INSIGHT: INVESTMENT BANK AND PRIVATE EQUITY SPONSOR INSIDER TRADING POLICIES: A SURVEY OF KEY PROVISIONS

Mayer Brown analyzed 34 insider trading policies to understand how large financial institutions address the heightened insider trading risks they face relative to other public companies. We analyzed the insider trading policies of 24 publicly traded investment banks, nine publicly traded private equity sponsors and one publicly traded financial institution with substantial operations in both investment banking and private equity management (which institution we include in both the investment bank and private equity sponsor statistics herein). Since the nature of their business necessarily creates both frequent opportunity for insider trading (especially in other companies' securities, including through "shadow trading") and a large universe of employees with access to material non-public information ("MNPI"), a survey of how these types of large financial institutions generally address such risks in their insider trading policies can be informative to financial institutions reviewing their existing policies.

Our analysis focuses on the following areas:

- Parameters for quarterly and *ad hoc* blackouts for trading in an institution's own securities;
- Pre-clearance and account supervisory requirements for personal securities trading and related restrictions (e.g., restricted lists and minimum holding periods);
- Restrictions on hedging, pledging and gifting of securities;
- Applicability to other companies' securities;
- Prohibitions on tipping; and
- Applicability to former employees and directors.

While we believe our analysis considers a representative sample of investment banks and private equity sponsors, we note that there are limitations inherent in sampling, notably that our review is limited to only policies filed with the U.S. Securities and Exchange Commission (the "SEC") on EDGAR by publicly traded financial institutions in response to Form 10-K or 20-F requirements to file such policies.

We are not commenting on the differences in blackouts for equity securities, equity-linked securities and fixed income securities of an institution.

Blackout Periods

Which insiders are subject to blackout periods?*

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
Directors and Officers	22	88%	10	100%	31	91%
Certain Employees Only	8	32%	2	20%	10	29%
All Employees	12	48%	8	80%	19	56%
Other Persons (e.g., Consultants, Independent Contractors, Temporary Employees)	6	24%	3	30%	8	24%
Not Specified	2	8%	0	0%	2	6%
No Blackout Provision	1	4%	0	0%	1	3%

* The categories represented by the first four rows in this table are not mutually exclusive, except that Certain Employees Only and All Employees are mutually exclusive of one another. A financial institution may be counted in more than one row; e.g., an investment bank that imposes blackout restrictions on all of its directors, officers and employees would be counted in the Directors and Officers and All Employees rows. For this reason, the percentage columns do not sum to 100%.

One investment bank's policy uses a "downstreaming" requirement to determine which insiders are subject to blackout periods, i.e., the policy only explicitly applies blackout requirements to directors and certain officers but requires those officers to designate and notify other employees to whom the blackout restrictions will also apply.[1]

Which persons and entities related to covered insiders are also subject to blackout periods?*

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
Family Members of Covered Persons	18	72%	9	90%	26	76%
Controlled Entities (other than family) of Covered Persons	9	36%	5	50%	14	41%
Not Specified	2	8%	0	0%	2	6%
No Blackout Provision	1	4%	0	0%	1	3%

[1] This investment bank is counted in the Directors and Officers, Certain Employees Only and Other Persons rows in the "*Which insiders are subject to blackout periods?*" table.

* The categories represented by the first two rows in this table are not mutually exclusive. A financial institution may be counted in both of the first two rows if it imposes blackout restrictions on both family members and controlled entities of covered persons. For this reason, the percentage columns do not sum to 100%.

How long before the end of the fiscal quarter do quarterly blackout periods begin?

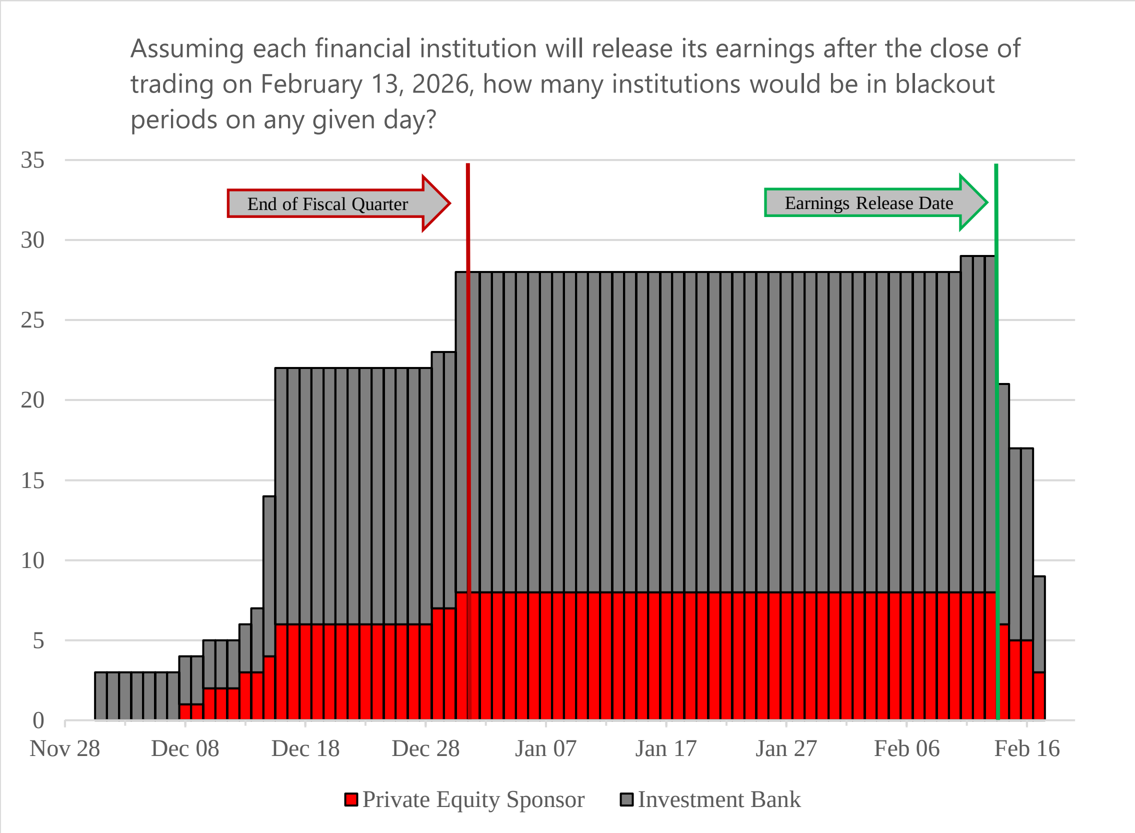
	Investment Banks		**Private Equity**		**Overall**	
	Number	%	Number	%	Number	%
Approx. 1 Month	3	12%	0	0%	3	9%
Approx. 3 Weeks or more	0	0%	2	20%	2	6%
Approx. 2 Weeks or more	12	48%	4	40%	16	47%
Approx. 1 Week or more	0	0%	0	0%	0	0%
Less than 1 Week prior to end of Fiscal Quarter	0	0%	1	10%	1	3%
Last Day of Fiscal Quarter	2	8%	1	10%	3	9%
Other (e.g., not tied to quarter end)	4	16%	0	0%	4	12%
Not Specified	3	12%	2	20%	4	12%
No Blackout Provision	1	4%	0	0%	1	3%

When do quarterly blackout periods end following the financial institution's publication of its earnings release (i.e., when is the last day of the blackout period)?

	Investment Banks		**Private Equity**		**Overall**	
	Number	%	Number	%	Number	%
Same Day	6	24%	2	20%	8	24%
+1 Business/Trading Day	9	36%	3	30%	12	35%
+2 Business/Trading Days	6	24%	3	30%	9	26%
Not Specified	3	12%	2	20%	4	12%
No Blackout Provision	1	4%	0	0%	1	3%

Two investment banks' policies impose longer blackout periods (i.e., shorter trading windows) on directors and executive officers than on other insiders.[2]

To visualize this data, the chart below represents the blackout periods each of the surveyed insider trading policies would impose prior to the publication of fourth quarter earnings assuming that (a) third quarter earnings were released on November 14, (b) the fourth quarter ends on December 31 and (c) fourth quarter earnings will be published after the close of trading on February 13.[3]



Based on such assumptions, blackout periods would range in length from just five calendar days to as long as 78 calendar days, with the median blackout period lasting 60 days. A blackout period of 60 days would mean insiders would be blacked out from trading their employer's securities for approximately two-thirds of a fiscal quarter due solely to regular quarterly blackouts.

In addition, 82% of the policies we surveyed contemplate the imposition of additional, distinct blackout periods, often called *ad hoc* or "event-driven" blackouts. *Ad hoc* blackouts can apply to some or all of the insiders generally subject to quarterly blackouts, and are generally imposed when insiders may have MNPI about specific events, such as M&A activity, significant litigation or major announcements. If an insider is subject to a quarterly blackout followed by an *ad hoc* blackout, an insider may be prohibited from trading in their employer's securities for most or all of any given quarter (noting that *ad hoc* blackouts are generally not enacted in every quarter).

[2] The tables and chart in this section represent these investment banks based on the generally applicable blackout period, not the longer blackout periods imposed on directors and executive officers.

[3] This chart does not represent the five financial institutions that either impose blackout periods without specified date ranges or do not impose blackout periods.

Does the policy cover event-driven/**ad hoc** ***blackouts?***

	Investment Banks		**Private Equity**		**Overall**	
	Number	%	Number	%	Number	%
Yes	20	80%	9	90%	28	82%
No	5	20%	1	10%	6	18%

The six policies that do not contemplate imposing *ad hoc* blackouts all nonetheless prohibit trading while in possession of MNPI. In other words, even when a financial institution does not impose an *ad hoc* blackout when insiders come to learn MNPI about specific events, it still prohibits such trading. That 82% of policies do contemplate *ad hoc* blackouts is significant, however, for the reason noted above: the combination of an *ad hoc* blackout and a regular quarterly blackout can result in insiders being barred from trading their company stock for significant periods of time. For example, an insider who learns before the current quarterly blackout period ends about a significant, unannounced merger that will not be publicly announced until after the next quarterly blackout period begins could be restricted from trading for five months or longer.

Preclearance and FINRA Compliance

It is not unusual for public companies to require at least some insiders (e.g., directors and executive officers) to pre-clear their trades in the company's securities. However, the nature of their business necessarily means directors, officers and employees of investment banks and private equity sponsors are frequently privy to MNPI not just about their own employer but also about other companies. In addition, FINRA Rules 3110(d) and 3210 impose on investment banks—which are subject to FINRA oversight by virtue of their registration as broker-dealers—the obligation to obtain and review statements and trade confirmations (or the transactional data contained therein) of their associated persons to prevent insider trading. While these FINRA rules are not directly applicable to private equity sponsors, several of the surveyed sponsors are affiliated with registered broker-dealers. In addition, SEC Rule 240A-1(a)(3)—which generally applies to private equity sponsors by virtue of their status as investment advisers—requires investment advisers to implement policies that require certain insiders to submit reports on their personal securities trading for supervisory review.

Unsurprisingly, some of the surveyed policies go further than simply requiring a limited set of insiders to pre-clear their trades in the company's own securities; several policies apply more broadly in both the types of insiders and the universe of securities to which pre-clearance requirements apply. Generally, pre-clearance is only valid for a very short period of time—in other words, an insider generally cannot obtain evergreen approval for possible future trades.

Which securities are subject to preclearance?

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
Only the Financial Institution's Own Securities	19	76%	9	90%	27	79%
Some Other Companies' Securities	2	8%	0	0%	2	6%
Any and All Public Securities	3	12%	1	10%	4	12%
Not Specified/No Pre-Clearance Rules	1	4%	0	0%	1	3%

Which insiders are required to pre-clear their personal securities trading?*

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
Directors	22	88%	10	100%	31	91%
Officers	23	92%	10	100%	32	94%
Some Employees	7	28%	1	10%	8	24%
All Employees	7	28%	7	70%	14	41%
Not Specified/No Pre-Clearance Rules	2	8%	0	0%	2	6%

* The categories represented by the first four rows in this table are not mutually exclusive, except that Some Employees and All Employees are mutually exclusive of one another. A financial institution may be counted in more than one row; e.g., an investment bank that imposes preclearance requirements on all of its directors and officers and employees with regular access to MNPI would be counted in the Directors, Officers and Some Employees rows. For this reason, the percentage columns do not sum to 100%.

How long is pre-clearance valid?

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
Same Day	4	16%	2	20%	5	15%
1 Business Day	8	32%	1	10%	9	26%
2 Business Days	1	4%	3	30%	4	12%
3 Business Days	1	4%	1	10%	2	6%
4 Business Days	0	0%	0	0%	0	0%
5 Business Days	1	4%	1	10%	2	6%
>5 Business Days	1	4%	0	0%	1	3%
Other/Not Specified/No Pre-Clearance Rules	9	36%	2	20%	11	32%

Some institutions also rely on "restricted list" policies to prohibit trading in any securities of particular issuers until such issuer is removed from the restricted list. In an April 2022 risk alert, the staff of the SEC Division of Examinations reminded investment firms of the SEC's guidance that investment advisers "should consider incorporating provisions into their codes [of ethics] to include 'restricted lists' of issuers about which the advisory firm has inside information, and prohibit any trading in securities of those issuers while they remain on the restricted list."[4]

Does the policy contemplate the use of a "restricted list" to limit or prohibit trading in certain other companies' securities at certain times?

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
Yes	6	24%	4	40%	10	29%
No	19	76%	6	60%	24	71%

The policy of one private equity sponsor, in addition to using a restricted list, also totally prohibits a smaller group of insiders from trading any securities other than either its own securities or certain "permitted securities" such as diversified exchange-traded funds.

[4] U.S. Sec. & Exch. Comm., Div. of Examinations, Risk Alert: Investment Adviser MNPI and Code of Ethics Compliance Issues (Apr. 26, 2022), available at https://www.sec.gov/files/code-ethics-risk-alert.pdf (the "2022 Risk Alert").

Five of the policies we surveyed require all personal securities trading to be conducted through approved brokers only and three require trading in the financial institution's own securities to be conducted through approved brokers only.

Does the policy include requirements arising from the requirements of FINRA Rules 3110(d) and 3210, e.g., requiring insiders to provide duplicate account statements to the financial institution or to only trade securities though certain approved brokers?

	Investment Banks		**Private Equity**		**Overall**	
	Number	%	Number	%	Number	%
Yes	6	24%	2	20%	8	24%
Yes, for accounts holding the institution's securities	0	0%	1	10%	1	3%
No, but statements must be provided to compliance upon request	0	0%	1	10%	1	3%
No	19	76%	6	60%	24	71%

One policy we surveyed does not explicitly require insiders to provide duplicate statements, trade confirmations or transactional data but encourages directors and executive officers to share a copy of the bank's insider trading policy with their brokers.

FINRA Rule 5130 prohibits certain insiders at registered broker-dealers from participating in initial public offerings ("IPOs") where the broker-dealer (i.e., the investment bank serving as underwriter) has "any economic interest." SEC Rule 240A-1(c) requires investment advisers to establish, maintain and enforce policies that require certain insiders to "obtain . . . preapproval before they directly or indirectly acquire beneficial ownership in any security in an initial public offering or in a limited offering." Three investments banks and one private equity sponsor whose policies we surveyed include restrictions or internal disclosure requirements on IPO participation by insiders.

Although 38% of the policies surveyed impose a minimum holding period with respect to an institution's own securities, only two policies impose minimum holding periods with respect to other companies' securities. Both are investment banks that impose a 30-day minimum holding period on other companies' securities, which, in both cases, is shorter than the bank's minimum holding period for its own securities.

Does the policy impose on insiders a minimum holding period with respect to the company's securities?

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
No Requirement	19	76%	3*	30%	21*	62%
30 Days	2	8%	0	0%	2	6%
60 Days	1	4%	3	30%	4	12%
90 Days	0	0%	3**	30%	3**	9%
180 Days/Six Months	3	12%	1	10%	4	12%

* Includes one private equity sponsor that does not impose a minimum holding period for its own securities but encourages its insiders not to speculate in its securities.

** Includes one private equity sponsor that imposes a broadly applicable 90-day minimum holding period for the sponsor's own securities, but also imposes a 180-day holding period applicable only to Section 16 insiders for such securities.

Sixteen of the policies surveyed (47%) explicitly permit (either entirely, with approval or with certain restrictions) the use of discretionary or "managed" accounts, i.e., securities accounts (a) beneficially owned by an insider, (b) over which the insider has delegated trading power to an account manager and (c) over which the insider has no discretion. While some of those policies limited the cases in which managed accounts were permitted (for example, policies may allow for trading of other entities' securities through managed accounts, but not securities of the insider's company), we did not observe any policy that prohibited the use of managed accounts entirely.

Hedging, Pledging and Gifting Securities

Does the policy prohibit insiders from hedging their positions in, or economic exposure to, the institutions' own securities?

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
Always Prohibited	13	52%	6	60%	19	56%
Restricted/Prohibited In Some Instances (e.g., generally prohibited with stated exceptions; only prohibited for certain insiders)	8	32%	2	20%	9	26%
Always Permitted or Permitted with Approval	0	0%	1	10%	1	3%
Not Addressed	4	16%	1	10%	5	15%

Does the policy prohibit insiders from pledging the institutions' own securities?

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
Always Prohibited	8	32%	2	20%	10	29%
Restricted/Prohibited In Some Instances (e.g., generally prohibited with stated exceptions; only prohibited for certain insiders)	8	32%	1	10%	9	26%
Always Permitted or Permitted with Approval	3	12%	6	60%	8	24%
Not Addressed	6	24%	1	10%	7	21%

Almost all of the policies surveyed treat gifts of securities the same as purchases and sales. However, three investment banks and two private equity sponsors provide a carveout for "bona fide gifts," e.g., gifts of securities to qualified charitable organizations. One of the investment banks carves bona fide gifts of its own securities out of the blackout restrictions but still requires pre-clearance through the same process as purchases and sales.

Applicability to Other Company's Securities and Shadow Trading

Does the policy explicitly prohibit insider trading only in the institution's own securities, in a limited universe of other companies' securities (e.g., suppliers and clients) or in all public securities (noting that all insider trading is a violation of the federal securities laws, regardless of the language of any given policy)?

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
Only the Financial Institution's Own Securities	7	28%	2	20%	9	26%
Some Other Companies' Securities	3	12%	2	20%	5	15%
Any and All Public Securities	15	60%	6	60%	20	59%

The concept of "shadow trading" has received increased attention lately. Shadow trading refers to trading in one company's securities on the basis of MNPI about another company. In 2024, the SEC obtained a jury verdict in *SEC v. Paunwat* finding that a defendant's shadow trading violated federal insider trading law.[5] In that case, the defendant received MNPI in the course of his employment, learning that Pfizer planned to acquire his employer, a biopharmaceutical company called Medivation, and improperly traded options of a significant Medivation competitor on the basis of such MNPI. The nature of investment banks' and private equity sponsors' business necessarily means insiders have frequent access to the types of MNPI that would facilitate similar shadow trading. However, we only observed five policies that address shadow trading, with all five being from investment banks.

Of the five policies that address shadow trading, it was clear one was updated following the *Panuwat* verdict. For the other four, it was not clear whether the shadow trading provisions predated *Panuwat*—in part because the requirement to file insider trading policies as exhibits to registrants' annual reports went into effect after the *Panuwat* verdict—but the language used in three of the policies suggests they were likely updated post-*Panuwat*. In any event, financial institutions may want to consider whether to update their policies to address shadow trading. The decision whether to so update should be made based on a number of factors and on circumstances specific to the particular financial institution; our analysis here is not a recommendation one way or the other.

Tipping

Tipping—sharing MNPI about an issuer with others who may trade that issuer's securities while in possession of such MNPI—is insider trading. Recent SEC enforcement actions demonstrate that private equity sponsors can face civil liability for failing to prevent the improper disclosure and misuse of MNPI, regardless of whether a tippee actually trades on such MNPI.[6] Such enforcement actions follow risk alerts from the staff of the Division of Examinations reminding investment advisers of their obligations under Section 240A of the Investment Advisers Act of 1940 and Rule 240A-1, which require investment advisers to "establish, maintain, and enforce written policies and procedures" to prevent the misuse of MNPI and comply with related federal securities laws.[7]

Does the policy explicitly prohibit tipping?

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
Yes	21	84%	9	90%	29	85%
No	4	16%	1	10%	5	15%

Post-Termination Applicability

There are a number of reasons a financial institution might impose post-termination restrictions. An insider who possesses MNPI when they leave the institution can still commit insider trading in violation of the law, which could have a significant negative impact of the institution's reputation. Further, in the case of Section 16 insiders, post-termination restrictions promote compliance with Rule

[5] *See SEC v Panuwat*, 2024 US Dist LEXIS 200382, at *2 [ND Cal Sep. 9, 2024, No. 21-cv-06322-WHO]. The verdict is currently pending appeal in the Ninth Circuit.

[6] See, e.g., In the Matter of OEP Capital Advisors, L.P., Investment Advisers Act Release No. 6514 (U.S. Sec. & Exch. Comm'n Dec. 26, 2023) (order).

[7] *See, e.g.*, the 2022 Risk Alert (n.4, *supra*); U.S. Sec. & Exch. Comm., Office of Compliance Inspections and Examinations, Risk Alert: Observations from Examinations of Investment Advisers Managing Private Funds (Jun. 23, 2020), available at https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf.

16a-2(b), which makes transactions following cessation of director or officer status subject to Section 16 if they are (a) made within six months of a pre-cessation opposite way transaction subject to Section 16(b) and (b) not otherwise exempt from Section 16(b).

Does the policy impose any restrictions following termination of an insider's employment by or service to the institution?

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
Yes	15	60%	6	60%	21	62%
No or Not Specified	10	40%	4	40%	13	38%

Of the 21 policies that impose post-termination restrictions, 19 prohibit insiders who would have been covered by the policy but for their termination and possess MNPI about the institution when terminated from trading in the institution's own securities until they no longer possess such MNPI, either because the information has become public or has ceased to be material. Eight of those 19 policies further prohibit insiders who would have been covered before termination and possess MNPI about other companies from trading in such other companies' securities until they no longer possess such MNPI. One of those 19 policies provides that some insiders whose employment or service terminates during a blackout period shall remain subject to blackout restrictions for the remainder of that blackout period. Another provides that some insiders shall remain subject to blackout restrictions and pre-clearance requirements until the end of the first full blackout period that begins following termination. In addition, four of the 19 policies also expressly prohibit tipping until such time as the insider no longer possesses MNPI.

Two of the 21 policies that impose post-termination restrictions do not impose the types of restrictions described in the prior paragraph. Both are from private equity sponsors. One provides that Section 16 insiders shall remain subject to the pre-clearance requirements for six months following termination. The other provides that insiders whose employment or service terminates during a blackout period shall remain subject to blackout restrictions for the remainder of that blackout period, in each case unless otherwise notified.

In addition, six of the 21 policies—five from investment banks and one from a private equity sponsor—impose continued pre-clearance requirements on at least some insiders for a period of time following termination.

Waivers and Exceptions

Does the policy permit waivers or exceptions?

	Investment Banks		Private Equity		Overall	
	Number	%	Number	%	Number	%
Permitted	12	48%	4	40%	15	44%
Permitted (Hardship/Exceptional Circumstance)	2	8%	2	20%	4	12%
No/Not Explicitly Permitted	11	44%	4	40%	15	44%

Most of the 19 policies that permit waivers or exceptions contemplate that such waivers or exceptions must be granted by the General Counsel, Chief Legal Officer or Chief Compliance Officer, by a designee of one of the foregoing or by the legal or compliance department. In one instance, authority to grant dispensation is vested in the Chief Executive Officer and Chief Financial Officer.

None of the four policies that permit exceptions in the case of hardship or exceptional circumstances set forth criteria for determining when a hardship or exceptional circumstance has occurred.

Bear in mind, however, that a waiver from or exception to an insider trading policy is not a waiver from or exception to the law. Insiders who are granted waivers or exceptions must still comply with the law and refrain from illegal insider trading.

Other Interesting Provisions

In our review, we found the following provisions in some policies which, although not commonplace, are noteworthy:

- Some private equity sponsors' policies require covered persons to notify the sponsor's legal or compliance departments when they believe they have received MNPI from government sources or government-related sources (e.g., lobbyists).
- A few investment banks that have wealth management lines of business include restrictions in their policies with respect to associated persons making trades in customer accounts involving the investment bank's own securities.
- One investment bank's policy includes a proscription against "copycat" trades, i.e., trades designed to mirror those of another individual or client who "appears to be prescient."
- One investment bank's policy includes references to MSRB Rule G-24 (concerning use of ownership information obtained in fiduciary or agency capacity) and FINRA Rule 2241 (concerning research analysts and research reports).
- One investment bank reserves the right to limit insiders' personal securities trading to prevent "excessive trading."
- A number of policies include language reminding covered persons of the Section 16, Form 144 and/or the Securities Exchange Act of 1934 Section 13(b)(2) requirements and provisions applicable to them.

Conclusion

While this survey demonstrates that there is some divergence in the approaches taken by financial institutions in designing their insider trading policies, there are also some clear trends that can be gleaned from the information. We hope this information can provide some useful insights for other financial institutions consider reviewing or further refining their insider trading policies.

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