

GIBSON DUNN



Capital Markets and Securities Regulation &
Corporate Governance Update

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Early Insights from Insider Trading Policies Filed by S&P 500 Companies under the SEC’s New Exhibit Requirement

I. Introduction

For fiscal years beginning on or after April 1, 2023, domestic public companies are required to disclose whether they have adopted insider trading policies and procedures governing the purchase, sale, and/or other dispositions of their securities by their directors, officers and employees, or the companies themselves, and if so to file those policies and procedures as an exhibit to their annual reports on Form 10-K.^[1] While calendar year companies must comply with these requirements in their Form 10-K for, or proxy statement following, the fiscal year ending December 31, 2024, 49 S&P 500 companies had addressed these requirements in filings as of June 30, 2024.^[2]

As discussed in the summary of our preliminary observations below, while specific provisions vary from company to company, certain common approaches are emerging with respect to key policy terms. That said, company policies and procedures can vary based on a company’s particular circumstances, some companies may have interpretive materials that were not filed but elaborate on the operation of their policies and procedures, and some companies are updating their policies and procedures in light of the new filing requirements. As a result, we caution companies against treating these early observations as “best practices.” Your Gibson Dunn

contacts are available to discuss the specifics of your policy and answer any questions you may have.

II. Persons Subject to the Insider Trading Policies

Nearly all policies we reviewed (96%) cover all company personnel (i.e., directors, officers and all employees of companies and their subsidiaries and, in some cases, certain affiliates) and their family members. Additionally, a significant majority of the policies (82%) expressly state that they apply to legal entities such as trusts whose securities transactions are controlled or influenced by company personnel and, in some cases, their family members. A majority of the policies (63%) also apply insider trading restrictions to contractors and/or consultants.^[3]

III. Transactions in Company Securities Subject to the Insider Trading Policies

All of the policies specify types of transactions that are subject to, or are exempt from, the policy terms. Aside from open market sales or purchases, which are addressed in all of the policies, the most commonly addressed transactions include the following:

- A significant majority of the policies (86%) provide some level of restriction on gifts, addressing to one degree or another the SEC's position that gifts can constitute a form of insider trading.^[4] A majority (61%) specifically address gifts as being subject to the policy for all covered persons (i.e., prohibiting gifts when an individual subject to the policy is in possession of material nonpublic information ("MNPI") and/or applying window periods and/or pre-clearance restrictions to gifts),^[5] although a handful of companies (8%) restrict gifts only if the donor has reason to believe the donee will sell while the donor has MNPI. Of the policies that do not apply gift restrictions to all employees, a majority restrict gifts only for certain covered persons that are subject to additional restrictions, such as blackout periods and/or pre-clearance procedures.
- *Option Exercises.* A majority of the policies (69%) exempt exercises of options when there is no associated sale on the market; however, exercises of options where there is a sale of some or a portion of shares delivered upon exercise (e.g., cashless broker exercise) are typically treated like any other sale. Of this group, approximately a quarter of the policies specifically provide that withholding of shares for tax withholding purposes is exempt, and a smaller minority of policies provide that withholding of shares for tax withholding purposes and/or the payment of exercise price is exempt.
- *Vesting and Settlement of Other Equity Awards.* A majority of the policies (59%) exempt vesting and settlement of equity awards, such as RSUs and restricted stock, and 51% of the policies specifically provide that withholding of shares for tax purposes (i.e., net share settlement) is exempt.

IV. Transactions in Other Company Securities

Nearly all policies (96%) specifically include some form of restriction on trading in the securities of another company when the person is aware of MNPI about that company or its securities. A significant majority of the policies (82%) prohibit trading in the securities of another company when the person is aware of MNPI about such company that was learned in the course of or as a result of the covered person's employment or relationship with the company. The rest apply the prohibition more broadly to trading in the securities of another company while aware of MNPI

about that company, without specifically addressing how the information was learned. Of the 82%, a minority tailor the prohibition to apply only to trading in the securities of another company that has some sort of a business relationship with the company (e.g., customers, vendors, or suppliers) or that is engaged in a potential business transaction with the company, and a smaller subset of these policies also include a specific reference to “competitors” in this prohibition.

V. Blackout Periods and Preclearance Procedures

- *Persons subject to quarterly blackout periods.* A significant majority of the policies (88%) subject directors, executive officers and a designated subset of employees to regular quarterly blackout periods, with a few policies applying two different blackout periods to different groups of employees. Although the groups of persons (other than directors and executive officers) who are subject to quarterly blackout periods tend to be company-specific, most of the policies identify the “restricted persons” to include employees by title (e.g., all Vice Presidents or higher) and/or by department or role (e.g., all officers in accounting, financial planning and analysis, investor relations, legal and finance departments, etc.) as well as other employees who have been identified as having access to systems that have MNPI. Some policies take a less specific approach and identify restricted persons as those who are designated as such by the officer administering the insider trading policy. A minority of the policies (6%) subject all covered persons under the policy to quarterly blackout periods.
- *Start and end of quarterly blackout periods.* The start date of the quarterly blackout periods ranges from quarter end to four weeks or more prior to quarter end. Under almost half of the policies (45%), the quarterly blackout periods start approximately two weeks prior to quarter end, 14% start the blackout periods three to four weeks prior to quarter end, and 18% start four weeks or more prior to quarter end. A significant majority of the policies (76%) end the quarterly blackout periods one to two full trading days after the release of earnings, with more policies ending after one trading day (51%) than two trading days (24%).^[6] Additionally, nearly all policies specifically state that from time to time the company may implement additional special blackout periods.
- *Preclearance procedures.* Nearly all policies require that certain covered persons must preclear their transactions with the appropriate officer administering the insider trading policy prior to execution. There is, however, variation in the persons subject to preclearance procedures—for 65% of the policies, the preclearance persons are a subset of the persons subject to blackout periods, while for a minority of the policies (29%), they are the same as the persons subject to the blackout periods. Of the 65% of the policies, a minority (38%) require preclearance only from the company’s directors and executive officers.^[7] Regardless of scope, nearly all of the policies provide that directors and executive officers are subject to preclearance procedures.

VI. Special Prohibitions Under the Insider Trading Policies

All of the policies prohibit or otherwise restrict certain types of transactions regardless of whether they involve actual insider trading, in some cases stating that such transactions present a heightened risk of securities law violations or the potential appearance of improper or inappropriate conduct. The most common prohibitions addressed: hedging transactions (96%);^[8] speculative transactions (96%); pledging securities as collateral for a loan (90%); and trading on margin or holding securities in margin accounts (82%). Although a significant majority of the policies apply the prohibition on hedging and speculative transactions to all persons subject to the

policy, prohibitions on pledging and/or margin trading/accounts are sometimes limited to sub-categories of persons subject to the insider trading policies (39% and 27%, respectively): for instance, some policies apply the prohibition only to directors and executive officers or persons subject to quarterly blackout periods and/or preclearance procedures.[\[9\]](#)

A significant majority of the policies do not specifically address standing or limit orders or short-term trading, but of the ones that do, a significant majority take the approach of discouraging such transactions rather than strictly prohibiting them. Even where standing or limit orders are not strictly prohibited, some policies require that such orders be cancelled if the person becomes aware of MNPI (or prior to the start of a blackout period, if applicable). A few policies prohibit standing or limit orders if they go beyond a specified duration.

VII. Rule 10b5-1 Plans

All of the policies address the availability of Rule 10b5-1 plans. A significant majority of the policies (86%) do not set forth restrictions on who can enter into a Rule 10b5-1 plan so long as approval and other requirements are met, but a minority of the policies (12%) limit the use of 10b5-1 plans to directors and designated officers. A small minority of the policies (6%) require directors and designated officers to trade only pursuant to Rule 10b5-1 plans.

All of the policies require that Rule 10b5-1 plans be approved prior to adoption, but the policies tend to vary in approach when describing the guidelines for entering into Rule 10b5-1 plans (or modifying or terminating them). A significant majority (71%) of the policies describe the specified conditions under the SEC rules for a plan to qualify as a Rule 10b5-1 plan, although some do so in a more streamlined manner than others. Of these policies, a majority include Rule 10b5-1 plan requirements within the body of the policy, although a minority do so in an appendix and one company filed the plan guidelines as a separate exhibit. A minority of the policies (29%) do not describe the specified conditions under Rule 10b5-1, but provide a general statement regarding the affirmative defense from insider trading liability under the securities laws for transactions under a compliant Rule 10b5-1 plan and refer covered persons to the officer administering the policy for more information and guidelines on how to establish such a plan.

VIII. Policies Addressing Company Transactions

As noted above, Item 408(b) of Regulation S-K requires a public company to disclose whether it has adopted insider trading policies and procedures governing transactions in company securities by the company itself, and, if so, to file the policies and procedures, or if not, to explain why. Of the 23 S&P 500 companies subject to Item 408(b) that filed a Form 10-K and proxy statement prior to June 30, 2024, a significant majority (78%) did not address insider trading policies or procedures governing companies' transactions in their own securities.[\[10\]](#) Of the ones that did, most included a brief sentence or two about the company's policy of complying with applicable laws in trading in its own securities. Only one company in our surveyed group filed a company repurchase policy as a separate exhibit.

IX. Filing Practices Regarding Related Policies or Documents

A significant majority (88%) of the companies filed only a single insider trading policy and no other related policies or documents (even where they referenced other related policies in their insider trading policy).^[11] In the few cases where multiple policies were filed, they appear to be supplemental guidelines/policies covering topics not generally applicable to all employees (e.g., trading windows, preclearance, 10b5-1 plans).

* * * *

We will continue to monitor public company filings of insider trading policies and procedures and expect to update our survey in early 2025 once calendar year-end companies' Forms 10-K are on file, as we expect disclosure and filing practices to evolve as companies go through the first full year of complying with the new Item 408(b) disclosure and filing requirements.

^[1] See Items 408(b) and 601(b)(19) of Regulation S-K, adopted by the SEC in connection with the Rule 10b5-1 amendments in December 2022. If a company has not adopted such policies and procedures, it is required to explain why it has not done so. Disclosure about the adoption (or not) of policies or procedures must appear in a company's proxy statement (and must also be included in, or incorporated by reference to, Part III of a company's Form 10-K), whereas the policies and procedures are to be filed as exhibits to the company's Form 10-K.

^[2] This group of 49 S&P 500 companies includes 23 companies that made Item 408(b) disclosures and 26 companies that were not subject to the disclosure requirements but voluntarily filed their insider trading policies and procedures with a Form 10-K filed prior to June 30, 2024.

^[3] A minority of policies also include other service providers specific to their businesses.

^[4] See Final Rule: Insider Trading Arrangements and Related Disclosures, [Release No. 33-11138](#) (Dec. 14, 2022). In its adopting release, the SEC stated its view that the terms "trade" and "sale" in Rule 10b5-1 include bona fide gifts of securities and that gifts can be subject to Section 10(b) liability, since the Securities Exchange Act of 1934 does not require that a "sale" be for value and instead provides that the terms "sale" or "sell" each include "any contract to sell or otherwise dispose of."

^[5] A small minority of these policies also provide certain exceptions for gifts, including gifts to family members and/or controlled entities that are already subject to the policy, or exceptions on a case by case basis.

^[6] Some policies use business days instead of trading days, but many policies do not define either term. We treated them as the same for purposes of our data analysis.

^[7] The remaining 6% includes two policies that do not address preclearance procedures and one policy which is unclear.

^[8] Item 407(i) of Regulation S-K requires companies to disclose practices or policies they have adopted regarding the ability of employees (including officers) or directors to engage in certain hedging transactions.

[9] A few policies allow for exceptions, subject to preclearance.

[10] For the purposes of this survey, we limited our review to Exhibit 19 filings and did not review the companies' disclosures in the body of the proxy statement or Form 10-K addressing Item 408(b)(1) of Regulation S-K.

[11] Under Regulation S-K Item 408(b)(2), if all of a company's insider trading policies and procedures are included in its code of ethics that is filed as an exhibit to the company's Form 10-K, that satisfies the exhibit requirement. However, many companies do not file their code of ethics and instead rely on one of the alternative means of making the code available allowed under S-K Item 406(c)(2) and (3).

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