

Question 120.21

Question: A person purchases employer stock through her participation in the employer's 401(k) plan. ~~These~~The purchases are made pursuant to bi-weekly payroll deductions invested in the plan's employer stock fund. The 401(k) plan also allows employees to transfer the assets in their accounts among funds within the plan (including the employer stock fund) through fund-switching transactions. Is a Rule 10b5-1(c)(1) defense available for payroll deduction purchases made under the 401(k) plan pursuant to the employer stock fund?

Answer: ~~If an~~Assuming the employee ~~acts~~'s enrollment in ~~good faith and is not aware of material nonpublic information at the time she provides written or oral instructions as to payroll deduction purchases~~the 401(k) plan 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)(ii)(B)-(C) applicable to the employee, a Rule 10b5-1(c)(1) defense would be available for ~~those payroll deduction~~ purchases under ~~Rule 10b5-1(e)~~the plan. See ~~Securities Act Release No. 7881~~Securities Act Release No. 11138 (~~Aug~~Dec. ~~15~~14, ~~2000~~, text ~~2022~~2025) at fn. ~~117-121~~120. [~~Mar~~Apr. 25, ~~2009~~2025]