
INSIDER TRADING & DISCLOSURE UPDATE

Insights from Publicly Filed Insider Trading Policies

The 2024 annual reporting season was the first time that issuers were required to file their insider trading policies as an exhibit to their Form 10-K or Form 20-F.

Following the annual reporting season, we surveyed the insider trading policies filed by over 60 issuers, including the 30 largest S&P 100 companies based on market capitalization. While issuers have tailored their policies to appropriately suit particular risk profiles and regulatory environments, we identified a range of common approaches with respect to key policy terms, including with respect to the parties covered by insider trading policies, the scope of prohibited activities and the exceptions to these prohibitions.

Persons Subject to Insider Trading Policies

All of the trading policies we reviewed cover all employees and directors of the issuer (“covered persons”), and a significant majority of the policies (87%) also cover family members of covered persons.

84% of policies expressly extend coverage to legal entities—such as corporations, partnerships and trusts—that are controlled or influenced by covered persons. 74% of policies include agents and other third parties, such as contractors and consultants, as covered persons.

A majority of policies (65%) also apply to departed directors and officers, typically until they no longer possess material non-public information (“MNPI”). A small subset of policies extend coverage to such individuals until the later of (i) a fixed time period (*e.g.*, six months following their departure or the end of the first blackout period following their departure) and (ii) the time at which the individual is no longer in possession of MNPI.

Transactions by the Issuer

Item 408(b) of Regulation S-K requires companies to disclose whether they have trading policies applicable to transactions by the issuer or explain why they do not. Historically, it has not been common for insider trading policies to apply to the company’s own trading activity.

Some issuers (10%) address this by including a statement within the insider trading policy that it is the policy of the issuer to comply with all applicable insider trading laws, rules and regulations. Doing so allows the issuer to disclose that it does have applicable policies, while still allowing flexibility to engage in appropriate transactions in its own securities.

Other issuers (13%) subject themselves to their insider trading policy by including the issuer in the definition of “covered person.” If taking this approach, issuers should take care that the insider trading policy does not impose undue constraints on company activities such as securities offerings, repurchase programs or hedging activities.

Transactions Subject to Policy

- **Gifts.** 92% of policies impose some restrictions on the gifting of issuer securities, although the specific restrictions vary. Of those, 77% apply these restrictions to all covered persons prohibiting them from gifting issuer securities while in possession of MNPI or applying window periods or pre-clearance procedures to gifts of securities. Further, a small number of insider trading policies (3%) explicitly prohibit gifting of issuer securities when the donor knows or has reason to believe the donee will sell the securities while the donor has MNPI. For policies that do not restrict gifts for all covered persons, the restrictions typically apply to Section 16 officers and directors.
- **Stock Options and Equity Awards.** 92% of the policies address stock options. Broker-assisted cashless exercises of options are typically subject to trading policies, while some issuers exempt transactions with no underlying sale to the market. A small subset of policies (27%) explicitly permit the exercise of company stock options when both the exercise price and applicable taxes are paid in cash. Further, 37% of policies expressly address the vesting and settlement of equity awards. Of those, 78% specify that the exercise or vesting of equity awards is exempt from the policy's restrictions.
- **Buying / Selling 401(k) Plan.** 39% of policies address the purchase and sale of company stock within an employee's 401(k) plan. Of these, 21% exempt purchases of company stock that result from periodic payroll contributions to the employee's plan. Most of the policies provide that certain participant elections are subject to the policy, including:
 - changing the percentage of periodic contributions allocated to company stock;
 - making intra-plan transfers into or out of company stock;
 - borrowing against the 401(k) account if it results in liquidation of company stock; and
 - pre-paying a plan loan if it results in allocation of loan proceeds to company stock.
- **Limit Orders.** A minority of policies (29%) address limit orders. Of these, 22% prohibit limit orders *per se*. The remaining policies allow limit orders under certain conditions, such as when they are placed outside blackout periods or have received pre-approval.

Prohibited Transactions

The insider trading policies reviewed commonly prohibit certain types of transactions involving company securities. The most frequently prohibited transactions include:

- **Hedges.** 94% of policies prohibit covered persons from engaging in hedging activities related to the issuer's securities. Of those, most policies apply to all persons covered by the policy, whereas few (7%) limit the prohibition on hedging to Section 16 officers, directors or other specifically restricted persons.
- **Short Sales.** 87% of policies prohibit covered persons from engaging in short sales of issuer securities.
- **Margin Accounts and Pledges.** 90% of policies prohibit covered persons from pledging issuer securities to secure personal

loans or other obligations, as well as holding shares of issuer securities in margin accounts.

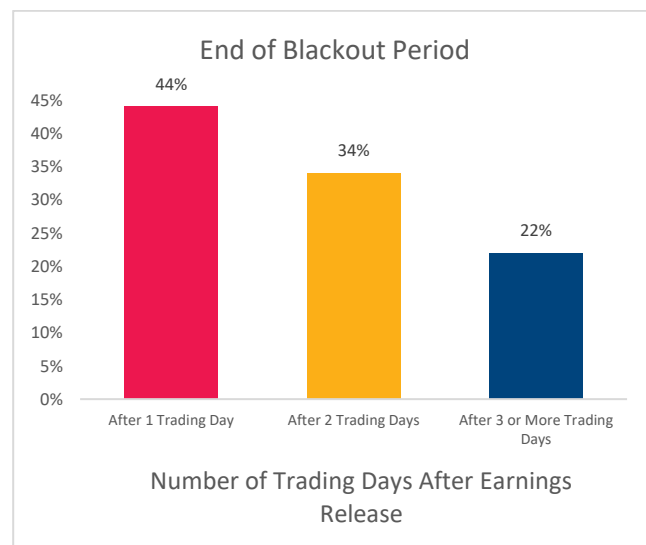
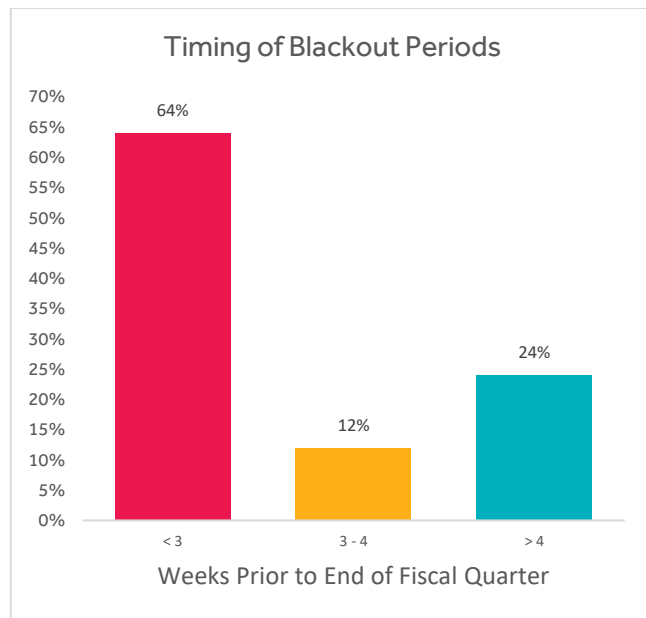
Rule 10b5-1 Plans

Nearly all of the policies we reviewed (94%) address the use of Rule 10b5-1 trading plans. Of those, 71% require pre-approval before entering into such plans. The process for entering into Rule 10b5-1 plans (or modifying or terminating them) varies, although often includes approval from the general counsel, a legal or compliance officer or the corporate secretary. Only a small number of policies (18%) expressly permit non-Rule 10b5-1 trading arrangements, whereas most policies (82%) do not address non-Rule 10b5-1 trading arrangements.

Trading Windows and Blackout Periods

Most policies we reviewed (95%) subject officers, directors and certain employees who have regular access to MNPI to quarterly blackout periods. Only a small number of policies (10%) extend blackout periods to all company employees.

The timing of blackout periods varies between issuers, as depicted below.



Shadow Trading

While most policies prohibit trading in the securities of another company when in possession of MNPI about that company obtained in the course of employment, few policies (6%) expressly prohibit illegal “shadow trading” misappropriation that was prosecuted by the SEC in *Panuwat*¹—that is, the use of MNPI regarding

one company to trade in the securities of another “economically-linked” company.

We discussed the *Panuwat* case in detail in the Special Edition of the Insider Trading and Disclosure Update, available [here](#).

Pre-clearance Procedures

Most policies we reviewed (95%) include pre-clearance procedures, although the persons subject to such procedures varies among issuers. Most issuers require Section 16 officers and directors to obtain clearance prior to trading in issuer securities, while others extend pre-clearance requirements to other senior members of management or certain employees (typically those working in a finance function).

Notes

¹ See Compl. at ¶¶ 21-22, SEC v. Panuwat, 21-CV-06322 (N.D. Cal. Aug. 17, 2021), <https://www.sec.gov/files/litigation/complaints/2021/comp-pr2021-155.pdf>.

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