.

**(b) Enumerated “duties of trust or confidence.”** For purposes of this [section](#), a “duty of trust or confidence” exists in the following circumstances, among others:

- (1) Whenever a person agrees to maintain information in confidence;
- (2) Whenever the person communicating the [material](#) nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the [material](#) nonpublic information expects that the recipient will maintain its confidentiality; or

**(3)** Whenever a person receives or obtains **material** nonpublic information from his or her spouse, **parent**, child, or sibling; *provided*, however, that the person receiving or obtaining the information may demonstrate that no duty of trust or confidence existed with respect to the information, by establishing that he or she neither knew nor reasonably should have known that the person who was the source of the information expected that the person would keep the information confidential, because of the parties' history, pattern, or practice of sharing and maintaining confidences, and because there was no agreement or understanding to maintain the confidentiality of the information.