

SEC Settles Stock Repurchase Charges for \$25 Million

November 20, 2023

On November 14, 2023, the Securities and Exchange Commission (the “SEC”) announced it had [settled charges](#) against Charter Communications, Inc. (“Charter”) for alleged internal accounting controls failures relating to stock repurchases made through trading plans designed to comply with Rule 10b5-1 (“Rule 10b5-1”) under the Securities Exchange Act of 1934 (the “Exchange Act”). As part of the settlement, Charter agreed to pay a \$25 million fine, but did not admit or deny the allegations. Two of the five SEC commissioners strenuously [dissented](#) from the decision on the grounds that SEC was broadly stretching its statutory authority to “tell companies how to run themselves.” The charges, which were based upon internal accounting controls violations rather than the anti-fraud provisions of the Exchange Act, may also have been a negotiated outcome designed to avoid impacting Charter’s status as a well-known seasoned issuer.

Although the SEC’s charges are styled as an internal accounting controls action, they stem from a governance disparity in Charter’s stock repurchase program. The Charter Board of Directors (the “Board”) authorized stock repurchases during closed trading windows predicated on the use of purchase plans that would comply with Rule 10b5-1. However, in its execution of the program, Charter entered into stock repurchase plans that contained “accordion” provisions through which the amount of repurchases under the plans would increase if Charter elected to complete certain debt offerings. According to the SEC, because Charter retained discretion over whether and when to conduct these debt offerings, the accordion provisions gave Charter the ability to influence trading activity after adoption of the plans. Consequently, the plans were inconsistent with the requirements of Rule 10b5-1, resulting in Charter operating outside the scope of its Board authorization.

The SEC took the position that the failure to comport with the Board authorization was the result of Charter’s insufficient internal accounting controls, which the SEC states in a footnote to its order reach beyond traditional notions of ‘accounting’— such as “the preparation of financial statements” — and instead broadly cover management authorization for transactions.

Notably, the SEC did not allege insider trading or fraud as the basis of its charge, notwithstanding that the allegedly defective Rule 10b5-1 plans would have prevented Charter from asserting the affirmative defense under Rule 10b5-1. Instead, the SEC asserted that Charter violated Exchange Act Section 13(b)(2)(B), which requires all reporting companies to maintain a system of internal accounting controls sufficient to provide reasonable assurances that corporate transactions, including share repurchases, are executed in accordance with corporate authorization. The SEC found that Charter failed to implement a reasonable process to ensure that its repurchase plans were adequately reviewed for conformity with the Board's authorization, which required compliance with Rule 10b5-1.

SEC Commissioner Peirce and SEC Commissioner Uyeda dissented, asserting that the SEC was using a statute designed to impose penalties for a failure to maintain accounting controls in order to impose penalties for a failure of Charter to maintain legal controls that would have ensured its plans complied with Rule 10b5-1. In the dissenting Commissioners' view, the SEC used Exchange Act Section 13(b)(2)(B) as "multi-use tool handy for compelling companies to adopt and adhere to policies and procedures that the Commission deems good corporate practice."

Key Takeaways. The Charter settlement is similar to a \$20 million settlement with Andeavor LLC in 2020 where the SEC also asserted that a failure to comply with the requirements of Rule 10b5-1 resulted in a violation of Exchange Act Section 13(b)(2)(B). The action against Charter is a further indication that the SEC intends to continue prioritizing review of share repurchase programs and Rule 10b5-1 plans, which is only expected to increase next year when the SEC's new Repurchase Disclosure Modernization rules (summarized [here](#) and available in full [here](#)) go into effect.¹ As part of the detailed disclosure of daily repurchase activity, the new share repurchase disclosure rules will require issuers to identify purchases intended to qualify for the safe harbors provided by Rule 10b5-1 and Rule 10b-18. Given the SEC's focus, we advise issuers to carefully evaluate whether their internal controls and disclosure controls over both existing and future share repurchase programs, and the corresponding disclosure, are sufficiently robust to accurately record, process, summarize and report the necessary information. Issuers should also ensure that any board authorization reflects the transactions that management is contemplating (and that management executes transactions in accordance with that authorization) and, if appropriate, provides management with sufficient flexibility to determine and execute repurchase transactions without additional board action.

¹ Assuming the SEC "correct[s] the defects" noted by the Fifth Circuit in a recent Administrative Procedure Act case (summarized [here](#)).

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Please do not hesitate to contact us with any questions.



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