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Date and Time: Monday, October 14, 2024 9:29:00 PM CDT

Job Number: 236002070

Document (1)

1. [*Insider Trading Policy: Updates and Best Practices Checklist Post-Panuwat*](#)

Client/Matter: -None-

[Insider Trading Policy: Updates and Best Practices Checklist Post-Panuwat](#)

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This checklist explores recent and trending insider trading enforcement by the U.S. Securities and Exchange Commission (SEC), specifically regarding a "shadow trading" theory, and takeaways and best practices addressing internal company policies and trading practices to address the SEC's scrutiny.

Background

The concept of insider trading under the federal securities laws has evolved over the years, at times in unexpected ways. Current insider trading standards have developed through case law and administrative actions applying the anti-fraud rules of the federal securities laws and have resulted in a framework that is not always clear. This creates uncertainty for public companies when drafting and implementing internal policies, but recent developments provide insight into new and important areas of focus for the SEC. The latest, and possibly the most controversial, development in insider trading law comes from a case decided in April 2024, based on a theory called "shadow trading."

***Panuwat* and Shadow Trading**

In *SEC v. Panuwat*, No. 21-CV-6322 (N.D. Cal.), the government successfully argued that trading in the securities of one company based upon material nonpublic information (MNPI) about another company (the securities of which the defendant does not even trade) can nevertheless violate the federal securities laws. The defendant, Matthew Panuwat, was an employee at a publicly traded biopharmaceutical company. After receiving MNPI that his employer was going to be acquired, Panuwat purchased short-term options in a competitor biopharmaceutical company that was not a party to and had no direct connection to the acquisition. When the acquisition was announced, the competitor company's stock price increased, and, through those short-term options, Panuwat realized profits of approximately \$110,000.00.

Although the SEC has stressed that there is "nothing novel" about the "pure and simple" insider trading theory it advanced in *Panuwat*, the ruling represents a significant new application of the federal government's insider trading authority to prevent such shadow trading in which corporate insiders allegedly exploit information about their own companies to profit by trading in the securities of "economically linked" companies. See [Statement, Gurbir S. Grewal, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Statement on Jury's Verdict in Trial of Matthew Panuwat \(Apr. 5, 2024\)](#) (attaching the SEC's Litigation Release and Complaint from August 2021).

In addition to advancing a controversial insider trading theory, *Panuwat* sheds light on the SEC's scrutiny of company internal policies. The SEC used the defendant's violation of his employer's insider trading policy as proof of a breach of duty to the company, which was a crucial element of the SEC's case.

Takeaways and Best Practices

As this case was the first of its kind, there are many open questions about how the SEC will bring future enforcement under the shadow trading theory. However, this victory will likely embolden the SEC to pursue similar claims in the future, and *Panuwat* may provide a valuable blueprint of what companies and investors can expect. Despite the unknowns, one thing is clear: the SEC's scrutiny of company internal policies is on the rise. The company insider trading policy that Panuwat signed, and Panuwat's subsequent violation of such policy, was a major factor in the SEC's advancement of its claims.

Companies should take the following steps with their own internal policies and trading practices:

- **Review Company Policies.** Public companies should evaluate the scope of their insider trading policies and how the policies define MNPI. Specifically, companies should consider the competitive landscape of their industry and whether restrictions on trading securities in other public companies should be implemented or revised. This could include an assessment of whether MNPI held by insiders of a company could affect

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security prices of companies in the same or similar industry sectors. Insider trading policies should emphasize the importance of special blackouts that prohibit trading by insiders in possession of MNPI during the pendency of an acquisition or other extraordinary transaction and should also consider expanding the blackouts to trading in "economically linked" companies.

- **Train Employees.** Companies should update employee compliance training programs to include risks surrounding trading in other company securities and ensure that these trainings are conducted frequently. This training should also discuss the importance of adhering to company insider trading policies.
- **Monitor Compliance.** Companies should ensure that they have an infrastructure in place to monitor and enforce their policies. This may include items such as internal audits, avenues for confidential reporting, and approvals for employee trades.
- **Revise or Implement Rule 10b5-1 Trading Plans.** In particular, executives should consider revising or implementing trading plans under Rule 10b5-1 (17 C.F.R. § 240.1b5-1) of the Exchange Act of 1934, as amended, to add an extra layer of protection from insider trading. However, it is vital that employees are educated on the requirements associated with these plans, as the SEC has recently increased its scrutiny on them.

Conclusion

The importance of compliance continues to increase as these developments come on the heels of the new insider trading disclosure requirements including the requirement that companies file their insider trading policy as an exhibit to the Annual Report on [SEC Form 10-K](#), which will first be required in the fiscal year 2024 SEC Form 10-K to be filed in 2025 for calendar year-end companies. This will provide additional data for the SEC to help it uncover potential insider trading issues. The evolving boundaries in the application of the insider trading laws and increased transparency into the way companies are ensuring compliance may be a perfect storm for future SEC enforcement.

Related Content

Practice Notes

- Forget Inside Trading, Let's Talk About 'Shadow Trading' Podcast
- Insider Trading Claims: Defenses
- Rule 10b5-1 Plans

Templates

- Insider Trading Memorandum
- Insider Trading Policy
- Securities Fraud and Insider Trading Policy
- Insider Trading Policy Template
- Insider Trading Policies

Checklist

- 10b5-1 Plans Best Practices Checklist

Articles

- Pro Say: Forget Insider Trading, Let's Talk 'Shadow Trading'
- New Shadow Trading Enforcement Lessons For Private Funds
- SEC's Win in 'Shadow Trading' Case Shines Light on Corporate Trading Policies
- Insider Trading Enforcement Related to Rule 10b5-1 Trading Plan Misuse: Client Alert Digest

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- Rule 10b5-1 Trading Plans: Recent Enforcement Developments and Takeaways

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