

Question 120.04

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 will establish a blind trust to which he will contribute some, but not all, of the issuer securities that he owns. The person intends to delegate investment control over trust assets to the trustee so as to establish a defense under Rule 10b5-1(c)(1)(i)(B)(3) for trust transactions. Within the meaning of Rule 144(a)(2), the person and the trust will be a single person.

During any three-month period, sales of issuer securities by the trust will share the Rule 144(e) volume limitation with the person's sales of other issuer securities he owns. Does the manner of allocating the Rule 144(e) volume limitation between sales by the trust and the person's other sales of issuer securities affect whether the person is permitted to exercise any subsequent influence over how, when, or whether to effect purchases or sales under the trust within the meaning of Rule 10b5-1(c)(1)(i)(B)(3)?

Answer: Yes. If during the term of the trust the person can control what portion of the Rule 144(e) volume limitation is available for trust sales, the person would be permitted to exercise subsequent influence over trust sales within the meaning of Rule 10b5-1(c)(1)(i)(B)(3). As a result, the Rule 10b5-1(c)(1)(i)(B)(3) defense would be unavailable.

However, the person would not be permitted to exercise subsequent influence over trust sales if the instrument creating the trust specified either (1) the percentage of the volume limit to be allocated to sales by the trust and other sales by the person, or (2) that the trustee would determine that allocation for each applicable three-month period without consulting the person. [MarApr. 25, 20092025]