

## Statement

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# The SEC's Swiss Army Statute: Statement on Charter Communications, Inc.



Commissioner Hester M. Peirce



Commissioner Mark T. Uyeda

**Nov. 14, 2023**

The classic Swiss Army Knife began its life as an ingenious multi-use tool designed by Karl Elsener, a Swiss cutler. [1] The early versions started with basic tools useful to soldiers—a blade, a can opener, a screwdriver, and a reamer—and soon expanded to include a second blade and a corkscrew. Over time, the knife has evolved to incorporate myriad attachments and has expanded beyond its martial beginnings to offer versions for different users. [2] The Commission in recent years has taken to using Securities Exchange Act Section 13(b)(2)(B) [3] as its own Swiss Army statute—a multi-use tool handy for compelling companies to adopt and adhere to policies and procedures that the Commission deems good corporate practice. We do not have the authority to tell companies how to run themselves, but we now routinely use Section 13(b)(2)(B) to do just that. The settlement with Charter Communications, Inc. is the latest example of the Commission’s unmooring of Section 13(b)(2)(B) from its statutory text and context to extend the reach of its jurisdiction.

According to the Commission’s Order Instituting Proceedings, Charter, since 2016, has bought back more than \$70 billion of its stock from shareholders. [4] The Order acknowledges that “Charter had controls designed to obtain share repurchase authorization from the Board, to stay within the Board’s financial parameters and guidelines, and to confirm that the buyback transactions were accurately reflected in its accounts and ledgers.” Indeed, the Order further acknowledges that “Charter personnel requested authorization from the board of Directors to engage in buybacks within certain financial parameters and guidelines.” Notwithstanding its functioning accounting controls, Charter ran afoul of the law because “the Board’s authorizations [to engage in buybacks] were predicated on the company’s use of trading plans that conform to Commission Rule 10b5-1” and “Charter failed to implement a reasonable process to ensure that its trading plans were adequately reviewed for conformity with the requirements of Rule 10b5-1 prior to adoption.” [5]

The fundamental flaw in the Order is its failure to distinguish between internal accounting controls and other types of internal controls. Section 13(b)(2)(B)(i) requires Charter to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with

management’s general or specific authorization.” (emphasis added). The Order recites no facts suggesting that Charter’s management used more funds than the board authorized for share buybacks, that management purchased shares at a quantity or time inconsistent with the board’s authorization, or that management failed to properly record the expenditure of corporate funds and consequent purchase of shares on Charter’s books. Instead, the Order faults Charter because it lacked “reasonably designed controls to analyze” its trading plans for compliance with Rule 10b5-1. Controls designed to answer a *legal* question—compliance with the regulatory conditions necessary to qualify for an affirmative defense—are simply not internal *accounting* controls within Section 13(b)(2)(B)’s scope.

At bottom, this case is simply the latest application of the unsupportable and ill-considered interpretation of Section 13(b)(2)(B) that the Commission advanced more than three years ago in *Andeavor, LLC*.<sup>[6]</sup> The Commission’s attempts to convert an internal accounting controls provision into an ever-unfolding utility tool that magically converts every corporate activity into something the Commission regulates are inappropriate extensions of the agency’s authority. We respectfully dissent.

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[1] *Swiss Army knife*, <https://www.britannica.com/technology/Swiss-Army-knife> (last visited Nov. 12, 2023); see also <https://www.victorinox.com/us/en/History/cms/history> (last visited Nov. 12, 2023).

[2] See [https://www.victorinox.com/global/en/Products/Swiss-Army-Knives/Medium-Pocket-Knives/c/SAK\\_MediumPocketKnives?ScrollPosition=0&maxResults=30](https://www.victorinox.com/global/en/Products/Swiss-Army-Knives/Medium-Pocket-Knives/c/SAK_MediumPocketKnives?ScrollPosition=0&maxResults=30) (last visited Nov. 12, 2023).

[3] 15 U.S.C. § 78m(b)(2)(B).

[4] *Charter Communications, Inc.*, Rel. No. 34-98923 (Nov. 14, 2023).

[5] The Order also states that Charter’s “trading plans did not satisfy the requirements of Rule 10b5-1.” Charter’s failure “to implement a reasonable process to ensure” that its trading plans met Rule 10b5-1’s requirements is independent from the question of whether Charter’s trading plans did or did not meet the conditions for Rule 10b5-1’s affirmative defense to liability under Section 10(b) and Rule 10b-5 for illegal insider trading. The Order does not charge violations of Section 10(b) or Rule 10b-5.

[6] *Statement of Commissioners Hester M. Peirce and Elad L. Roisman—Andeavor, LLC*, available at <https://www.sec.gov/news/public-statement/peirce-roisman-andeavor-2020-11-13> (last visited Nov. 12, 2023); see also *Andeavor, LLC*, Rel. No. 34-90208, 2020 WL 6112215 (Oct. 20, 2020) (3-2 decision).