european corporate governance institute

Insider Trading Spillover

Law Working Paper N° 980/2026
November 2026

Geeyoung Min
Emory School of Law and ECGI

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Abstract

Federal insider trading liability can differ depending on who employs you. In SEC v. Panuwat, a federal district court reasoned that a violation of a company's internal trading policy, standing alone, can establish the breach of duty required for federal liability. Although Panuwat is often framed as a debate over trading in competitors' stock, that framing obscures a more systematic and fundamental shift embedded in the decision. The scope of federal insider trading law can now be defined by private corporate drafting choices at any time, potentially without notice, rulemaking, or judicial approval. This Article conceptualizes the systemic consequence of this shift as insider trading spillover, the process through which privately drafted trading prohibitions spill into federal enforcement and reshape the traditional contours of insider trading. The mechanism is particularly consequential because companies have long adopted expansive trading prohibitions that extend far beyond competitors' stock to demonstrate preventive compliance efforts and thereby mitigate companies' controlling person liability. Yet Panuwat transforms that defensive breadth into a freestanding enforcement hook. This shift is already altering how companies design their policies. Using the first set of S&P 500 insider trading policy disclosures filed under the SEC's disclosure requirements, this Article shows that many companies are retaining historically broad trading prohibitions while increasingly adopting disclaimers that distance the company from employees' potential insider trading liability. These developments risk chilling the internal compliance functions essential to effective corporate oversight of insider trading. Because internal policies govern day-to-day conduct across all levels of the company, these changes can immediately affect employees' trading decisions before any later litigation addresses materiality or other requirements for liability. This Article makes three contributions. First, it develops a theory of insider trading spillover that explains how private compliance choices become inputs into public enforcement. Second, it provides empirical evidence of a perverse dynamic in which the threat of policy-based liability discourages effective corporate oversight of insider trading. Third, it offers a prescriptive framework for courts and companies to mitigate the institutional consequences of allowing private drafting to define the boundaries of a public offense.

Keywords: insider trading, insider trading spillover, insider trading policies, corporate internal policy, corporate compliance, shadow trading, misappropriation theory, fiduciary duty, SEC v. Panuwat, private ordering, public enforcement

Geeyoung Min

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This Article conceptualizes the systemic consequence of this shift as *insider trading spillover*, the process through which privately drafted trading prohibitions spill into federal enforcement and reshape the traditional contours of insider trading. The mechanism is particularly consequential because companies have long adopted expansive trading prohibitions that extend far beyond competitors' stock to demonstrate preventive compliance efforts and thereby mitigate companies' controlling person liability. Yet *Panuwat* transforms that defensive breadth into a freestanding enforcement hook.

This shift is already altering how companies design their policies. Using the first set of S&P 500 insider trading policy disclosures filed under the SEC's disclosure requirements, this Article shows that many companies are retaining historically broad trading prohibitions while increasingly adopting disclaimers that distance the company from employees' potential insider trading liability. These developments risk chilling the internal compliance functions essential to effective corporate oversight of insider trading. Because internal policies govern day-to-day conduct across all levels of the company, these changes can immediately affect employees' trading decisions before any later litigation addresses materiality or other requirements for liability.

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* Associate Professor, Emory School of Law. I am grateful for invaluable comments from Dhruv Aggarwal, Jennifer Arlen, Stephen M. Bainbridge, Albert Choi, Patrick Corrigan, Lisa M. Fairfax, Jill Fisch, Christodoulos Kaoutzanis, Donald Langevoort, Alex Lee, Maria Macia, Elise Maizel, Veronica Root Martinez, William Moon, James Park, Caley Petrucci, Alexander Platt, Elizabeth Pollman, Adam C. Pritchard, Jodi Short, Justin Simard, Emily Strauss, James Tierney, Andrew Verstein, Karen Woody, Quinn Yeargain, David Zaring, Jeffery Zhang, and participants in the Penn ILE Junior Faculty Workshop, UCLA Business Law Workshop, Notre Dame Law & Economic Seminar, BYU Law Winter Deals Conference, University of Illinois College of Law Business Law Seminar, Corporate and Securities Litigation Workshop, National Business Law Scholars Conference, LSA Annual Meeting, AALS Financial Regulation Mid-Year Workshop, and faculty workshops at Northwestern Pritzker School of Law, University of Michigan Law School, BYU Law School, Emory University School of Law, Tulane University School of Law, and Michigan State University College of Law.

TABLE OF CONTENTS

INTRODUCTION **3**

I. THE INCREASING CENTRALITY OF INSIDER TRADING POLICIES **10**

A. CORPORATE LIABILITY AS A CONTROLLING PERSON 10
B. POLICY BREACH AND THE POTENTIAL EXPANSION OF ENFORCEMENT 13
1. The Classical and Misappropriation Theories of Insider Trading Liability *13*
2. Extending the Reach of the Misappropriation Theory: SEC v. Panuwat *14*
3. Beyond Shadow Trading: Policy Breach Trading *17*
C. THE SEC'S DISCLOSURE MANDATE FOR INSIDER TRADING POLICIES 19

II. INSIDER TRADING POLICIES IN PRACTICE **21**

A. TIMELINE AND DATA COLLECTION 21
B. SCOPE OF PROHIBITED TRADING 24
1. Before and After Mandatory Disclosure: Persistent Prevalence of Blanket Prohibitions *25*
2. The Spectrum of Targeted Prohibitions: Trading in Business Partners, Competitors, and Peers *28*
C. THE RISE OF THE CORPORATE DISCLAIMERS 32
1. Distancing Corporate Liability from Employee Violations *32*
2. Disclosure Without Credit *35*

III. CHILLING EFFECT OF INSIDER TRADING SPILLOVER **36**

A. INSIDER TRADING SPILLOVER 36
B. CHILLING EFFECTS ON THE INTERNAL COMPLIANCE FUNCTION 37
1. Chilling Effect on Companies *38*
2. Chilling Effect on Employees *38*

IV. POLICY IMPLICATIONS **39**

A. IMPLICATIONS FOR COMPANIES 40
1. Rethinking Blanket Prohibitions in Insider Trading Policies *40*
2. Reevaluating Corporate Disclaimers in Insider Trading Policies *41*
B. IMPLICATIONS FOR COURTS 41

CONCLUSION **43**

Introduction

Insider trading is a crime—a serious one. Advanced technology for detecting suspicious trading activities,[1] combined with the imposition of severe penalties,[2] creates strong incentives to comply with insider trading laws.[3] Despite the prevalence of insider trading in federal securities enforcement,[4] its legal contours remain frustratingly elusive.[5] This is mainly because of the absence of a clear statutory definition of insider trading,[6] which leaves its boundaries to be shaped by a patchwork of judicial interpretations of the federal antifraud provisions.[7] Now, companies' internal insider trading policies are adding a new layer of uncertainty to these already unsettled boundaries.

For decades, companies have faced compelling incentives to adopt their internal policies that are deliberately overinclusive and more restrictive than any clearly established legal prohibition.[8] This prophylactic approach reflects an effort to create a margin of safety against violations, driven in significant part by the SEC's authority to impose controlling person liability on companies that fail to take reasonable steps to prevent their employees' insider trading violations.[9] Although such policies

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[1] *See, e.g.,* SEC Press Release, *SEC Files Multiple Insider Trading Actions Originating from the Market Abuse Unit's Analysis and Detection Center*, FOR IMMEDIATE RELEASE 2022-129 (July 25, 2022), https://www.sec.gov/newsroom/press-releases/2022-129 ("Each of the three [enforcement] actions . . . originated from the SEC Enforcement Division's Market Abuse Unit's (MAU) Analysis and Detection Center, which uses data analytics tools to detect suspicious trading patterns.").

[2] 15 U.S.C. § 78ff(a) (2018 & Supp. V 2024) (providing for criminal penalties, including fines up to $5,000,000 or imprisonment up to 20 years for individuals, and fines up to $25,000,000 for entities). *E.g.*, The Kroger Co. Policy on Securities Trading IV. Consequences of Violation. ("Insider trading is a serious crime. There are no thresholds or limits on the size of a transaction that will trigger insider trading liability.").

[3] Recent enforcement summaries indicate that insider trading remains a durable focus of the SEC's enforcement activity, notwithstanding broader recalibrations of enforcement priorities. *See* Mark E. Bini et al., *SEC Enforcement Newsletter: Q4 2025*, REED SMITH NEWSLETTERS (Dec. 5, 2025), https://www.reedsmith.com/articles/sec-enforcement-newsletter-q4-2025/ ("While most areas saw declines, insider trading and market manipulation actions increased compared to FY 2024…. Across FY 2025, the Commission emphasized "bread and butter" priorities: insider trading….").

[4] *See* Stephen M. Bainbridge, *An Overview of Insider Trading Law and Policy*, RESEARCH HANDBOOK ON INSIDER TRADING 1 (2025) ("In most capital markets, insider trading is the most common violation of the securities laws.").

[5] *See* Stephen M. Bainbridge, INSIDER TRADING LAW AND POLICY 1 (2d ed. 2023) ("The term insider trading is something of a misnomer."); James J. Park, *Insider Trading and the Integrity of Mandatory Disclosure*, 2018 WIS. L. REV. 1133, 1179 (2018) ("The law of insider trading has often been criticized for its failure to establish a clear boundary between permissible and impermissible trading."); Zachary J. Lustbader, *Title 18 Insider Trading*, 130 YALE L. J. 1828, 1828 (2021) ("[F]ederal prosecutors have pursued insider trading convictions by charging defendants with willfully violating the securities laws. But the resulting doctrine has long been viewed as incoherent, inefficient, unpredictable, and unjust.").

[6] *See* Andrew Verstein, *Insider Tainting: Strategic Tipping of Material Nonpublic Information*, 112 NW. U. L. REV. 725, 739 (2018) ("No statute or rule defines 'insider trading.'"); Iman Anabtawi, *Toward a Definition of Insider Trading*, 41 STAN. L. REV. 377, 377 (1989) ("The legal confusion surrounding insider trading results from the absence of either case law or statutory specification of a clear theory on which to base insider liability.").

[7] 15 U.S.C. § 78j(b) (2018); 17 C.F.R. § 240.10b-5 (2023). *See United States v. McGee*, 763 F.3d 304, 306 (3d Cir. 2014) ("Congress declined to define the amorphous term "deceptive device" in § 10(b), and 10(b) did not mention insider trading at all, much less misappropriation or the relationships required for liability"); Jill E. Fisch, *Constructive Ambiguity and Judicial Development of Insider Trading*, 71 SMU L. REV. 749, 757 (2018) ("Because §10(b) is an 'open-textured statute,' its interpretation requires the courts to engage in the more expansive interpretive exercise associated with common law adjudication."); Miriam Baer, *Insider Trading's Legality Problem*, 127 YALE L. J. F. 129, 145 (June 19, 2017)("There are drawbacks to the type of piecemeal lawmaking typified by the Supreme Court's insider trading jurisprudence, particularly in regard to criminal law.").

[8] *E.g.*, Catalent Insider Trading Policy, 1. Background ("In addition to requiring compliance with securities laws, this Policy includes additional guidance and restrictions to avoid even the *appearance* of impropriety….")(emphasis added).

[9] 15 U.S.C. § 78t(a) (2018). *See* Marc I. Steinberg & Forrest C. Roberts, *Laxity at the Gates: The SEC's Neglect to Enforce Control Person Liability*, 11 VA. L. & BUS. REV. 201, 205-06 (2017) ("[P]ursuant to the Dodd-Frank Act of 2010, Congress made

are formally mandated only for broker-dealers and investment advisers,[10] many other companies strategically adopt and draft such policies as a precautionary measure to signal a strong compliance posture[11] and to further reinforce their affirmative defense against potential SEC enforcement actions allowed under the controlling person liability framework.[12] In practice, approximately one-quarter of S&P 500 companies' insider trading policies expressly reference "controlling person liability," underscoring the perceived gravity of insider trading violations and the need for rigorous internal policies.[13]

The SEC's recent enforcement strategy has reversed that logic, producing a paradoxical distortion of compliance incentives that pushes companies toward more permissive insider-trading policies.[14] Broad internal prohibitions, once adopted as prophylactic compliance measures, can now serve as enforcement hooks against employees by turning the scope of trading restrictions in internal policies into a source of external liability.[15] In *SEC v. Panuwat*, the SEC charged Mr. Panuwat, an employee of Medivation, with trading in the stock of Incyte, a comparable mid-sized oncology pharmaceutical company with no direct relationship with his company (Medivation), based on confidential information about his company (Medivation)'s impending acquisition by Pfizer.[16] The SEC alleged that Mr. Panuwat anticipated that Pfizer's acquisition of Medivation would make Incyte an attractive acquisition target for other potential buyers, driving its stock price higher, and it did.[17]

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clear that the SEC has the authority to utilize Section 20(a) in its enforcement actions, embracing the majority view held by the lower federal courts.") (quoting Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(c), 124 Stat. 1865 (2010)). *See, e.g.*, Analog Devices, Inc. Insider Trading Policy (Adopted by Dec. 12, 2023) ("This insider trading policy is being adopted …. with the goal of helping… protect the Company from controlling person liability"). Analog Devices' policy adopts blanket prohibition of trading any other company's stock.

[10] Exchange Act §20 explicitly imposes an affirmative duty to maintain such policies solely on broker-dealers and investment advisers. 15 U.S.C. § 78u-1(b)(1)(B) (1988); Section 15(f) of the Exchange Act, 15 U.S.C. § 78o(f) (1988) (imposing affirmative duty on broker-dealers); Section 204A of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-4a (1988) (imposing affirmative duty on investment advisers).

[11] *See* Geeyoung Min, *Strategic Compliance*, 57 UC DAVIS L. REV. 415, 454-55 (2023) (finding that 72.5% of stand-alone insider trading policies and 51.8% of insider trading sections within codes of ethics adopt blanket prohibitions on trading in the stock of any other publicly-traded company).

[12] *See* Stephen M. Bainbridge, *Insider Trading Compliance Programs*, THE CAMBRIDGE HANDBOOK OF COMPLIANCE 855, 859 (Benjamin van Rooij & D. Daniel Sokol eds., 2021) ("[A]doption and effective implementation of a reasonable compliance program make it significantly more difficult for the SEC to show that the issuer acted recklessly and/or failed to take appropriate steps with respect to potential illegal trading by its insiders.").

[13] On file with author. *See, e.g.*, Analog Devices, Inc. Insider Trading Policy (Adopted by Dec. 12, 2023) ("This insider trading policy is being adopted …. with the goal of helping… protect the Company from controlling person liability").

[14] *Cf.* In his influential work, Professor Anderson critiques the uncertainty surrounding insider trading law that creates a "paradox" in which companies impose strict prohibitions on trading in *their own stock* to avoid violations, which in turn may reduce liquidity and harm shareholders. John P. Anderson, *Solving the Paradox of Insider Trading Compliance*, 88 TEMPLE L. REV. 273 (2016). This Article, by contrast, focuses on the paradox that arises when companies extend trading prohibitions to the *stock of other companies*. After *SEC v. Panuwat*, such extra efforts once intended to prevent insider trading now operate as independent sources of insider trading liability. *See infra* I. B.

[15] On the risks of adopting broad prohibition after Panuwat, *see, e.g.*, Edward A. Imperatore & Jackie Lu, *Takeaways for In-House Counsel from the SEC's "Shadow Insider Trading" Action*, MORRISON FOERSTER CLIENT ALERT (Mar. 7, 2022), https://www.mofo.com/resources/insights/220307-shadow-insider-trading ("Vague or overbroad language in an insider trading policy could broaden the scope of potential liability for employees or insiders who are subject to the policy."). See also, *Strategic Compliance*, *supra* note 11, at 429-30; John P. Anderson, *Rethinking Insider Trading Compliance Policies in Light of the SEC's New "Shadow Trading" Theory of Insider Trading Liability*, 24 TRANSACTIONS: TENN. J. BUS. L. 413, 428-30 (2023).

[16] Complaint, SEC v. Panuwat, No. 21-cv-06322 (N.D. Cal. Aug. 17, 2021).

[17] Incyte's stock price increased by 8% after the disclosure of the Pfizer's acquisition of Medivation, and Panuwat obtained $107,666 in profits. For a detailed discussion of SEC v. Panuwat, *see infra* Parts I.B.1. and II.A.

Because Panuwat traded in the stock of a company for which he was not an insider, the SEC relied on the misappropriation theory and argued that his trading in violation of Medivation's internal policy satisfied the required breach of duty.[18] That policy-based strategy prevailed at trial,[19] resulting in a jury verdict against Panuwat.[20] Notably, the defense has focused on disputing whether Mr. Panuwat's conduct in fact violated the policy, rather than whether the policy could spill over into federal law and define the relevant duty in the first place.[21] Accordingly, even a decision in the pending appeal may not squarely resolve this broader question despite its potential significance.[22] Likewise, even if the SEC retreats from pursuing cases characterized as shadow trading, *Panuwat* has already recognized a pathway through which intenral corporate policies can independently supply the duty predicate for federal liability, and a change in enforcement priorities alone would not close that pathway or reverse the changes the decision has already prompted in companies' internal compliance practices.[23]

Extensive commentary has characterized *Panuwat* as a novel "shadow trading" case,[24] emphasizing its extension of insider trading liability to trades in peer companies' stock.[25] Yet the case may have a broader doctrinal reach than its immediate shadow trading context suggests because it reframes the inquiry from *which* trading was prohibited to *why* such trading became unlawful under federal law.[26] Corporate policies have long been used in insider trading enforcement, but typically as

[18] Complaint, SEC v. Panuwat, No. 21-cv-06322 (N.D. Cal. Aug. 17, 2021).

[19] While the SEC identified two other independent sources for Mr. Panuwat's fiduciary duty not to trade in a peer company's stock—a signed confidentiality agreement and agency law—its reliance on the company's insider trading policy as a key component of its enforcement theory was notable. In response, most law firm memos advised companies to reassess their insider trading policies. *See* Edward A. Imperatore et al., *Takeaways for In-House Counsel from the SEC's "Shadow Insider Trading" Trial*, MORRISON FOERSTER CLIENT ALERT (Apr. 16, 2024), https://www.mofo.com/resources/insights/240416-takeaways-for-in-house-counsel ("The jury's finding that the *Panuwat* defendant had breached his duty of trust and confidence to his employer, a public company, *turned upon the wording of his employer's insider trading policy*, which prohibited trading the securities of any public company based on material non-public information.") (emphasis added).

[20] Jury verdict, SEC v. Panuwat, No. 21-cv-06322 (N.D. Cal. Apr. 5, 2024).

[21] Brief of the U.S. Securities and Exchange Commission, Appellee at 26-27, SEC v. Panuwat, No. 24-6882 (9th Cir. Jan. 2, 2026)(noting that Panuwat "do[es] not dispute that... the requisite duty may arise... through an 'express agreement.'").

[22] *See* Oral Argument at 28:01–28:27, *SEC v. Panuwat*, No. 24-6882 (9th Cir. June 11, 2026), https://www.ca9.uscourts.gov/cases/streams-videos/archive?case=24-6882&hearingDate=2026-06-11 (Judge Nguyen stating, "I think the more difficult question, and the question on which I did not see an adequate challenge or briefing is, in the face of an express policy whether that controls and … trumps any sort of implied duty that may arise from his employee-employer relationship, and that's the specific argument that I think is more difficult in this case, and I didn't see that preserved.").

[23] *See infra* Parts II. B. & C.

[24] The term "shadow trading" was coined by Professors Mihir N. Mehta, David Reeb & Wanli Zhao to describe corporate insiders' "using their private information to facilitate trading in economically linked firms." Mihir N. Mehta, David Reeb & Wanli Zhao, *Shadow Trading*, 96 ACCT. REV. 367, 367 (2021). Despite its prominence in commentary, neither the SEC nor the court used the term "shadow trading" in *Panuwat*.

[25] *See, e.g.*, Jay B. Sykes, *SEC's First "Shadow Trading" Case Slated for Trial*, CONG. RSCH. SERV. LSB11119 (Feb. 28, 2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11119; Reed Brodsky et al., *SEC Successfully Prosecutes Novel "Shadow Trading" Theory at Trial*, GIBSON DUNN (Apr. 10, 2024), https://www.gibsondunn.com/sec-successfully-prosecutes-novel-shadow-trading-theory-at-trial/; *See* John C. Coffee, Jr., *"Shadow Trading" and the Common Law of White Collar Crime*, THE CLS BLUE SKY BLOG (Apr. 15, 2024), https://clsbluesky.law.columbia.edu/2024/04/15/shadow-trading-and-the-common-law-of-white-collar-crime/. *See also* Yoon-Ho Alex Lee & Alessandro Romano, *Shadow Trading and Macroeconomic Risk*, 13 HARV. BUS. L. REV. 393 (2023); Karen E. Woody & M. Cole Davidson, *Safe Harbors in the Shadows: Extending 10b5-1 Plans to Cover Shadow Trading*, 2023 MICH. ST. L. REV. 1069.

[26] *See infra* Figure 1.

corroboration that information was confidential or that an employee understood it as such.[27] *Panuwat* went further. The court treated the employer's trading policy, a confidentiality agreement, and agency law as alternative sources of the duty required for liability and held that any one of them would suffice. Its post-trial order described "one of three ways" the jury could have found that the trader owed a duty to the employer,[28] and its earlier summary judgment order said that "any one [of the three] would be sufficient to meet the breach element of misappropriation."[29] Neither order carries binding precedential force, but the court's alternative-sources framework may have significant practical implications. It provides a blueprint for future enforcement actions premised on corporate policy alone as a freestanding source of duty, particularly where other asserted sources of duty are less certain.[30] Beyond the courtroom, companies have already begun revising their insider trading policies in response.[31]

This reliance on corporate policies to substantiate insider trading allegations signals a potential shift, expanding federal enforcement to encompass what could be termed *policy breach trading*,[32] trading that violates a company's internal insider trading policy[33] and may encompass trades in companies with more attenuated connections to the source of the information than typically involved in shadow trading.[34] For instance, some companies explicitly state that their trading ban in policies "goes beyond"

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[27] In United States v. Carpenter, a Wall Street Journal reporter disclosed confidential information about forthcoming "Heard on the Street" columns to traders who used the information before publication. The Second Circuit held that the reporter breached a duty of confidentiality owed to the Journal based in part on the Journal's written conflicts of interest policy, which treated information obtained through employment as company property. *See* United States v. Carpenter, 791 F.2d 1024, 1028–30 (2d Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 19, 24 (1987). The policy thus supported both the existence of the duty and the reporter's knowledge of it, rather than serving as the sole source of the duty. *See also* SEC v. Talbot, 530 F.3d 1085, 1093–95 (9th Cir. 2008).

[28] *See* Order on Post-Trial and Remedies Motions, SEC v. Panuwat, No. 21-cv-06322, 31 (N.D. Cal. Sept. 9, 2024)("This means that the jury could find that Panuwat had a duty to Medivation in *one of three ways*: (1) by finding that the Policy conferred that duty upon him….")(emphasis added). The other two theories sound in agency law and a confidentiality agreement. Because the court found evidence supporting all three, the policy was not the exclusive basis for breach, but within the court's disjunctive framing, it could serve as an independently sufficient one.

[29] *See* Order denying defendant's motion for summary judgment, SEC v. Panuwat, 702 F. Supp. 3d 883, 897-98 (N.D. Cal. Nov. 20, 2023) ("The SEC advances three separate theories of how Panuwat breached a duty of trust and confidence to Medivation. I conclude that there is evidence that he breached a duty under all three; *any one would be sufficient to meet the breach element of misappropriation*….")(emphasis added).

[30] *See* Colleen Honigsberg & Robert J. Jackson, Jr., *Interpreting the Effects of Rule 10b5-1 Reform*, J. ACCT. & ECON. 101933 (2026), https://doi.org/10.1016/j.jacceco.2026.101933 ("Insider trading policies do not simply implement federal securities law within the firm; under some circumstances, they may also shape the duties that courts evaluate in determining liability under Rule 10b-5.").

[31] *See infra* Parts II. B & C.

[32] For the discussion of "policy breach trading," *see infra* Part I.B.3.

[33] It is worth noting that while Panuwat was not the only case in which the SEC referenced a written compliance policy to establish fiduciary duty, it can be the first instance where the SEC successfully relied on a stand-alone policy as the primary basis for expanding liability. *See, e.g.*, SEC v. Sheinfeld, No. 1:20-cv-01692 (M.D. Pa. Mar. 23, 2021) (citing Rite Aid's Code of Conduct to support allegations against an employee for trading in Rite Aid stock; case settled without admitting or denying liability); SEC v. Obus, 693 F.3d 276 (2d Cir. 2012) (relying on the confidentiality provision in the company's code of conduct in a tipper-tippee liability case, but after a 13-year legal battle, the jury ultimately acquitted the defendants).

[34] *See infra* Figure 1 & Table 2. *See also* Stephen M. Bainbridge, *SEC Takes a Crack at Expanding Misappropriation Theory to "Shadow" Insider Trading*, WASH. LEGAL FOUND. LEGAL PULSE (Sept. 7, 2021), https://www.wlf.org/2021/09/07/wlf-legal-pulse/sec-takes-a-crack-at-expanding-misappropriation-theory-to-shadow-insider-trading/("But the SEC's broad theory of this [Panuwat] case would suggest that it is now illegal to trade while in possession of any material nonpublic information a corporate employee learns on the job about any company, whether or not that other company is a party to a transaction with the employer.").

what the law prohibits,[35] and they ban even the mere "appearance" of improper trading, regardless of whether the trading would actually constitute a federal insider trading violation.[36] This practice signals that the scope of prohibited trading under internal insider trading policies is broader, often substantially so, than what federal law typically contemplates.[37] The concern is not only that some policies sweep too broadly, but that they diverge across companies.[38] Under *Panuwat*, this variance maps directly onto federal liability. An employee at a company with an expansive policy faces greater federal insider trading exposure than an otherwise identically situated employee at a company with a narrower policy. Federal liability thus turns, in significant part, on the idiosyncratic compliance choices of private employers.

In that sense, *Panuwat* already marks a turning point. By allowing external enforcement to track the heightened prohibitions embedded in corporate policies, even to the appearance of impropriety, the decision has reshaped compliance culture and altered how employees approach their own trading activity. As a result, companies face a new challenge of navigating competing incentives: on the one hand, they are incentivized to expand prohibitions to establish an affirmative defense against corporate oversight liability.[39] On the other hand, narrowing these policies reduces employees' direct liability risks, which in turn may decrease the company's exposure to secondary liability.[40]

Against this backdrop, the SEC's new disclosure rules further intensify this tension by requiring companies to publicly disclose their insider trading policies.[41] While affirming the flexibility of self-regulation and granting companies substantial discretion over the content of their policies,[42] the mandatory disclosure rules introduce greater visibility and permanence.[43] Although disclosure rules

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[35] *See, e.g.*, Alphabet's Policy Against Insider Trading ("This Policy *goes beyond* legal requirements, and Alphabet may determine that specific conduct violates this Policy, even if it does not violate the law, and may take disciplinary action prior to the filing or resolution of any civil or criminal action against the alleged violator.")(emphasis added).

[36] *See, e.g.*, Leidos Holdings, Inc., Insider Trading Policy, p.1 ("The securities laws do not recognize any mitigating circumstances, and, in any event, *even the appearance* of an improper Trade must be avoided to preserve the Company's reputation for adhering to the highest standards of conduct.")(emphasis added).

[37] Some may argue that other elements, such as 'materiality,' ultimately limit the reach of federal law. But those safeguards come into play only if the defendant chooses to litigate in court, which is rarer than settlements. In practice, the enforcement theory the SEC can signal ex ante does more to shape behavior than the ex post limits a court might impose. For another example that doctrine shapes conduct, *see* Fernan Restrepo, *The Impact of Insider Trading Doctrine on the Incidence of Insider Trading: An Analysis of the Effect of the Misappropriation Theory*, Working Paper (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4627327 (empirically showing that the misappropriation theory deterred insider trading).

[38] *See infra* Tables 1 & 2.

[39] *See Infra* Part I.A.

[40] *See* Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 295 (2020) ("Legal and regulatory interventions, and sometimes even industry standards, often require firms to adopt particular programs and policies."). *Cf.* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (theorizing how vicarious liability can perversely disincentivize companies from funding *ex post* monitoring and detection). Moving beyond Professor Arlen's foundational model, this Article reveals how the SEC's emphasis on policy breach trading incentivizes an *ex ante* structural adaptation, driving companies to strategically redefine the substantive boundaries of their internal rules to avoid manufacturing liability.

[41] 17 C.F.R. § 229.408(b) (2023). SEC Insider Trading Arrangements and Related Disclosures, 87 Fed. Reg. 80362, 80362-63 (Dec. 29, 2022). For a more detailed discussion of the new disclosure rule, *see infra* Part I.C.

[42] *Id.* at 82. ("Decisions as to specific provisions of the policies and procedures are best left to the issuer."); DOJ, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 1 (2024) ("We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation.").

[43] Under its "comply or explain" framework, companies may elect to explain why they have not adopted insider trading policies, but none of the S&P 500 companies chose to do so. *See infra* Table 3.

do not push companies toward either expanding or narrowing the scope of prohibited trading, the heightened transparency can elevate litigation and enforcement risks, making both existing policies and future revisions more susceptible to scrutiny. Consequently, companies are likely to exercise greater caution in drafting their insider trading policies,[44] recognizing that their language and structure may invite scrutiny from both regulators and private plaintiffs.[45]

The developments discussed so far converge on a critical question of how companies have drafted their insider trading policies in response to these contradictory regulatory pressures. Particularly, if companies universally opted to narrow the scope of their prohibitions, the SEC's ability to use internal policies as a basis for enforcement, as in the *Panuwat* case, would be significantly curtailed. Many companies that implemented blanket prohibitions before the mandatory disclosure obligation, however, may hesitate to scale back their policies because doing so could signal a weakened commitment to compliance.[46] This Article provides an original analysis of insider trading policies disclosed by companies in response to the new SEC disclosure rules.[47]

Drawing on an analysis of hand-collected insider trading policies from S&P 500 companies subject to the disclosure requirement, this Article finds two notable trends. First, blanket prohibitions remained prevalent, with an upward trend specifically targeting restrictions on trading stock of specified companies, such as suppliers or customers. Second, companies increasingly use corporate disclaimers that distance corporate liability from employees' insider trading violations.[48] The prevalent use of disclaimers is alarming, especially when combined with blanket prohibitions. In the wake of *Panuwat*, breaches of internal policies can be reframed as violations of fiduciary duty and increase enforcement risks for both companies and employees. Faced with these dynamics, companies may scale back proactive compliance efforts or adopt defensive strategies (e.g., disclaimers)[49] to shield themselves, often at the expense of their employees.

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[44] *See* Veronica Root, *The Compliance Process,* 94 IND. L.J. 203, 214 (2019).

[45] *See* David Lynn, *Shadow Insider Trading Back in the Spotlight*, THE CORPORATE COUNSEL (Feb. 23, 2024), https://www.thecorporatecounsel.net/blog/2024/02/shadow-insider-trading-back-in-the-spotlight.html ("Those companies that have the very broad formulation in their insider trading policies should revisit those policies to tighten up the prohibited conduct, so as not to create duties for employees that could potentially be seen as breached under the shadow insider trading concept.").

[46] *See infra* Part I.A. Corporate insider trading policies differ from bilateral contracts in both form and function because they are adopted unilaterally rather than negotiated between parties and reflect the company's institutional compliance posture rather than an aggregation of individual contractual undertakings such as nondisclosure agreements. *See* Kimberly D. Krawiec, *Fairness, Efficiency, and Insider Trading: Deconstructing the Coin of the Realm in the Information Age*, 95 NW. U. L. REV. 443 (2001); Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117, 130 (1982).

[47] Prior empirical and doctrinal analyses and discussions of insider trading policies have largely focused on Rule 10b5-1 plans, which provide an affirmative defense for insiders trading their employer's stock pursuant to a prearranged schedule, while other aspects of insider trading policies have received relatively little attention. This Article builds on those significant studies of Rule 10b5-1 plans but offers broader implications. Unlike Rule 10b5-1 plans, which are primarily utilized by Section 16 individuals—officers, directors, and beneficial owners of more than 10% of a company's equity securities—due to their regular access to material nonpublic information (MNPI) and the heightened scrutiny of their trading activities, the policies examined here apply to all employees. 15 U.S.C. § 78p (2023).

[48] *See, e.g.*, McKesson Corporation Insider Trading Policy (Last Revision Date: May 2, 2024) ("The Company's attorneys represent the Company and its affiliates, not individuals. The securities laws are complex, and you should consider seeking advice from your personal legal counsel about your decisions to trade in any Securities."); Brown-Forman Corporation Insider Trading Policy (Effective Jan. 23, 2024) ("Neither this Policy nor any action by the Company, the Securities Law Compliance Officer or any other employee or director pursuant to this Policy (or otherwise) constitutes legal advice or insulates an individual from liability under applicable securities laws.").

[49] *See* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1350 (1999) ("Many corporations simply purchase only the amount of compliance necessary to effectively shift liability away from the

The tension becomes particularly pronounced when a company explicitly states that its policy is merely a "guideline," effectively placing ultimate interpretive responsibility and liability on individual employees.[50] This raises a foundational question of how the breach of such a guideline can serve as the basis for triggering federal liability. More broadly, such defensive positioning risks discouraging employee engagement with internal compliance systems and, in turn, undermines the flow of information necessary for effective oversight.[51]

To address these challenges, this Article offers a framework for reform. First, in light of Panuwat, it recommends that companies should refine their insider trading policies. Specifically, it questions the use of blanket prohibitions and corporate disclaimers that deny employees any protection even when they disclose and obtain approval for trades as the same policy requires. These features may create additional legal and compliance risks, chill otherwise lawful employee trading, and discourage employees from using the internal compliance procedures that such policies are designed to promote. Second, and more fundamentally, it argues that courts should proceed with caution in extending insider trading liability based primarily on a breach of corporate policy. Federal insider trading law requires a breach of a duty of trust and confidence,[52] but it does not specify how far that duty extends. When a blanket prohibition effectively supplies the duty, a private company may determine the boundary of federal liability, and that boundary may vary across employers. Courts should consider declining to treat corporate policies as the primary basis for liability in trades beyond current and prospective business partners. [53] That restraint would help maintain insider trading liability grounded in clearer and more uniform legal principles.

This Article makes three key contributions. First, it develops a theoretical framework of insider trading spillover, clarifying the evolving tension between corporate self-regulation and the doctrinal boundaries of federal insider trading law. Second, it presents an original analysis of insider trading policies, assessing how internal compliance practices intersect with the theoretical framework and evaluating their broader legal and practical implications. Finally, it advances policy recommendations for companies in designing insider trading policies and for courts in clarifying the doctrinal reach of insider trading spillover.

The Article proceeds in four Parts. Part I examines the SEC's three major initiatives that have elevated the significance of corporate insider trading policies in the enforcement of insider trading violations. Part II provides an original analysis of insider trading policies disclosed by S&P 500

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firm."); Donald C. Langevoort, *Compliance as Liability Risk Management*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE (Benjamin van Rooij & D. Daniel Sokol eds., 2021), at 123 ("[T]he prevailing idea is that firms are expected to invest in precaution (i.e., compliance investments) up to a level where the marginal benefits in terms of diminished liability risk to the firm equal the marginal costs associated with such efforts.").

[50] *E.g.*, F5 Insider Trading Policy (the policy does not specify its effective date, but was filed with the SEC on Nov. 18, 2024)("The guidelines set forth in this Policy are *guidelines only*, and appropriate judgment should be exercised in connection with any trade in the Company's securities").

[51] *See* Vikramaditya S. Khanna, *What Rises from the Ashes?*, 47 J. CORP. L. 1029, 1038 (2022); Veronica Root Martinez, *The Government's Prioritization of Information over Sanction: Implications for Compliance*, 83 LAW & CONTEMP. PROBS. 85, 88 (2020); Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 954 (2009).

[52] *See* United States v. O'Hagan, 521 U.S. 642, 652 (1997) (explaining that misappropriation liability rests on using confidential information for securities trading in breach of a duty owed to the information's source); 17 C.F.R. § 240.10b5-2(a) (2026). *See also Expanding Misappropriation Theory to "Shadow" Insider Trading, supra* note 34 ("Although the misappropriation theory has critics…., it is now well-settled law.").

[53] *See infra* Figure 1.

companies after the implementation of mandatory disclosure rules, focusing on the scope of prohibited trading and the emergence of disclaimer provisions. Part III explores the chilling effect of insider trading spillover and details how overly broad insider trading policies erode internal compliance functions. Part IV offers policy recommendations for companies and courts to better balance the goals of robust compliance and market participation while ensuring that insider trading policies do not overreach or create unintended liabilities.

I. The Increasing Centrality of Insider Trading Policies

Both the SEC and the Department of Justice (DOJ) have sought to expand the boundaries of insider trading liability, but their distinctive enforcement roles subject them to different legal standards and burdens. Because the DOJ must meet a higher burden of proof in *criminal* prosecutions than the SEC does in *civil* enforcement actions,[54] the SEC has greater discretion in enforcing insider trading law and can take a more proactive role in shaping the evolving contours of insider trading liability,[55] while the DOJ tends to face greater constraints in criminal prosecution.[56]

The SEC's efforts to expand the boundaries of insider trading are not new,[57] but its multifaceted initiatives are generating powerful momentum. The three key components driving this expansion are: (1) the SEC's substantive rules imposing employer liability for failing to prevent their employees' insider trading violations; (2) its litigation strategy treating corporate policy violations as fiduciary duty breaches; and (3) its newly implemented disclosure requirements for insider trading policies. Each plays an indispensable role in reshaping the regulatory landscape. Their combined effect can broaden the practical reach of insider trading regulation and facilitate enforcement.

A. Corporate Liability as a Controlling Person

As part of the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA), Congress adopted Section 20(a) of the Securities Exchange Act of 1934, which established liability for

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[54] *See* Matthew E. Kaplan et al., *Insider Trading & Disclosure Update*, DEBEVOISE & PLIMPTON 3 (April 2024), https://www.debevoise.com/-/media/files/insights/publications/2024/04/april-2024-insider-trading-disclosure-update.pdf ("Given that the jury's *Panuwat* decision was based on a 'preponderance of the evidence' standard, it is unclear whether shadow insider trading claims will be extended to a criminal setting with the more rigorous 'beyond a reasonable doubt' requirement. However, it is likely that the SEC will continue to actively enforce insider trading laws, with this new tool in its belt.").

[55] *See* James J. Park, *The SEC as an Entrepreneurial Enforcer*, 119 NW. U. L. REV. 689, 689 (2024) (The SEC "now routinely avoids doctrinal limitations on the reach of Rule 10b-5 and brings cases that disagree with established precedent. One reason for this shift is the SEC's increasing emphasis on penalty collection. Another is that the SEC is advancing a more ambitious regulatory agenda."); A.C. Pritchard, *Insider Trading Law and the Ambiguous Quest for Edge*, 116 MICH. L. REV. 945, 947 (2018) ("[The SEC] enjoyed considerable success with its agenda in the lower courts, most notably the Second Circuit . . . the government got pushback, however, when the Justice Department deployed the prohibition in a criminal case.").

[56] *See, e.g.,* David Rosenfeld, *Current Trends in Insider Trading Prosecutions*, 26 U. PENN. J. BUS. L. 51, 87 (2023) ("It is also interesting that in Panuwat there were no parallel criminal charges showing that it is not always easier to bring criminal charges than civil ones.").

[57] *See* A.C. Pritchard, *Justice Lewis F. Powell, Jr. and the Counterrevolution in the Federal Securities Laws*, 52 DUKE L.J. 841, 930 (2003) ("These opinions reflect Powell's unease with the SEC's efforts to expand Rule 10b-5 through aggressive interpretation.").

controlling persons.[58] Under this provision, companies,[59] as controlling persons,[60] can be held liable for their employees' insider trading unless the companies can demonstrate that they acted in good faith[61] and did not induce the violations.[62] Controlling person liability is not strict liability and thus is not automatically imposed upon employees' violations.[63] Under Section 21A(b)(1) of the Securities Exchange Act of 1934, the SEC must establish that companies failed to prevent the violations:[64]

> (1) Liabilities of Controlling Persons. No controlling person shall be subject to civil penalties unless the Securities and Exchange Commission (SEC) establishes that:
>
> (A) such controlling person knew or recklessly disregarded the fact that the controlled person was likely to engage in the act or acts constituting the violation and ***failed to take appropriate steps to prevent*** such act or acts before they occurred; or
>
> (B) such controlling person knowingly or recklessly ***failed to establish, maintain, or enforce any policy or procedure*** required under section 15(f) of this title or section 204A of the Investment Advisers Act of 1940, and such failure substantially contributed to or permitted the occurrence of the act or acts constituting the violation. [65]

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[58] 15 U.S.C. § 78t(a) (2018)("Every person who, directly or indirectly, controls any person liable [for insider trading] . . . shall also be liable *jointly and severally* with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . *unless* the controlling person acted in good faith and did not directly or indirectly induce the violations.") (emphasis added).

[59] Controlling persons may also include individuals such as executives and directors, although enforcement against them is relatively rare. *Laxity at the Gates, supra* note 9 at 207-08 ("While the SEC recognizes that individual liability for gatekeepers is an effective way of promoting compliance with the law, the commission steadfastly refuses to bring enforcement actions premised on control person liability against individuals at large publicly-traded companies and investment firms.").

[60] *See* Alexander C. Drylewski, *Control Person Liability*, SKADDEN INSIGHTS (2022), https://www.skadden.com/-/media/files/publications/2022/11/control_person_liability.pdf?rev=c8f32bf659c743a790c5b81b2b8a1502. ("The term "control" is not defined in the statutes and courts have reached different conclusions as to what may constitute control.").

[61] *See* Michael Gilbert & Christopher Bosch, *SEC Insider Trading Case Presents Liability Risk for Employers*, BLOOMBERG LAW (July 31, 2024), https://news.bloomberglaw.com/us-law-week/sec-insider-trading-case-presents-liability-risk-for-employers ("This 'good faith' defense [under Section 20(a)] can be established by showing that reasonable measures were taken to prevent the violation, which may lead to a review of the adequacy of supervisory policies and procedures.").

[62] Given the availability of such defenses, controlling person liability does not constitute strict liability. *See* Ralph C. Ferrara & Diane Sanger, *Derivative Liability In Securities Law: Controlling Person Liability, Respondeat Superior, And Aiding And Abetting,* 40 WASH. & LEE L. REV. 1007, 1016 (1983) ("The [respondeat superior] doctrine, however, is not grounded on the employer's negligence or failure to supervise, and thus such defenses to liability as the employer's good faith or due diligence are not available.").

[63] Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997) (arguing that when a company's interests diverge from those of its employees, "the simple vicarious liability may no longer be the preferred corporate incentive regime . . . . Instead, the firm must be induced to take direct action to deter agents from committing wrongs, including measures to prevent misconduct and policing measures to detect and sanction it."); Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 950 (2017) ("Insider trading is a good example of behavior for which the employer faces only a small risk of secondary liability because of the entirely self-serving nature of the act; as a result, regulators have to demand that employers where there is a particularly high risk of insider trading (broker-dealers and investment advisers) adopt policies and procedures to generate compliance.").

[64] INSIDER TRADING LAW AND POLICY, *supra* note 5, at 169. ("Because the purpose of controlling person liability is to encourage employers and the like to supervise their employees so as to prevent violations by the latter, there is no need to show that the controlling person was involved in the wrongful conduct.").

[65] 15 U.S.C. § 78u-1(b)(1)(B) (1988).

Although Section 21A(b)(1)(B) explicitly imposes an affirmative duty to maintain such policies solely on brokers, dealers, and investment advisers,[66] the use of such policies to mitigate controlling person liability has become widespread among publicly traded companies.[67] Thus, "the presence of reasonably adequate procedures will render it more difficult for the SEC to establish recklessness on the part of controlling persons under Section 21A of the Exchange Act."[68] By explicitly linking liability to compliance efforts,[69] these provisions reflect regulatory intent to emphasize the role of companies in developing robust preventative frameworks that deter misconduct and promote corporate accountability.[70]

In response, most companies establish and maintain effective insider trading policies to prevent employees from violating insider trading laws[71] and to mitigate the risk of being held liable as controlling persons for the actions of employees they oversee.[72] Although commentators have expressed skepticism about the likelihood of SEC enforcement under Section 20(a), companies seem to treat the risk of controlling person liability seriously, at least in how they draft their policies. Some companies explicitly state that their insider trading policies are intended to serve as an affirmative defense to controlling person liability,[73] and 125 S&P 500 companies expressly invoke the term "controlling person liability" in their policies to emphasize the severity of potential penalties.[74] Such rigorous policies serve both to discipline employees and to signal to regulators and courts that the company has made substantial efforts to deter insider trading.[75] Such incentive mechanisms are

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[66] *Id.* Section 15(f) of the Exchange Act, 15 U.S.C. § 78o(f) (1988) (imposing affirmative duty on broker-dealers); Section 204A of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-4a (1988) (imposing affirmative duty on investment advisers).

[67] *See Solving the Paradox*, *supra* note 14, at 277. (based on a 1996 survey, "Most issuers have adopted strict insider trading compliance policies and procedures despite the fact that they are not expressly required to do so under the ITSFEA.").

[68] *Id.* Controlling person liability is a form of civil liability that can be enforced either by the SEC or through private litigation. 15 U.S.C. § 78t(a) (2018). Also, controlling person liability does not preclude liability under Rule 10b-5 and agency law, allowing them to operate concurrently in addressing securities law violations. *See* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 184 n.12 (1994) ("In addition, many courts, concluding that § 20(a)'s 'controlling person' provisions, 15 U.S.C. § 78t, are not the exclusive source of secondary liability under the Exchange Act, have imposed liability in § 10(b) actions based upon *respondeat superior* and other common-law agency principles.").

[69] Although Sections 21A(b)(1)(A) and 21A(b)(1)(B) serve as disjunctive triggers for controlling person liability, the failure to implement policies or procedures itself is often the most readily identifiable basis for liability—not just for 21A(b)(1)(B), but also as a direct support for the SEC to establish 21A(b)(1)(A). *Id.* ("The failure to adopt and implement effective insider trading compliance programs and procedures can sometimes stand as evidence of 'reckless disregard' under section 21A(b)(1)(A).") (citing William K. S. Wang & Marc I. Steinberg, INSIDER TRADING 884-85 (3d ed. 2010)).

[70] *Solving the Paradox, supra* note 14, at 277. ("The legislative history reflects that the intent behind ITSFEA was to 'increase the economic incentives' for controlling persons to 'supervise vigorously their employees.'") (quoting H.R. REP. NO. 100-910, at 17).

[71] *Control Person Liability*, *supra* note 60.

[72] *See, e.g.*, Medtronic Global Insider Trading Policy (no dates on the document) ("The insider trading policy is being adopted with the goal of helping . . . to protect the Company from controlling person liability.").

[73] *E.g.*, The Coca-Cola Company Global Insider Trading Compliance Policy, Section I. ("[T]he purpose of the Policy is to ensure that the Company itself fulfills its responsibility to comply with those laws by demonstrating that it has taken reasonable steps to prevent insider trading violations and to prevent even the appearance of improper insider trading."); ANSYS, Inc. Insider Trading Policy and Procedures, Section II. A. ("Board of Directors has adopted this Policy to satisfy the Company's obligation to reasonably supervise the activities of the Company and its personnel…").

[74] On file with author.

[75] *Strategic Compliance*, *supra* note 11, at 462; A.C. Pritchard & Robert B. Thompson, *Texas Gulf Sulphur and the Genesis of Corporate Liability Under Rule 10b-5*, 71 SMU L. REV. 927 (2018). By crafting and enforcing such policies, companies aim to protect themselves from being deemed negligent under Section 20(a). *See Laxity at the Gates*, *supra* note 9, at 205 ("Section

prevalent in practice, with a vast majority of S&P 500 companies often going even further by implementing blanket prohibitions in their insider trading policies as a defensive measure to signal their strong commitment to preventing employees' violations.[76]

This emphasis on companies' preventive measures and efforts is also consistent with the DOJ's strong emphasis on proactive compliance.[77] The SEC's enforcement division also considers a company's self-policing and self-regulation through its compliance program when making enforcement decisions.[78] A company's cooperation with the SEC is not limited to cooperation after the violation is revealed, and the SEC retroactively examines whether the company is responsible for failing to prevent the violation.[79] Thus, companies have incentives to implement rigorous policies to make a strong argument that they could not have foreseen the egregious behavior despite their utmost efforts to prevent it.[80]

B. Policy Breach and the Potential Expansion of Enforcement

The SEC's second, yet most impactful, initiative involves its successful use of corporate internal policies to charge an employee with an insider trading violation for trading in a peer company's stock.[81] The scope of illegal insider trading has primarily been shaped through judicial decisions,[82] resulting in the development of two key theories of liability: the classical theory and the misappropriation theory.[83] This Section examines how the SEC's new strategy in *Panuwat* potentially has a broader impact than shadow trading.

1. The Classical and Misappropriation Theories of Insider Trading Liability

Under current federal common law doctrines, insider trading liability turns on a breach of fiduciary duty of trust and confidence.[84] Without such a breach, trading based on an informational

20(a) of the Securities Exchange Act encompasses control person liability in the private as well as the SEC enforcement setting.").

[76] *Strategic Compliance*, *supra* note 11.

[77] Existence of an effective compliance program "at the time of misconduct" is one of three necessary conditions, along with self-reporting and cooperation, for declining prosecution even when misconduct relates to aggravating factors. *See* U.S. DEP'T OF JUST., 9-47.120 – CRIMINAL DIVISION CORPORATE ENFORCEMENT AND VOLUNTARY SELF-DISCLOSURE POLICY 1-2 (2023), https://www.justice.gov/criminal-fraud/file/1562831/download; *see also*, *Compliance Process, supra* note 44, at 215 ("Interestingly, the Organizational Guidelines, while technically applicable only to criminal enforcement actions, have become an important tool that prosecutors and regulators utilize to encourage corporations engaged in misconduct to settle claims through the use of civil enforcement actions.").

[78] Gurbir S. Grewal, *"The Five Principles of Effective Cooperation in SEC Investigations," Remarks at Securities Enforcement Forum West 2024*, SEC SPEECH (May 23, 2024), https://www.sec.gov/newsroom/speeches-statements/grewal-remarks-securities-enforcement-forum-west-052324.

[79] *Id.*

[80] *Cf. Laxity at the Gates, supra* note 9, at 208 (the SEC "steadfastly refuses to bring enforcement actions premised on control person liability against *individuals* at large publicly-traded companies and investment firms") (emphasis added).

[81] *See* Tami Stark et al., *"Novel" or Not: the SEC and DOJ's Expansion of Insider Trading to "Shadow Trading" and 10b5-1 Plans Survive Their Days in Court*, WHITE & CASE (Apr. 16, 2024), https://www.whitecase.com/insight-alert/novel-or-not-sec-and-dojs-expansion-insider-trading-shadow-trading-and-10b5-1-plans ("As courts are now showing a willingness to accept the SEC and DOJ's expansion of insider trading activity to "shadow trading" and 10b5-1 plans, it may be time for public companies and other entities to reconsider their insider trading policies.").

[82] *See supra* note 9.

[83] *See Ambiguous Quest for Edge*, *supra* note 55, at 947-48.

[84] It is important to acknowledge that the extensive body of insider trading doctrines and scholarship cannot be summarized in several paragraphs. For a more detailed analysis, *see generally*, Stephen M. Bainbridge, INSIDER TRADING

advantage itself is not illegal.[85] In *Chiarella v. United States*, the Supreme Court rejected a broad parity-of-information rule, holding that insider trading liability arises only when a trader breaches a fiduciary duty owed to the counterparties to the trade, namely shareholders from whom the trader buys or to whom the trader sells the securities.[86] This "classical theory" became the foundation of insider trading liability for corporate insiders and temporary insiders who traded the corporation's stock, but it turned out to be underinclusive because it left many cases involving outsiders beyond its reach. [87]

United States v. O'Hagan illustrates this doctrinal gap. [88] In this landmark case, O'Hagan, a partner at a law firm whose client (Grand Met) planned a tender offer for Pillsbury, traded Pillsbury stock and call options before the tender offer was announced, earning more than $4 million. Because he owed no fiduciary duty to Pillsbury's shareholders, the classical theory of insider trading did not apply. To fill this doctrinal void, the SEC advanced the misappropriation theory, which extends insider trading liability to trading on nonpublic information in breach of a duty owed to the source. Under this theory, the deception lies in betraying the trust of the source of information rather than defrauding the counterparties to the trade.[89] O'Hagan breached the duty of trust and confidence owed to the source of the information (his employer *and* its client, Grand Met) by misusing confidential information for personal gain without disclosing it.[90]

The Supreme Court has explained that these two theories for insider trading liability are complementary.[91] In both frameworks, the essential predicate for liability is the existence and breach of a fiduciary or fiduciary-like duty. Despite these seemingly straightforward doctrines, their application has not been clear. The following Sections show how the SEC's new strategy in its enforcement action has complicated the application of the misappropriation theory of insider trading liability.

2. Extending the Reach of the Misappropriation Theory: *SEC v. Panuwat*

LAW AND POLICY (2d ed. 2023); A.C. Pritchard & Robert B. Thompson, A HISTORY OF SECURITIES LAW IN THE SUPREME COURT, 126-67 (2023); John P. Anderson, INSIDER TRADING: LAW, ETHICS, AND REFORM (2018).

[85] *See* Merritt B. Fox, Lawrence R. Glosten & Gabriel V. Rauterberg, *Informed Trading and Its Regulation*, 43 J. CORP. L. 817, 861-68 (2018)

[86] Chiarella v. United States, 445 U.S. 222, 227 (1980); *see* Donald C. Langevoort, *Insider Trading and the Fiduciary Principle: A Post-*Chiarella *Restatement*, 70 CALIF. L. REV. 1, 3 (1982) ("*Chiarella* has made the fiduciary principle a consideration of utmost importance.").

[87] *See, e.g.*, Ian Ayres & Stephen Choi, *Internalizing Outsider Trading*, 101 MICH. L. REV. 313 (2002); Bruce H. Kobayashi & Larry E. Ribstein, *Outsider Trading as an Incentive Device*, 40 UC DAVIS L. REV. 21 (2006); Victor Brudney, *Insiders, Outsiders, and Informational Advantages under the Federal Securities Laws*, 93 HARV. L. REV. 322 (1979).

[88] United States v. O'Hagan, 521 U.S. 642, 653 (1997).

[89] *Cf.* Zachary J. Gubler, *A Unified Theory of Insider Trading Law*, 105 GEO. L. J. 1225 (2017) (arguing that insider trading liability should be unified under the misappropriation theory, with liability turning on deception of the source of information rather than the fragmented classical framework).

[90] *Id.*

[91] *United States v. O'Hagan*, 521 U.S. 642, 653 (1997) ("The two theories are complementary, each addressing efforts to capitalize on non-public information through the purchase or sale of securities.").

In *SEC v. Panuwat,*[92] the SEC alleged that Mr. Panuwat used material nonpublic information (MNPI) about his employer, Medivation, to purchase call options of Incyte, [93] a "peer" company.[94] As Mr. Panuwat was an outsider to the traded company (Incyte), it was essential for the SEC to establish that he owed a fiduciary duty to the source of information, and he breached that duty. The SEC primarily relied on Medivation's insider trading policy in applying the misappropriation theory, which prohibited employees from trading in the stock of any other company based on material nonpublic information.[95] It argued that Panuwat's trading constituted a breach of the policy, which in turn represented a violation of the fiduciary duty of trust and confidence owed to the source of the information—his employer, Medivation. [96] Even though the SEC listed agency law, a confidentiality agreement, and the corporate policy as independent grounds for breach of fiduciary duty, commentators have suggested that the SEC would have been unlikely to succeed against Mr. Panuwat without relying on the policy provision.[97]

Notably, there was no direct relationship between Medivation and Incyte, and the companies did not view each other as competitors.[98] Instead, the SEC's materiality argument rested on a 'between two companies, based on the claim that Pfizer's proposed acquisition of Medivation was likely to increase Incyte's stock price because both were mid-sized oncology pharmaceutical companies that the market could view as comparable acquisition targets.[99] Much of the discourse on *Panuwat* has therefore focused on shadow trading, [100] particularly because it was "the first trial based on alleged insider trading in a peer company" in which the trader used information about the trader's employer.[101]

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[92] Complaint, SEC v. Panuwat, No. 21-cv-06322 (N.D. Cal. Aug. 17, 2021).

[93] *See* Patrick Augustin, Menachem Brenner & Marti G. Subrahmanyam, *Informed Options Trading Prior to Takeover Announcements: Insider Trading?* 65 MGMT. SCI. 5697 (2019) (finding that about 25% of all U.S. takeovers between 1996 and 2012 had positive abnormal trading volumes in target companies' equity options before the announcement, but the SEC litigates only about 8% of them for alleged insider trading).

[94] For the boundaries of "peers," *see infra* Part II.B.2.

[95] Medivation's insider trading policy states that "[Y]ou may receive important information that is not yet publicly disseminated . . . about the Company [Medivation]. . . or the securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers, or competitors of the Company. . . . For anyone to use such information to gain personal benefit . . . is illegal." Order denying defendant's motion to dismiss, SEC v. Panuwat, No. 21-cv-06322, 2022 WL 633306 (N.D. Cal. Jan. 14, 2022).

[96] The SEC identified three grounds for insider trading liability in *Panuwat*: a violation of an internal insider trading policy, a breach of a confidentiality agreement, or a breach of fiduciary duty under agency law. Among these, the insider trading policy was the primary focus and the most heavily contested throughout the proceedings. Complaint, SEC v. Panuwat, No. 21-cv-06322 (N.D. Cal. Aug. 17, 2021). *Cf.* The SEC did not rely on Rule 10b5-2 to establish Panuwat's fiduciary duty. 17 C.F.R. § 240.10b5-2 (2019).

[97] *See, e.g.*, John P. Anderson, *Rethinking Insider Trading Compliance Policies in Light of the SEC's New "Shadow Trading" Theory of Insider Trading Liability* 24 TENN. J. BUS. L. 413, 430 (2023) ("[H]ad that language [narrowly limiting trading prohibition to the company's customers and suppliers] been in Medivation's compliance policy, there's no way the SEC could have brought this case…"); J. W. Verret & Greg Lawrence, *Introduction to SEC v. Panuwat: Understanding "Shadow" Insider Trading,* working paper (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4792069 ("It is unclear whether the SEC's theory would have survived summary judgment or the verdict if not for that broad firm policy…").

[98] *See* Order denying defendant's motion for summary judgment, SEC v. Panuwat, 702 F. Supp. 3d 883, 10 (N.D. Cal. Nov. 20, 2023) (No. 21-cv-06322).

[99] For a detailed timeline of the proceeding, *see infra* Part II.A.

[100] *See* Verret & Lawrence, *supra* 97; *Extending 10b5-1 Plans to Cover Shadow Trading, supra* note 25, at 1077-80.

[101] SEC, *SEC Announces Enforcement Results for Fiscal Year 2024*, Immediate Release 2024-186 (Nov. 22, 2024), https://www.sec.gov/newsroom/press-releases/2024-186.

The case's implications, however, can extend beyond this specific practice of shadow trading to "policy breach trading." This framework is particularly relevant given the prevalence of blanket prohibitions, which define the scope of prohibited trading more broadly than shadow trading. [102] Since the SEC's argument in *Panuwat* effectively elevated a violation of an internal insider trading policy to a breach of fiduciary duty under federal securities laws,[103] this expansion can significantly broaden potential liability for employees. [104] This interpretation blurs the traditional boundary between private governance and public regulation, potentially creating chilling effects on employee trading and subjecting both companies and their employees to heightened scrutiny and liability.[105]

In the order denying summary judgment, the court reasoned that the breach of the corporate policy alone "would be sufficient to meet the breach element of misappropriation."[106] The court later reiterated this view in its order on post-trial and remedies motions, noting that the corporate policy represented an independent way to establish the requisite duty.[107] By successfully treating a policy violation as sufficient to establish a fiduciary duty, the SEC substantially expanded the legal framework for insider trading liability.[108] This approach risks delegating greater regulatory power to companies, effectively privatizing aspects of federal securities laws.[109] As insider trading policies become more comprehensive—often prohibiting trading in competitors' or peers' securities—employees may find themselves navigating increasingly expansive and ambiguous boundaries of liability.

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[102] *See infra* Parts II.B.1 -2.

[103] *See, e.g.*, Gerald Hodgkins et al., *Recent SEC "Shadow Trading" Case Signals Potential Expansion of Insider Trading Law*, COVINGTON ALERT (May 8, 2024), https://www.cov.com/en/news-and-insights/insights/2024/05/recent-sec-shadow-trading-case-signals-potential-expansion-of-insider-trading-law ("Because of Medivation's particular insider trading policy, the SEC was able to argue that using the information regarding Pfizer's acquisition of Medivation to trade Incyte securities breached his duty to Medivation.").

[104] Although *Panuwat* was the first case where a court recognized the validity of the internal *expansion* of insider trading prohibition under misappropriation theory, its doctrinal implication of such expanded insider trading prohibition has been theoretically alluded to. *See, e.g.*, Ian Ayres & Joe Bankman, *Substitutes for Insider Trading*, 54 STAN. L. REV. 235, 239 (2001) (noting that under the misappropriation theory, "[a]n employee is a fiduciary of her employer. If a company explicitly prohibits its employees from using nonpublic information to trade in another company's stock, an employee who violates that prohibition will violate Section 10(b)").

[105] *See infra* Part III.

[106] Order denying defendant's motion for summary judgment, SEC v. Panuwat, 702 F. Supp. 3d 883, 15-16 (N.D. Cal. Nov. 20, 2023) (No. 21-cv-06322) ("The SEC advances three separate theories of how Panuwat breached a duty of trust and confidence to Medivation. I conclude that there is evidence that he breached a duty under all three; *any one would be sufficient* to meet the breach element of misappropriation…")(emphasis added). In this case, the other two theories rested on agency law and a confidentiality agreement, but the policy-breach theory affords the SEC significant evidentiary advantages.

[107] Order on Post-Trial and Remedies Motions, *supra* note 28.

[108] *Cf.* Michael A. Perino, *Real Insider Trading*, 77 WASH. & LEE L. REV. 1647 (2020) (analyzing a dataset of 465 defendants and finding that insider trading enforcement overwhelmingly targets routine, easily provable "heartland" cases rather than expanding the doctrine), which makes the expansion in *SEC v. Panuwat* a notable departure that came as a surprise to market participants.

[109] The privatization concern here arises from reliance on internal trading restrictions that companies formulate unilaterally and impose as compliance obligations. These policies may help supply the duty predicate for federal insider-trading liability. This differs from proposals to replace liability under the federal misappropriation theory with enforcement of express agreements under state contract law. *Cf.* Kimberly D. Krawiec, *Privatizing "Outsider Trading,"* 41 VA. J. INT'L L. 693 (2001). Even when employees acknowledge or agree to those policies, the concern remains that privately drafted trading restrictions acquire consequences under federal law beyond internal discipline or contractual remedies.

3. Beyond Shadow Trading: Policy Breach Trading

Some commentators treat *SEC v. Bechtolsheim* as the second SEC enforcement action based on the theory of "shadow trading," where an individual trades in the stock of a company with which they have no relationship.[110] Mr. Bechtolsheim, the founder and former chairman of Arista Networks, spoke with a senior manager at Tech Company A under a non-disclosure agreement (NDA)[111] that bound the parties to keep the information they exchanged confidential. During the conversation, Bechtolsheim learned about Cisco's acquisition of Acacia Communications.[112] Neither Cisco nor Acacia had any relationship with the trader's employer. He then purchased Acacia options through third-party brokerage accounts based on that material nonpublic information. When the acquisition was announced, he profited over $400,000.[113]

Beyond the clear violation of the NDA, the SEC's charges against Bechtolsheim also relied on his violation of Arista's insider trading policy,[114] which prohibited the use of material nonpublic information about any third-party companies, such as vendors or business partners.[115] Although the trading policy was not a contract like the NDA, Bechtolsheim's formal acknowledgment and training on the policy were sufficient for the SEC to argue that he knowingly violated it.[116] Bechtolsheim's settlement terms, including a $923,740 penalty and a five-year officer/director ban, underscore the seriousness with which the SEC views such violations.[117]

That characterization of Bechtolsheim as a shadow trading case is questionable. Not all trading in unrelated companies' stock is shadow trading. After all, in *Bechtolsheim*, the trader had direct information about the traded company. This case is better understood as reinforcing the emerging concept of "policy breach trading." In this case, Bechtolsheim's conduct also violated an NDA,[118] a clear contractual basis for the asserted duty. Yet the SEC went further by presenting the blanket prohibition in Arista's policy as an independent basis for federal liability. The more often the SEC

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[110] *See, e.g.*, Hunter Bezner, Jessica B. Magee & Allison Kernisky, *Shady Days: SEC Secures Another Insider Trading Stat on Shadow Trading Theory*, HOLLAND & KNIGHT (Jun. 11, 2024), https://www.hklaw.com/en/insights/publications/2024/06/shady-days-sec-secures-another-insider-trading-stat-on ("The settlement is notable as the second instance of the SEC bringing an enforcement action for insider trading under the so-called 'shadow trading' theory."); Michael L. Charlson et al., *Out from the Shadows: The SEC Succeeds on Shadow Insider Trading Theory*, VINSON & ELKINS (Apr. 15, 2024), https://www.velaw.com/insights/out-from-the-shadows-the-sec-succeeds-on-shadow-insider-trading-theory/ ("Companies should review their insider trading policies…in light of the SEC's increasing focus on the "shadow trading" theory and the importance of the wording of employer policies in both *Panuwat* and the Bechtolsheim Complaint.").

[111] SEC v. Bechtolsheim, Civ. Action No. 5:24-cv-01845, at 4 (N.D. Cal. filed Mar. 26, 2024) (complaint).

[112] *Id.*

[113] *Id.* at 2.

[114] *Id.* at 5.

[115] *Id.*

[116] *Id.*

[117] SEC, *SEC Charges Former Arista Networks Chairman Andy Bechtolsheim with Insider Trading* (Mar. 26, 2024), https://www.sec.gov/enforcement-litigation/litigation-releases/lr-25955.

[118] *Cf.* United States v. Chow, 993 F.3d 125 (2d Cir. 2021). *See* Susanna M. Buergel et al., *Second Circuit Reaffirms That Standard Confidentiality Agreements Can Create a Relationship of Trust and Confidence for Insider Trading Purposes*, PAUL WEISS CLIENT MEMORANDUM (May 25, 2021), https://www.paulweiss.com/media/3981129/second_circuit_reaffirms_that_standard_confidentiality_agreements_can_create_a_relationship_of_trust_and_confidence_for_insider_trading_purposes.pdf (This case "confirms that, at least in the Second Circuit, a standard NDA—even one that lacks an explicit prohibition against trading—is sufficient to impose a duty not to trade on MNPI and not to pass on MNPI to someone else who trades on the information.").

relies on this strategy, the more firmly corporate policies may become established as freestanding sources of duty, eventually even in cases lacking a comparably strong contractual basis, such as an NDA.

Figure 1 below illustrates the spectrum of insider trading, ranging from traditional insider trading, which involves trading in the securities of one's own employer or current or prospective business partners, to shadow trading, where employees trade securities of competitors or peers that have a market connection with their own companies. At the broadest level, policy breach trading encompasses trading in any company's securities in violation of an employer's internal policies, even when no market connection exists between the two firms. [119]

Figure 1. A Spectrum of Insider Trading under Misappropriation Theory



The SEC's successful reliance in *Panuwat* on policy breach trading to establish the requisite duty signals a broader regulatory development with significant implications for corporate compliance and securities law. [120] Companies with blanket prohibitions in their insider trading policies can be positioned as *de facto* enforcers of federal law, which blurs the line between internal governance and public enforcement. Responding to the concerns about the expansion, the *Panuwat* court explained that "[s]cienter and materiality provide sufficient guardrails to insider trading liability."[121] But because insider trading defendants frequently opt to settle rather than litigate, [122] courts often have no opportunity to determine whether the information at issue was in fact material[123] or whether the trader

[119] Order denying defendant's motion for summary judgment, SEC v. Panuwat, 702 F. Supp. 3d 883, 8-10 (N.D. Cal. Nov. 20, 2023) (No. 21-cv-06322).
[120] Reed Brodsky et al., *SEC Successfully Prosecutes Novel "Shadow Trading" Theory at Trial*, GIBSON DUNN CLIENT ALERT (Apr. 10, 2024), https://www.gibsondunn.com/sec-successfully-prosecutes-novel-shadow-trading-theory-at-trial/ ("[T]he successful prosecution of Mr. Panuwat has armed the federal government with a powerful new precedent.").
[121] Order denying defendant's motion to dismiss, SEC v. Panuwat, No. 21-cv-06322, 2022 WL 633306 (N.D. Cal. Jan. 14, 2022).
[122] *See* Verity Winship & Jennifer K. Robbennolt, *An Empirical Study of Admissions in SEC Settlements*, 60 ARIZ. L. REV. 1 (2018); Stephen J. Choi, *Measuring the Impact of SEC Enforcement Decisions*, 89 FORDHAM L. REV. 385 (2020); Urska Velikonja, *Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901 (2016).
[123] *See* Joan MacLeod Heminway, *Just Do It! Specific Rulemaking on Materiality Guidance in Insider Trading*, 72 LA. L. REV. 999, 1013–14 (2012); Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 AM. U. L. REV. 1131, 1190–91 (2003).

acted with the requisite scienter. [124] Thus, those supposed guardrails may provide only limited practical constraint on the expansive reach of blanket prohibitions in federal enforcement actions.

Furthermore, the reliance on insider trading policies as enforcement tools may have unintended consequences. As uncertainty grows over what constitutes permissible trading, risk-averse employees may refrain from trading altogether. [125] Over-deterrent compliance efforts can, in turn, expose companies to greater liability risks for insider trading violations, thereby creating incentives to narrow the scope of prohibited trading in their policies.[126] The recent cases of *Panuwat* and *Bechtolsheim* illustrate the SEC's evolving enforcement strategy, from addressing shadow trading to broadening the concept of policy breach trading. These developments highlight the growing importance of insider trading policies as instruments of federal enforcement, extending beyond their traditional role as internal compliance tools.

C. The SEC's Disclosure Mandate for Insider Trading Policies

The SEC's third initiative, which elevated the prominence of insider trading policies, is its newly adopted rule requiring companies to disclose whether they have such policies.[127] Under the SEC's "comply or explain" framework, however, companies are required to disclose only the existence or absence of an insider trading policy, and are not required to adopt any particular policy or to conform to a prescribed standard. If a company has not adopted such policies, it must explain why.[128] Companies with calendar-year fiscal periods had to comply with these requirements for the first time in their 2024 Form 10-K filings, which were submitted in early 2025. [129] The failure to implement an insider trading policy itself may expose a company to SEC enforcement actions,[130] highlighting the growing regulatory emphasis on formalized compliance frameworks.[131]

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[124] *E.g.*, S.E.C. v. Bechtolsheim, Civ. Action No. 5:24-cv-01845 (N.D. Cal. filed Mar. 26, 2024).

[125] *See* John P. Anderson, Jeremy L. Kidd & George A. Mocsary, *Public Perceptions of Insider Trading*, 51 SETON HALL L. REV. 1035, 1079–80 (2021) ("[C]hilling effect of insider trading enforcement may thus have a greater impact on market participation than does the activity that it seeks to prevent."); Restrepo, *supra* 37.

[126] *See infra* Part III.B.1.

[127] 17 C.F.R. § 229.408(b). SEC Rule Release, *supra* note 41 ("The securities laws' antifraud prohibitions that proscribe insider trading, including Section 10(b) of the Exchange Act, play an essential role in maintaining the fairness and integrity of our securities markets . . . . [Insider trading] harms not only individual investors but also undermines the foundations of our markets by eroding investor confidence.").

[128] *Id.* This disclosure requirement applies to annual reports on Form 10-K, proxy statements on Schedules 14A and 14C, and, for foreign private issuers, on Form 20-F. 17 C.F.R. § 229.408(b).

[129] Insider Trading Arrangements and Related Disclosures, *supra* note 41, at 80362-63. *See* Harold Halbhuber & Katya Bogdanov, *Refreshing Insider Trading Policies Ahead of Mandatory Public Disclosure*, SHERMAN & STERLING MEMORANDUM (Dec. 24, 2023), https://corpgov.law.harvard.edu/2023/12/24/refreshing-insider-trading-ahead-of-mandatory-public-disclosure/ ("This disclosure and filing requirement will apply for the first time to the annual report covering the first full fiscal period beginning on or after April 1, 2023. This means that calendar year reporters will first be required to provide this disclosure and file their insider trading policies with the SEC in 2025, with the Form 10-K or 20-F for 2024.").

[130] SEC Charges Sound Point Capital Management for Compliance Failures in Handling of Nonpublic Information, SEC IMMEDIATE RELEASE 2024-106 (Aug. 26, 2024), https://www.sec.gov/newsroom/press-releases/2024-106?utm_medium=email&utm_source=govdelivery (Sound Point agreed to pay $1.8 million civil penalty to settle the SEC's charges that the company "did not establish, maintain, or enforce any written policies or procedures concerning the potential impact of MNPI about the loans in the third party-managed CLOs until June 2024.").

[131] *See* DOJ, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (2024), https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl?inline.

In the final rule, the SEC stated that the purpose of the new disclosure requirement is "to provide investors with comprehensive information regarding a registrant's insider trading policies and procedures to enable investors to better assess the manner in which the registrant promotes compliance with insider trading laws and protects MNPI from misuse."[132] Unlike related party transaction policies[133] and clawback policies,[134] which are also subject to the SEC's mandatory disclosure rule but apply only to a small group of individuals with significant control over the company, insider trading policies apply universally to all employees at every level.

Also, the SEC made a key modification to the final rule from its original proposal based on public feedback on the location of the disclosure.[135] Originally, the proposal required companies to disclose their insider trading policies as a stand-alone document in their annual filings. Commenters such as Dow, Davis Polk, and SIFMA argued that this requirement would impose an undue administrative burden on companies by demanding separate disclosures within the body of these filings.[136] In response, the SEC allowed a more flexible approach. The final rule now permits companies to meet this requirement by including insider trading policies within their code of ethics. If the insider trading policies are entirely contained in the company's code of ethics, filing the code as an exhibit can fulfill the insider trading disclosure requirement.[137]

This disclosure rule has elevated insider trading policies from internal governance tools to public-facing instruments of corporate accountability, subject to heightened scrutiny from both regulators and investors. Companies no longer have the option to remain in the dark about their insider trading policies by strictly keeping them internal.[138] Instead, they must now make deliberate and transparent choices about the scope of prohibited activities, and those decisions may shape their internal compliance framework as well as their regulatory and reputational risks.[139] Policies that are too narrow may fall short of the enforcement authorities' expectations for robust compliance

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[132] Insider Trading Arrangements and Related Disclosures, *supra* note 41, at 80384.
[133] 17 C.F.R. §229.404(b)(1) (2023).
[134] 17 C.F.R. pts. 229, 240, 249, and 274 (2023); Keith L. Halverstam et al., *SEC Clawback Rules: Practical Considerations and FAQs*, LATHAM & WATKINS CLIENT ALERT (Oct. 20, 2023), https://www.lw.com/admin/upload/SiteAttachments/SEC-Clawback-Rules-Practical-Considerations-and-FAQs.pdf ("From a governance perspective and in order to be responsive to institutional investors and advisory firms, many companies are choosing to retain the broader aspects of their existing clawback policies, either by retaining their existing policies as a separate policy or by integrating these broader aspects and the SEC Clawback Rules into one policy. With either approach, companies should retain any discretion afforded to the board of directors and administrators in respect of any retained aspect of an existing policy that goes beyond the SEC Clawback Rules.").
[135] Insider Trading Arrangements and Related Disclosures, *supra* note 41, at 80385.
[136] *Id.* at 80384-85.
[137] In the final rule, the SEC addressed the issue. ("*If all of the registrant's insider trading policies and procedures are included in its code of ethics* . . . and . . . is filed as an exhibit pursuant to Item 406(c)(1), a hyperlink to that exhibit, accompanying the issuer's disclosure as to whether it has insider trading policies and procedures, would satisfy this component of the exhibit filing requirement.") (emphasis added). *See*, Insider Trading Arrangements and Related Disclosures, *supra* note 41, at 80385.
[138] *See* Harold Halbhuber & Katya Bogdanov, *Refreshing Insider Trading Policies Ahead of Mandatory Public Disclosure*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 24, 2023), https://corpgov.law.harvard.edu/2023/12/24/refreshing-insider-trading-ahead-of-mandatory-public-disclosure/ ("Now is a good time for companies to start getting their policies "camera ready" for 2025. Companies will want to allow for sufficient lead time for review and input from advisers and stakeholders before policies are exposed to public scrutiny.").
[139] *Id.*

efforts,[140] whereas overly broad policies risk imposing overreaching liability and operational burdens.[141]

II. Insider Trading Policies in Practice

Part I examined the evolving developments in insider trading law that have created conflicting pressures for companies drafting their internal insider trading policies. On the one hand, companies have had incentives to adopt stringent policies that demonstrate regulatory diligence and reduce liability risks. On the other hand, overly restrictive policies can inadvertently expose both employers and employees to increased liability risks after *Panuwat*.[142] Balancing these competing incentives has become a critical yet increasingly complex task for companies. The SEC's recent disclosure mandate has further amplified this challenge by requiring public companies to disclose their insider trading policies or explain why they have not adopted one.

Analyzing how companies adjusted their insider trading policies in response to these regulatory shifts is crucial for assessing the impact of *Panuwat*.[143] Corporate responses can reveal whether these policies achieve their intended goal of enhancing compliance or inadvertently lead to increased violations. If most companies responded by narrowing the scope of prohibited trading, instances where an internal insider trading policy breach leads to federal insider trading law violations would be rare. These insights are critical for evaluating the evolving landscape of insider trading law and its practical implications for corporate governance and regulatory enforcement.

A. Timeline and Data Collection

This Article presents an original empirical analysis of insider trading policies from S&P 500 companies, using a hand-collected dataset that tracks the same set of companies from October 2022 to July 2025.[144] With the 2025 proxy season marking the first time companies are required to file insider

[140] *Id.* ("Companies will want to consider the SEC's court-affirmed stance on shadow trading when updating their own insider trading policies.").

[141] *Id.* ("Companies should be mindful, however, that so sharpening their policies may have consequences for their insiders.").

[142] In *Panuwat*, the SEC successfully argued that an employee's trading of third-party stock violated a fiduciary duty, relying on Medivation's broadly worded insider trading policy, which prohibited trading in securities of "any other publicly traded company" using material nonpublic information. Order denying defendant's motion to dismiss, SEC v. Panuwat, No. 21-cv-06322, 2022 WL 633306 (N.D. Cal. Jan. 14, 2022).

[143] For instance, if most insider trading policies narrowly prohibit trading only in an employer's stock, it would be significantly harder for the SEC to establish that trading in third-party securities constitutes a policy breach. Conversely, policies that prohibit trading in securities of unrelated companies based on material nonpublic information—whether due to market connectivity or other factors—may unintentionally broaden the scope of insider trading liability in ways that courts and regulators have yet to clearly define.

[144] Industry surveys provide smaller-scale observations on a broad range of insider trading policy features under the new disclosure regime. *E.g.*, Elizabeth Ising et al., *Survey of S&P 100 Insider Trading Policies in Year One of the SEC's Insider Trading Exhibit Requirement*, GIBSON DUNN (Oct. 9, 2025)(finding that 21% of S&P 100 companies specifically address "shadow trading" in their insider trading policies, although the approaches vary across policies), https://www.gibsondunn.com/wp-content/uploads/2025/10/survey-of-insider-trading-policies-filed-by-s-p-100-companies-10.09.25.pdf; Maia Gez et al., *Insider Trading Policies: A Survey of Recent Filings*, WHITE & CASE (Oct. 13, 2025) (reporting increased use of prohibitions on trading in the stock of "economically linked" companies in a survey of 50 policies from companies of various sizes and industries), https://www.whitecase.com/insight-alert/insider-trading-policies-survey-of-recent-filings.

trading policies annually with the SEC,[145] this dataset captures corporate behavior during a critical transitional period. It offers a granular view of how companies adjusted their internal policies in response to evolving regulatory developments.

For the pre-mandatory disclosure period, insider trading policies were collected from corporate websites.[146] If companies posted stand-alone insider trading policies on their websites, those stand-alone policies were coded. When stand-alone insider trading policies were unavailable, insider trading provisions within their codes of ethics were analyzed instead.[147] To preserve historical accuracy, all policies, whether stand-alone or parts of the code of ethics, were archived as PDFs.[148] By contrast, the post-mandatory disclosure rule data was sourced from Exhibit 19 attached to annual filings (Form 10-K) on the SEC's EDGAR database, as required by the new disclosure rule.[149]

This Article's primary empirical contribution is its in-depth analysis of insider trading policies, with a focus on the scope of prohibited trading, which has emerged as a central issue in light of recent developments in insider trading law.[150] Despite its importance, the specific internal policy term that defines *which securities employees are prohibited from trading* has largely been overlooked in prior scholarship until *Panuwat* brought it to the forefront.[151] This is the first academic Article to systematically examine the scope of prohibited trading in insider trading policies under the SEC's new disclosure regime, which improves the comparability of the underlying data. Because most companies now attach stand-alone insider trading policies pursuant to the new rule, the available source material is more detailed and standardized, and concerns about comparisons across insider trading policies collected from different types of corporate documents are substantially reduced.[152]

Figure 2 below provides a detailed timeline of critical developments, including case proceedings, rulemaking actions, and data collection points. These milestones serve as the basis for

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[145] *See* Insider Trading Arrangements and Related Disclosures, 87 Fed. Reg. 80362, 80385 (Dec. 29, 2022) (codified at 17 C.F.R. pts. 229, 232, 240, 249).

[146] For related research that systematically collected and analyzed internal corporate policies from companies' websites, see Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 CALIF. L. REV. 1097 (2020); *Strategic Compliance*, *supra* note 11.

[147] All sample companies adopted and disclosed a code of ethics, as required by major U.S. stock exchange rules for listed companies. *See, e.g.*, NYSE Listed Company Manual Section 303A.10 ("Listed companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees . . . ."); NASDAQ Listing Rule 5610 ("Each Company shall adopt a code of conduct applicable to all directors, officers, and employees, which shall be publicly available . . . satisfying this rule must comply with the definition of a 'code of ethics" set out in Section 406 (c) of the Sarbanes-Oxley Act of 2002 and any regulations promulgated thereunder by the Commission.").

[148] On file with author.

[149] 17 CFR 229. 601 (b)(19).

[150] *See supra* I. B.

[151] *Cf. Shadow Trading*, *supra* note 24. The prior research identified the existence of shadow trading but defined it narrowly, limiting it to trades in stock of "business partners and competitors." Examining 267 policies during sample period of 2010-11, the study found that approximately 53% of policies prohibit shadow trading.

[152] *See* Laura Nyantung Beny & Anita Anand, *Private Regulation of Insider Trading in the Shadow of Lax Public Enforcement: Evidence from Canadian Firms*, 3 HARV. BUS. L. REV. 216, 237 (2013) (using publicly available 167 TSX/S&P listed *Canadian* companies' insider trading policies to test determinants for the *procedural* stringency of policies); Alan D. Jagolinzer, David F. Larcker & Daniel J. Taylor, *Corporate Governance and the Information Content of Insider Trades*, 49 J. ACCT. RSCH. 1249, 1253 (2011) (collecting 260 firms' stand-alone insider trading policies by scraping their websites in 2006 and 2007 and by directly requesting the policy from companies to empirically test the impact of the *general counsel's approval requirement* on insider trading activities in 10b5-1 plans); *Shadow Trading, supra* note 24 (collecting "each source firm's code of ethics statement or Employee Professional Conduct manual to determine the source firm's insider trading policy"); J.C. Bettis, J.L. Coles & M.L. Lemmon, *Corporate Policies Restricting Trading by Insiders*, 57 J. FIN. ECON. 191, 195 (2000) (evaluating the effectiveness of both written and unwritten insider trading policies in practice using data from a 1996 survey of 403 firms).

examining corporate responses to shifts in insider trading law. By tracing changes in policies across these data points, the analysis provides insights into corporate behavior during this regulatory transition.[153] First, the blue markers above the timeline represent significant events in the *Panuwat* litigation. The case commenced on August 17, 2021, when the SEC filed its complaint against Panuwat,[154] initiating a novel theory for insider trading violations.[155] On January 14, 2022, the court denied the defendant's motion to dismiss,[156] allowing the case to proceed to discovery. On November 20, 2023, the court denied the motion for summary judgment,[157] setting the stage for trial. Following the trial, on April 5, 2024, the jury returned a verdict finding Panuwat liable for insider trading.[158] Subsequently, Panuwat filed a notice of appeal on November 8, 2024.[159]

[153] Prior studies on insider trading policies have concentrated on Rule 10b5-1 plans as an affirmative defense to insider trading liability. *See, e.g.*, Jun Deng, Huifeng Pan, Hongjun Yan & Liyan Yang, *Disclosing and Cooling-Off: An Analysis of Insider Trading Rules*, 160 J. FIN. ECON. 1 (2024), https://corpgov.law.harvard.edu/2024/09/17/disclosing-and-cooling-off-an-analysis-of-insider-trading-rules/; David F. Larcker, Bradford Lynch, Phillip Quinn, Brian Tayan & Daniel J. Taylor, *Gaming the System: Three "Red Flags" of Potential 10b5-1 Abuse,* STANFORD CLOSER LOOK SERIES CORPORATE GOVERNANCE RESEARCH INITIATIVE (Jan 2021), https://www.gsb.stanford.edu/faculty-research/publications/gaming-system-three-red-flags-potential-10b5-1-abuse; Donald C. Langevoort, *What Were They Thinking? State of Mind Puzzles in Insider Trading* (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4398154; *Insider Trading Compliance Programs*, *supra* note 12; *Solving the Paradox*, *supra* note 14, at 273; Steven Chasin, *Insider v. Issuer: Resolving and Preventing Insider Trading Compliance Policy Disputes*, 50 UCLA L. REV. 859, 859 (2003).

[154] SEC Litigation Release No. 25170, *SEC Charges Biopharmaceutical Company Employee with Insider Trading* (Aug. 17, 2021), https://www.sec.gov/enforcement-litigation/litigation-releases/lr-25170.

[155] Complaint, SEC v. Panuwat, No. 21-cv-06322 (N.D. Cal. Aug. 17, 2021).

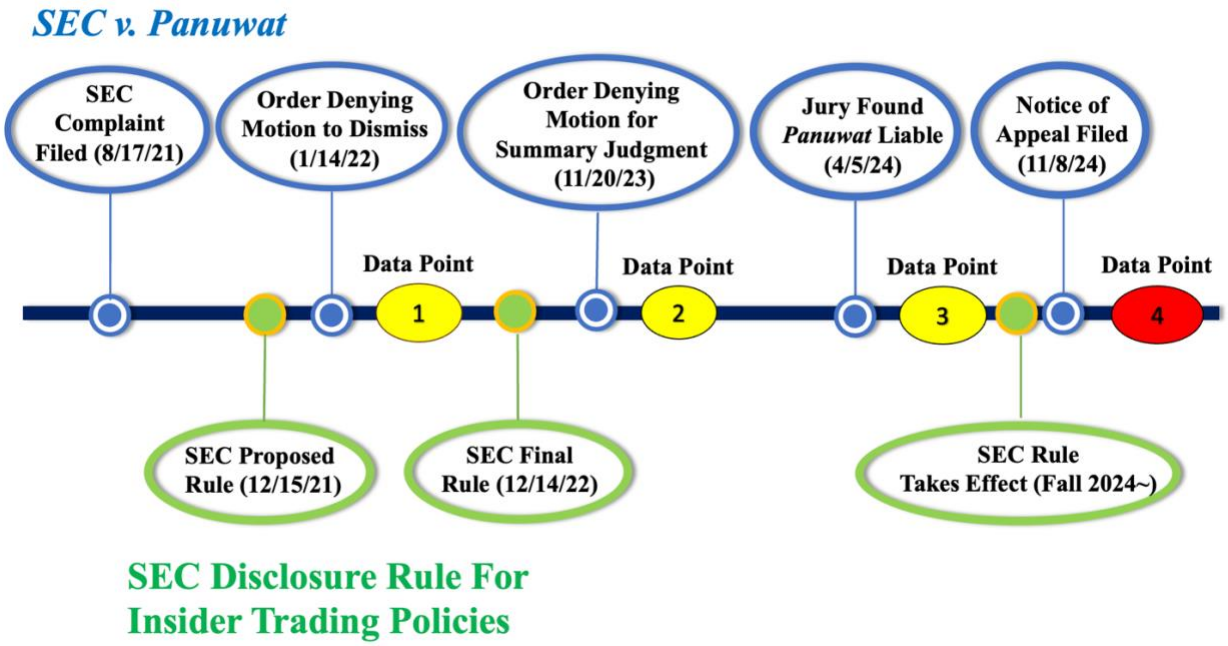
[156] Order denying defendant's motion to dismiss, SEC v. Panuwat, No. 21-cv-06322, 2022 WL 633306 (N.D. Cal. Jan. 14, 2022).

[157] Order denying defendant's motion for summary judgment, SEC v. Panuwat, 702 F. Supp. 3d 883 (N.D. Cal. Nov. 20, 2023) (No. 21-cv-06322).

[158] Jury verdict, SEC v. Panuwat, No. 21-cv-06322 (N.D. Cal. Apr. 5, 2024).

[159] Notice of Appeal, No. 21-cv-06322 (N.D. Cal. Nov. 8, 2024).

Figure 2: Timeline of Developments in Insider Trading Law



Second, the green markers below the timeline highlight key moments in the SEC's rulemaking process on insider trading disclosure. On December 15, 2021, the SEC proposed amendments addressing insider trading arrangements and disclosures,[160] subsequently issuing a revised proposing release on January 13, 2022.[161] After the notice-and-comment period, the SEC adopted the final rules on December 14, 2022,[162] establishing a *disclosure* framework for insider trading policies beginning with the 2025 proxy season.[163] The SEC issued the proposed rule just one day before the court denied Mr. Panuwat's motion to dismiss, which indicates that the SEC was concurrently pursuing both a litigation strategy in *Panuwat* that relied heavily on the employer's insider trading policy and a rulemaking initiative to require disclosure of such policies.

Third, the yellow and red circles mark four rounds of data collection. The first collection followed the court's denial of the motion to dismiss. The second data collection took place in December 2023, after the SEC finalized the disclosure rule. The third data collection occurred in Summer 2024 (June and July), shortly after the jury returned a verdict against Mr. Panuwat. The fourth and final data collection was conducted in December 2024, when companies submitted their first annual reports (Form 10-K), including insider trading policies under the new SEC disclosure rule.

B. Scope of Prohibited Trading

[160] See SEC, SEC Proposes Amendments Regarding Rule 10b5-1 Insider Trading Plans and Related Disclosures, Press Release No. 2021-256 (Dec. 15, 2021), https://www.sec.gov/newsroom/press-releases/2021-256.
[161] *See* Rule 10b5-1 and Insider Trading, 87 Fed. Reg. 8686, 8695 (Feb. 15, 2022) (to be codified at 17 C.F.R. pts. 229, 232, 240, 249).
[162] SEC Rule Release, *supra* note 41.
[163] *See supra* Part I.C.

Federal law prohibits stock trading based on material nonpublic information.[164] Corporate insider trading policies, however, vary in how broadly they define the securities covered by that restriction and can be grouped into three levels of customization.[165] All companies prohibit trading in (1) the employer's stock (Baseline Prohibition; Level of Customization 0). Beyond this baseline, some companies expand the prohibition to include (2) the stock of business partners and competitors (Targeted Prohibition; Level of Customization 0.5). Others go even further by prohibiting trading in (3) the stock of any other company (Blanket Prohibition; Level of Customization 1).

1. Before and After Mandatory Disclosure: Persistent Prevalence of Blanket Prohibitions

Table 1 below reveals a clear preference for broader prohibitions on trading *before* the SEC's mandatory disclosure regulation became effective. Across all three data collection points in Fall 2022, Winter 2023, and Summer 2024, a vast majority of companies—ranging between 70.1% and 71.3%—prohibited trading in the stock of "any companies," reflecting a widespread adoption of the blanket prohibition.[166] Combined with the restrictions limited to trading in the stock of the employer and its business partners, consistently over 84% of sample companies prohibited trading beyond their own stock.

Even after the SEC finalized the disclosure rules and a jury found Mr. Panuwat liable,[167] most companies made only minimal to modest changes to the scope of prohibited trading before the disclosure rules took effect.[168] The data reveals a consistent pattern in widespread adoption of blanket prohibitions on trading in the stock of any other companies, both in stand-alone policies and codes of ethics.[169] While *Panuwat* heightened awareness of insider trading risks and prompted legal recommendations to revisit overly broad policies, companies that had already adopted blanket prohibitions largely maintained them even after the jury returned a verdict against Mr. Panuwat (Data Point 3), likely valuing their clarity[170] and potential utility in enforcement contexts.[171]

Before the disclosure mandate, over 80% of S&P 500 companies disclosed their insider trading policies through their codes of ethics.[172] These disclosures typically offered only high-level

[164] Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2023); 17 C.F.R. § 240.10b-5 (2023).
[165] Academic discussions in the U.S. and other jurisdictions over whether and when insider trading should carry criminal liability offer helpful insights for defining the boundaries of unlawful conduct. *See* Henry G. Manne, INSIDER TRADING AND THE STOCK MARKET (1966); Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1983); Jonathan R. Macey, *Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899 (2007); Laura Nyantung Beny, *Insider Trading Laws and Stock Markets Around the World: An Empirical Contribution to the Theoretical Law and Economics Debate*, 32 J. CORP. L. 238 (2007); Eric C. Chaffee, *Lost in Translation: A Global Perspective on Insider Trading Regulation*, in RESEARCH HANDBOOK ON INSIDER TRADING 227, 234 (Stephen M. Bainbridge ed., 2025); Michael D. Guttentag, *Avoiding Wasteful Competition: Why Trading on Inside Information Should Be Illegal*, 86 BROOK. L. REV. 895 (2021).
[166] *See supra* Part I. A. Corporate Liability as Controlling Person.
[167] *See supra* Figure 2.
[168] *See infra* Table 2.
[169] *See infra* Table 3.
[170] *See* Vikramaditya S. Khanna, *Compliance as Costs and Benefits*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE (Benjamin van Rooij & D. Daniel Sokol eds., 2021), at 19.
[171] *See supra* Part I. A.
[172] On file with author.

guidance or referred to separate, stand-alone policies accessible only to insiders.[173] In cases where the codes of ethics did not specify the scope of prohibited trading, the policy was categorized as "Vague." A small number of companies, between 1.6% and 2.2%, neither disclosed a stand-alone policy nor included any mention of insider trading in their codes of ethics and were categorized as having "No Disclosed Policy."

Table 1. Scope of Prohibited Trading *Before* Mandatory Disclosure: Overall

Prohibited Trading	After Order Denying Motion to Dismiss : Fall 2022	After Order Denying Motion for Summary Judgment : Winter 2023	After Jury Verdict : Summer 2024
Stock of Employer Only [**Baseline** Prohibitions]	64 (12.9%)	59 (12.1%)	55 (11.3%)
Stock of Employer & Related Companies [**Targeted** Prohibitions]	68 (13.7%)	73 (14.9%)	72 (14.8%)
Stock of Other Companies [**Blanket** Prohibitions]	350 (70.3%)	343 (70.1%)	347 (71.3%)
Vague	6 (1.2%)	3 (0.6%)	5 (1.0%)
No Disclosed Policies	10 (2.0%)	11(2.2%)	8 (1.6%)
Total	498 (100%)[174]	489 (100%)[175]	487 (100%)[176]

By contrast, Table 2 below shows how companies adjusted the scope of prohibited trading in stand-alone insider trading policies before and after the SEC's mandatory disclosure regulation took effect.[177] The observed trends in policy changes—such as the variance between targeted prohibitions and blanket prohibitions—show companies' discretion and the complexity of crafting insider trading policies that balance legal and operational considerations. [178] The sharp decline in baseline prohibitions, which restrict only trading in employers' stock, suggests a growing recognition among companies that such limited restrictions may be inadequate to inform employees of the potential liability risks

[173] *E.g.*, COMERICA, Code of Business Conduct and Ethics for Employees (Effective July 25, 2023) ("9 (b) Insider trading is both unethical and illegal. For further information regarding trading in Comerica's Securities, consult Comerica's Insider Trading Policy.").

[174] Fox Corporation and Alphabet Inc. each have dual-class stock structures, with multiple classes included in the S&P 500. Because both classes within each firm are governed by the same insider trading policy, each firm is counted once, yielding 498 distinct companies in the sample.

[175] To track changes in policies over time, this Article follows the same set of S&P 500 companies initially compiled in Fall 2022. By the second data collection point in December 2023, nine companies were no longer publicly traded for various reasons: Abiomed Inc., Activision Blizzard, Inc., Citrix Systems Inc., Duke Realty Corp., First Republic Bank, Nielsen Holdings, Signature Bank, SVB Financial Group, and Twitter Inc.

[176] Between December 2023 and the third data collection point in July 2024, two additional companies ceased to be publicly traded: Discover Financial Services, and Pioneer Natural Resources Company.

[177] *See* Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 295 (2020) ("Legal and regulatory interventions, and sometimes even industry standards, often require firms to adopt particular programs and policies.").

[178] *See, e.g.*, Brad Bondi, Sean Donahue & Michael Wheatley, *SEC Wins Trial Involving First-Ever Shadow Trading Case*, PAUL HASTINGS CLIENT ALERT (Apr. 24, 2024), https://www.paulhastings.com/insights/client-alerts/sec-wins-trial-involving-first-ever-shadow-trading-case ("Companies and financial services firms should consider the Panuwat case when drafting their policies and make conscious, informed decisions about whether to adopt policies that may impose duties beyond the requirements of the federal securities laws.").

associated with trading in other companies' stock.[179] By comparison, the modest reduction in blanket prohibitions (71.2% to 67.1%) alongside the significant rise in targeted prohibitions (14.8% to 26.5%) indicates a more strategic effort to balance regulatory expectations with operational practicality. That is, the increasing prevalence of targeted prohibitions may reflect companies' efforts to limit exposure to enforcement risks while avoiding the administrative burdens associated with broad prohibitions.[180]

Table 2. Changes in the Scope of Prohibited Trading Before and After Mandatory Disclosure

Prohibited Trading	**Before** the Mandatory Disclosure : Collected in Summer 2024	**After** the Mandatory Disclosure (Exhibit 19) : Collected in Spring 2025
Stock of Employer Only [**Baseline** Prohibitions]	55 (11.3%)	30 (6.2%)[181]
Stock of Employer & Related Companies [**Targeted** Prohibitions]	72 (14.8%)	129 (26.5%)
Stock of Other Companies [**Blanket** Prohibitions]	346 (71.2%)	326 (67.1%)
Vague	5 (1.0%)	0 (0.0%)
No Disclosed Policies	8 (1.6%)	1 (0.2%)[182]
Total	486 (100%)[183]	486 (100%)[184]

It is puzzling that a vast majority of companies continue to maintain blanket prohibitions, despite the potential liability risks they pose to both companies and their employees.[185] Companies may view blanket prohibitions as offering the strongest defense against insider trading violations, particularly given the SEC's reliance on internal policy breaches in *Panuwat*.[186] Another possibility is

[179] DEBEVOISE UPDATE, *supra* note 54, at 3 ("[A] broad prohibition on such trading in policies, accompanied by training on the issues and risks, is important to inform trading employees and to help protect companies or firms from allegations of policy or control-related failures.").

[180] *See infra* Part II.B.2.

[181] Franklin Resources Inc. only disclosed a 'Trading Blackout Policy' (Exhibit 10-19) that applies to trading in the employer's stock by designated "Covered Persons," while this policy mentions the existence of a separate, general insider trading compliance policy applicable to the entire workforce.

[182] Teradyne, Inc. did not attach its insider trading policy in Form 10-K in violation of Regulation S-K Item 408(b)(2). *See* Teradyne, Inc., Annual Report (Form 10-K) (Feb. 20, 2025). The policy attached the following year, however, adopted targeted prohibitions. *See* Teradyne, Inc., Insider Trading Policy, Ex. 19.1 to Annual Report (Form 10-K) (Feb. 19, 2026), https://www.sec.gov/Archives/edgar/data/97210/000119312526059002/ter-ex19_1.htm.

[183] To compare the same set of companies before and after the disclosure mandate, the total number of the companies was adjusted to 486 because Marathon Oil was not publicly traded in Spring 2025.

[184] In November 2024, ConocoPhillips acquired Marathon Oil Corporation, which reduced the total sample size to 486.

[185] *See, e.g.*, Matt Levine, *Shadow Trading Is Bad Sometimes*, BLOOMBERG OPINION MONEY STUFF (May 30, 2024), https://www.bloomberg.com/opinion/articles/2024-05-30/shadow-trading-is-bad-sometimes?embedded-checkout=true ("But perhaps as matter of employee relations (and keeping the employees out of trouble), companies should instead have policies saying "go ahead and shadow trade in our competitors' stocks, that is explicitly allowed by our policies, have fun." Why would a company want to have a policy that could send its employees to jail for doing something that doesn't hurt the company?").

[186] *See, e.g.*, David Lopez et al., *Jury Decision Lends Support for "Shadow" Insider Trading Theory*, CLEARY GOTTLIEB ALERT MEMORANDUM (Apr. 10, 2024), https://www.clearygottlieb.com/-/media/files/alert-memos-2024/jury-decision-lends-support-for-shadow-insider-trading-theory.pdf ("[C]ompanies should consider expanding their insider trading policies to

that companies with preexisting blanket prohibitions are reluctant to narrow the scope of prohibited trading because doing so could signal a scaling down of compliance efforts. Such a change could expose companies to the argument that they intentionally weakened their compliance programs when they later face insider trading investigations or enforcement actions.[187]

As shown in Table 3 below, the SEC's mandatory disclosure rules led to near-universal disclosure of stand-alone insider trading policies. Under the SEC's "comply-or-explain" framework,[188] companies are not mandated to adopt insider trading policies so long as they explain why they have not done so. Yet no sample company chose that option. All but one of the companies attached their policies as Exhibit 19 to their annual reports (Form 10-K).[189] As to the form of disclosure, only three companies attached a code of ethics in lieu of a stand-alone policy, even though the SEC rules permit either document to be filed as an exhibit.[190] This represents a notable shift in disclosure practice because only sixty-seven of the 486 sample companies (13.8%) had voluntarily disclosed stand-alone insider trading policies prior to the new disclosure rules. The new disclosure regime made substantially more detailed information about companies' internal control over employee trading publicly available.

Table 3. Types of Insider Trading Policies

	Before the Mandatory Disclosure : Summer 2024	**After** the Mandatory Disclosure : Spring 2025 (Exhibit 19)
Stand-Alone Policies	67 (13.8%)	482 (99.2%)
Code of Conduct/Ethics	411 (84.6%)	3 (0.6%)[191]
No Disclosure	8 (1.6%)	1 (0.2%)[192]
Total	486 (100%)	486 (100%)

These findings provide insights into the dynamic interplay between public regulation and private compliance frameworks, contributing to broader debates about the SEC's role in shaping corporate behavior. By demonstrating how mandatory disclosure requirements influence the design and distribution of insider trading policies, this analysis highlights the extent to which such rules operate as both a regulatory tool and a mechanism of private ordering.

2. The Spectrum of Targeted Prohibitions: Trading in Business Partners, Competitors, and Peers

expressly prohibit trading in their own securities and securities of others that could be impacted by MNPI acquired in the course of their employment.").

[187] *Strategic Compliance*, *supra* note 11, at 480-82. See also, Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More Than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361-396 (2010) (empirically finding that "organizations are more likely to follow through on their commitments to self-regulate when they (and their competitors) are subject to heavy regulatory surveillance and when they adopt self-regulation in the absence of an explicit threat of sanctions.").

[188] SEC Rule Release, *supra* note 41.

[189] *See supra* note 182. Teradyne, Inc. first disclosed its stand-alone policy in 2026, a year after the sample period, but the policy itself had been approved on Feb. 27, 2023.

[190] *See supra* note 147.

[191] Two companies (Omnicom Group Inc. and Wells Fargo & Company) attached only the relevant pages from their Code of Conduct, while Interpublic Group of Companies Inc. attached the full 44-page document. Only Omnicom Group Inc. adopts Targeted Prohibitions, and the others implement Blanket Prohibitions.

[192] *See supra* note 182.

This Section focuses on policies that fall between the two extremes of prohibition. Table 4 below groups these variations into four cumulative categories, with each category extending the preceding one. Even when the categories are clear, whether a particular company qualifies as a competitor or peer can be highly fact-specific.

Table 4. Targeted Prohibitions and Fiduciary Duty

<table>
<tr><td rowspan="2"></td><td rowspan="2">Prohibited Trading</td><td colspan="2">Fiduciary Duty of Trust and Confidence</td></tr>
<tr><td>between Employer and Traded Company</td><td>between Employer and Employee</td></tr>
<tr><td>A</td><td>Existing Business Partners (E.g., Customers, Suppliers, and Vendors)</td><td rowspan="2">Yes</td><td rowspan="3">Yes</td></tr>
<tr><td>B</td><td>Potential Business Partners or Transacting Parties (E.g., Prospective Target)</td></tr>
<tr><td>C</td><td>Competitors</td><td rowspan="2">No</td></tr>
<tr><td>D</td><td>Peers</td><td></td></tr>
</table>

First, the baseline of targeted prohibitions extends beyond the employer's own stock to ban trading in the stock of companies that currently do business with the employer. These companies, often termed "business partners," typically include the employer's customers, clients, suppliers, and vendors. Second, many policies expand Category A to cover trading in the stock of companies involved in potential deals or transactions with the employer, including prospective business partners and counterparties (Categories A+B).

Determining whether an outsider owes the duty of trust and confidence can be difficult,[193] but Categories A and B generally involve the kind of relationship required under misappropriation theory in *United States v. O'Hagan*.[194] Mr. O'Hagan breached the fiduciary duty of trust and confidence owed to the source of the information, his employer *and* its client by using confidential information for personal gain without disclosure.[195] Similarly, for companies in Categories A and B of Table 4 (current and prospective business partners) that have a direct relationship with the trader's employer, that inter-firm relationship may create a fiduciary duty for the trader through the trader's employment relationship with the employer.

Third, numerous insider trading policies also prohibit trading in the stock of "competitors" (Categories A+B+C).[196] This is the same category of companies examined in the academic article that

[193] *See* Donna M. Nagy, *Reframing the Misappropriation Theory of Insider Trading Liability: A Post-O'Hagan Suggestion*, 59 OHIO ST. L. J. 1223 (1998); Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99 COLUM. L. REV. 1491(1999); Adam C. Pritchard, *United States v. O'Hagan: Agency Law and Justice Powell's Legacy for the Law of Insider Trading*, 78 B.U. L. REV.13 (1998).
[194] *See supra* Part I.B.1.
[195] United States v. O'Hagan, 521 U.S. 642 (1997).
[196] *E.g.*, J.M. Smuckers Insider Trading and Disclosure Policy (Last revised on May 1, 2025) ("All prohibitions relating to trading of Company Securities have equal applicability to trading in securities of the Company's business partners and companies that they may be dealing with, including the Company's competitors.").

introduced the concept of shadow trading before the Panuwat case.[197] The term competitor itself may seem straightforward, but determining whether two companies are competitors is often nuanced and highly fact-specific in practice.[198] For instance, in *Panuwat*, both the trader's employer and the traded company were mid-sized oncology pharmaceutical firms. While their similarity led some commentators to classify them as competitors,[199] Mr. Panuwat countered that neither company considered the other as a direct competitor in their annual filings,[200] noting that their flagship drugs targeted different types of cancer and faced competition from distinct pharmaceutical companies. This ambiguity illustrates the challenges in defining "competitor" relationships for the purposes of insider trading policies.

Fourth, the term "peers" encompasses an even broader scope than "competitors" (Categories A+B+C+D), but its outer boundaries are significantly more ambiguous and context-dependent than "competitors."[201] In *Panuwat*, the SEC consistently referred to the traded company (Incyte) as a "peer company" of the trader's employer (Medivation).[202] The *Panuwat* court held that "[n]o legal authority suggests that a reasonable investor would conclude that Medivation's acquisition would only affect the stock price of companies that directly competed with Medivation"[203] and thus the prohibition may extend beyond competitors. The court found that the two companies were in "*sufficiently similar* spaces in the market" such that material information about Medivation was also material to Incyte,[204] and were "*sufficiently alike"* to impose a duty on Medivation employees not to use material nonpublic information obtained from Medivation to trade Incyte's stock.[205] This broad application of "peers" seems to exacerbate the ambiguity surrounding fiduciary duties under the misappropriation theory,[206] as it provides little concrete guidance on which companies are sufficiently similar or alike.

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[197] *Shadow Trading*, *supra* note 24, at 368 (referring to "a company from which private information emerges as a"source firm," and a stakeholder for which the private information could be price-relevant as a"linked firm." In other words, source firms are either business partners or competitors of linked firms.").

[198] DEBEVOISE UPDATE, *supra* note 54, at 3 ("The determination of what constitutes a 'competitor' or an entity with 'market connection' will be a heavily factual inquiry based on a combination of business operations, industry analysis, and market price movements, and the SEC will be acting with the benefit of hindsight, knowing, for example, that the stock price in Company B moved following an announcement by Company A.").

[199] *E.g.*, Sharon M. Bunzel et al., *Jury Finds Former Executive Liable in Novel Shadow Insider Trading Case*, O'MELVENY ALERT (Apr. 9, 2024), https://www.omm.com/insights/alerts-publications/jury-finds-former-executive-liable-in-novel-shadow-insider-trading-case/ ("traded call options in a Medivation *competitor* based on nonpublic information . . .") (emphasis added).

[200] Order denying defendant's motion for summary judgment, SEC v. Panuwat, 702 F. Supp. 3d 883, at 10 (N.D. Cal. Nov. 20, 2023) (No. 21-cv-06322) ("Panuwat also argues that Incyte and Medivation did not consider each other competitors . . . [based on each company's annual reports (Form 10-Ks) filed in February 2016 that show] "both companies described their competition in ways that did not seem to include the other.").

[201] The selection of peer companies has been a controversial issue in various corporate contexts. For executive compensation benchmarking, *see* David F. Larcker, Charles McClure & Christina Zhu, *Peer Group Choice and Chief Executive Officer Compensation*, working paper (Feb. 11, 2019) ("Given the controversy surrounding the choice of peer groups, understanding whether peer group selection is an appropriate labor market benchmarking analysis by the board of directors or a mechanism for rent extraction by the CEO."). For corporate governance benchmarking, *see* Yaron Nili, *Peer Group Governance*, 16 HARV. BUS. L. REV. 169 (2026).

[202] *Enforcement Results for Fiscal Year 2024*, *supra* note 101 ("After an eight-day trial in SEC v. Panuwat, the jury found the defendant liable for insider trading in the first trial based on alleged insider trading in a *peer* company.") (emphasis added).

[203] Order denying defendant's motion for summary judgment, SEC v. Panuwat, 702 F. Supp. 3d 883, at 10 (N.D. Cal. Nov. 20, 2023) (No. 21-cv-06322).

[204] Order on Post-Trial and Remedies Motions, *supra* note 28.

[205] *Id.* at 34 (emphasis added).

[206] *See* Sung Hui Kim, *Insider Trading as Private Corruption*, 61 UCLA L. REV. 928 (2014).

Some companies use the term "economically linked" to include peer companies, drawing on the academic article that introduced the phenomenon of shadow trading.[207] The authors use the term "economically linked" to describe situations where material information about one company is likely to influence the stock price of another, and limit the category to business partners and competitors.[208] While the term is helpful in capturing shadow trading as a prevalent phenomenon, it still lacks sufficient clarity when applied to criminal liability.[209] Uncertainty about what is prohibited under insider trading policies can lead to over-deterrence, causing employees to refrain from legitimate trading due to fear of inadvertently violating unclear rules.[210]

The rationale for prohibiting employees' stock trading rests on a clear foundation in the fiduciary duty of trust and confidence to their employer when the prohibition applies to stock of companies that are in direct business relationships with the employer, such as customers, suppliers, vendors, or prospective transaction counterparties. Once the prohibition expands further to include competitors and beyond, however, the rationale may begin to shift. The misappropriation theory can still treat such trades as a breach of fiduciary duty owed to the employer as the source of information, but as the traded company becomes more remote from that source, the operative concern may increasingly resemble a fairness-based rationale to prevent employees from gaining an unfair informational advantage over other market participants.[211]

In such unsettling regulatory environments, some companies start sharing boilerplate language, attempting to clarify the scope of prohibited trading as follows:

> **[Example 1]** HPE policy prohibits trading in the securities of any company (i) with which HPE does business, such as customers, channel partners, suppliers, and other business partners or (ii) that is involved in a potential transaction or business relationship with HPE, such as potential acquisition targets (such companies, "Business Partners"), by persons who are aware of material non-public **information about such company** acquired as a result of performing his or her duties at HPE (emphasis added).[212]
>
> **[Example 2]** This Policy and the guidelines described herein also apply to **MNPI** (i) relating to other companies, including the Company's customers, vendors or suppliers ("business partners"), **or (ii) relating to the Company** if there is a **reasonable likelihood** that it would be considered important to an investor in making an investment decision to purchase, sell, or hold stock of other companies, including business partners, in each case when that information is obtained in the course of employment with, or other services performed on behalf of, the Company (emphasis added).[213]

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[207] *Shadow Trading*, *supra* note 24.
[208] *Id.* at 368.
[209] *Insider Trading's Legality Problem*, *supra* note 7.
[210] *See infra* Part III.B.2.
[211] *Cf.* Jonathan R. Macey, *Insider Trading: Easterbrook and Fischel and Easterbrook vs. Fischel*, 1 U. CHI. BUS. L. REV. 363 (2022).
[212] Hewlett Packard Enterprise Co. Insider Trading Policy (the policy does not include its effective date but was filed with the SEC on Dec. 19, 2024). This provision closely mirrors a model insider trading policy featured in the January-February 2023 issue of *The Corporate Counsel*. Lynn, *supra* note 45.
[213] F5 Insider Trading Policy (the policy does not specify its effective date, but was filed with the SEC on Nov. 18, 2024).

Example 2 leaves room for interpretation because it relies on "reasonable likelihood" to determine whether trading in the stock of a company with no direct relationship to the trader's employer is prohibited. This ambiguity reflects a trade-off between greater ex post flexibility for companies and less ex ante guidance for employees.[214] Example 1 shows that firm-specific tailoring need not come at the expense of clarity. Variation across companies is not inherently problematic as long as employees receive sufficiently clear ex ante guidance about the scope of prohibited trading.

C. The Rise of the Corporate Disclaimers

An important development following *SEC v. Panuwat* and the SEC's new disclosure rule is the prevalence of disclaimer provisions in insider trading policies.[215] These disclaimers typically state that compliance with internal policies or reliance on corporate approval does not shield employees from potential legal consequences for insider trading violations.[216] They reflect a corporate strategy to limit organizational exposure to potential liability by clearly distancing the company from employees' trading decisions, but such disclaimers complicate the role of internal policies and sit uneasily with the misappropriation theory of insider trading liability.

1. Distancing Corporate Liability from Employee Violations

At the most basic level, companies deploy disclaimers to signal that any insider trading violation is the employee's sole responsibility. This strategy shifts the legal burden onto individual employees, reinforcing for both employees and regulators the principle that insider trading liability is a personal risk rather than an institutional one. While such disclaimers may reduce a company's exposure to enforcement actions, they leave employees in a precarious and uncertain position.[217] The absence of a reliable safe harbor deprives employees of clarity and assurance, effectively forcing them to navigate the increasingly complex and fragmented intersection of internal corporate policies and federal insider trading laws on their own with no help or guidance from their employers. Table 5 below illustrates two types of disclaimers, differentiated by the extent to which a company explicitly distances itself from employees' liability for their insider trading violations.

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[214] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557 (1992) ("[C]onduct is more likely to reflect the content of previously promulgated *rules than of standards* that will be given content only after individuals act.") (emphasis added).

[215] *See infra* Table 6.

[216] *E.g.*, General Motors Company Insider Trading Policy (Amended and Restated Mar. 9, 2023) ("Compliance with this Policy, including having the Securities Practice Team preclear a proposed transaction, is not an assurance that an insider trading violation will not be found to have occurred. This policy is only designed to reduce the risk that such violation will be found to have occurred.").

[217] This trend starkly contrasts with a recent proposal advocating for the expansion of Rule 10b5-1 Plans as an affirmative defense to encompass trading in the stock of other companies. *See* Woody & Davidson, *supra* note 25.

Table 5. Types of Disclaimers and Exemplary Text

	Exemplary Text
[Soft] Accountability Disclaimer	"The ultimate responsibility for adhering to this Policy and avoiding improper transactions rests with each individual."[218]
[Hard] Liability-Shield Disclaimer	"**Neither compliance with this Policy nor any approval or guidance** received from the FactSet Legal Department **is an assurance that an insider trading violation will not be found** to have occurred. Approval of trades or trading plans does not reduce your obligations under applicable laws. **Any action on the part of the Company**, a member of the FactSet Legal Department or any other Company employee does **not** constitute legal advice or **insulate you from liability under applicable laws**."[219]

Both soft and hard disclaimers may reflect a corporate strategy to shift liability risk from the company to its employees, but only hard disclaimers plausibly function as meaningful shields. Soft disclaimers suggest employee accountability but fall short of the explicit denial needed to preclude reliance on corporate approval or guidance. Hard disclaimers, by contrast, eliminate that reliance by making clear that company approval or compliance with policy cannot serve as a defense, which helps protect the company from liability.

Furthermore, the significance of disclaimers correlates with the breadth of the underlying prohibition. Policies with a baseline prohibition limited to the employer's own stock pose fewer interpretive challenges and less need for disclaimers. By contrast, as policies expand to cover trading in other companies' stock, the risk of potential legal exposure increases, and companies may rely more heavily on disclaimers. Table 6 below provides insights into the structure and communication of insider trading policies across different levels of prohibition by illustrating the use of disclaimers—categorized as hard disclaimers, soft disclaimers, and no disclaimers—across three distinct scopes of prohibited trading.

[218] Hormel Foods Corporation Insider Trading Policy, at 3 (Last Revised: November 2024), https://www.sec.gov/Archives/edgar/data/48465/000004846524000051/q42024ex19insidertradingpo.htm.
[219] FactSet Research Systems, Inc. Securities and Insider Trading Policy V.(2) (Last Revision Effective Date: July 1, 2023), https://www.sec.gov/Archives/edgar/data/1013237/000101323724000141/fds-20240831xexx19.htm.

Table 6. Corporate Disclaimer Types Across Scopes of Prohibited Trading

Prohibited Trading	**[Hard] Liability-Shield** Disclaimer	**[Soft] Accountability** Disclaimer	**No** Disclaimer	Total
Stock of Employer Only [**Baseline Prohibitions**]	7 (23.3%)	6 (20.0%)	17 (56.7%)	30 (100%)
Stock of Employer & Related Companies [**Targeted Prohibitions**]	47 (36.4%)	31 (24.0%)	51(39.5%)	129 (100%)
Stock of Other Companies [**Blanket Prohibitions**]	116 (35.6%)	92 (28.2%)	118 (36.2%)	326 (100%)
Total	170	129	186	485

The data reveals a clear trend: the broader the scope of prohibited trading, the more prevalent disclaimers become. Among firms that impose baseline prohibitions, banning trades only in the employer's own stock, just 43.3% (7+6=13 out of 30) include either form of disclaimer. In comparison, 60.4% (78 out of 129) of policies featuring targeted prohibitions include disclaimers. The figure rises slightly to 63.8% (208 out of 326) among policies that adopt blanket prohibitions, which restrict trading in the stock of any other company. This trend seems to be consistent with the intuition that greater ambiguity invites more formal distancing language.

Notably, among 129 policies that implement targeted prohibitions, forty-seven policies (36.4%) include hard disclaimers, thirty-one policies (24.0%) include soft disclaimers, and fifty-one policies (39.5%) lack any disclaimer. This distribution reflects a diverse drafting approach among companies that seek to balance specificity and flexibility in drafting insider trading policies. The fact that more than 60% of the policies with targeted prohibitions also include corporate disclaimers may reflect companies' dual efforts aimed at protecting companies themselves by limiting employees' exposure to insider trading liability **and** by insulating the company from liability arising from employees' trading. This approach may suggest a prioritization of institutional risk management over fostering collaborative compliance with employees.

Also, of the 326 companies that adopt blanket prohibitions, 116 policies (35.6%) employ hard disclaimers, ninety-two (28.2%) use soft disclaimers, and 118 (36.2%) include none. For companies that implemented such expansive prohibitions before the SEC's disclosure mandate, pairing them with hard disclaimers may serve as a risk-averse response to potential litigation or enforcement, without signaling externally that they are scaling down their compliance efforts. From the employees' perspective, however, this pairing can cause the most ambiguity, as it provides no clear guidance on what actions are prohibited, while simultaneously disclaiming the company's responsibility for advancing legal compliance and leaving employees entirely exposed and uncertain.

The use of disclaimers, especially hard liability shields, raises a critical question about the role and effectiveness of insider trading policies: Are these policies truly designed to provide meaningful guidance and foster compliance with federal law,[220] or are they merely instruments of corporate risk

[220] *Compliance Process*, *supra* note 44, at 214.

mitigation at the expense of employees? For instance, when a company even explicitly states that its policy is merely a "guideline," placing the ultimate judgment and liability on each employee,[221] it raises the issue of how a breach of such a guideline can serve as the basis for triggering federal liability.[222] This ambiguity reveals a deeper flaw in the SEC's reliance on internal policies as a foundation for federal insider trading enforcement in *Panuwat*, as the agency risks transforming private compliance tools into de facto federal law and collapsing the boundary between internal governance and external regulation.

2. Disclosure Without Credit

The interaction between internal insider trading policies and federal law introduces another layer of complexity to the misappropriation theory's treatment of disclosure and consent.[223] Under the misappropriation theory, an employee who discloses to the source of information the intended use of confidential information generally would not face insider trading liability, as it negates the deception essential to the theory.[224] The jury instructions in *SEC v. Panuwat* articulate the principle in the conventional form as follows:

> A duty [of trust, confidence, or confidentiality] also arises, even in the absence of a written agreement, when an employer entrusts an employee with confidential information. This is because a company's confidential information is the company's property, and employees are not permitted to use their position of trust and confidence to further their private interests **without fully disclosing that use to the company and gaining the company's consent** (emphasis added).[225]

In practice, however, many corporate insider trading policies create a potential doctrinal conflict by expressly stating that neither an employee's disclosure nor the company's approval of a proposed trade under the policy shields the employee from insider trading liability.[226] Under common law agency principles, a principal's valid consent may prevent an agent's conduct from breaching the

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[221] *E.g.*, F5 Insider Trading Policy (the policy does not specify its effective date, but was filed with the SEC on Nov. 18, 2024)(" The guidelines set forth in this Policy are *guidelines only*, and appropriate judgment should be exercised in connection with any trade in the Company's securities."); Catalent Inc. Insider Trading Policy (issued on Jan. 29, 2020) ("This Policy and the procedures that implement this Policy are not intended to mirror the precise contours of the legal prohibitions against insider trading and tipping, which are highly complex, fact-specific, and evolving . . . . In this respect, the matters set forth in this Policy are *guidelines only* and are not intended to replace your responsibility to understand and comply with the legal prohibitions on insider trading.") (emphasis added).

[222] *See* Coffee, *supra* note 25 ("Most companies may want to fire an overeager trader, such as Mr. Panuwat, but probably most are less than certain that they want to see him indicted and jailed.").

[223] Merritt B. Fox, Lawrence R. Glosten & Gabriel V. Rauterberg, *Informed Trading and Its Regulation*, 43 J. CORP. L. 817, 861 (2018); Jill E. Fisch, *Constructive Ambiguity and Judicial Development of Insider Trading*, 71 SMU L. REV. 749, 757 (2018) ("Because §10(b) is an 'open-textured statute,' its interpretation requires the courts to engage in the more expansive interpretive exercise associated with common law adjudication."); John C. Coffee, Jr., *Introduction: Mapping the Future of Insider Trading Law: Of Boundaries, Gaps, and Strategies*, 2013 COLUM. BUS. L. REV. 281 (2013) ("Rule 10b-5 was intended to evolve to keep pace with the ingenuity of fraudsters. It still can—if the SEC will only exercise its authority."); *Insider Trading's Legality Problem*, *supra* note 7, at 145 (unveiling "drawbacks to the type of piecemeal lawmaking typified by the Supreme Court's insider trading jurisprudence, particularly in regard to criminal law").

[224] *See Reframing the Misappropriation Theory, supra* note 193.

[225] SEC v. Panuwat, Jury Instruction, No. 17 (Duty, defined).

[226] *See supra* Table 5.

fiduciary duty, and the parties generally can modify those default principles by agreement.[227] Federal insider trading doctrines, however, place greater weight on disclosure. On the other hand, *Chiarella* establishes that nondisclosure is actionable only when the trader has a duty to disclose,[228] and *O'Hagan* states more specifically that disclosure to the source eliminates the deception required for misappropriation liability even without the source's approval.[229] But commentators have criticized the "brazen fiduciary" problem under the misappropriation theory,[230] in which a trader who openly discloses an intent to trade on material nonpublic information may escape federal liability without obtaining the source's approval.[231]

The effect of these disclaimers remains uncertain because their validity and doctrinal limits have not been tested. If the insider trading policy overrides traditional doctrine, the company's approval would not protect the employee from potential federal liability pursuant to the policy. Conversely, if traditional doctrine overrides the policy, an employer's consent and an employee's good faith reliance on the company's clearance may eliminate the deception necessary to establish federal liability. Corporate disclaimers deliberately undermine such reliance by explicitly warning employees that the company's approval does not insulate them from liability.[232] Moreover, such disclaimers shift the burden of legal risk almost entirely onto employees and erode the protections traditionally provided by fiduciary duty principles. Instead of fostering compliance, such policies may create a fragmented regime that prioritizes corporate insulation over employee guidance.[233] If employees receive no protection for seeking guidance and disclosing proposed trades, they have little reason to use the internal compliance channels.

III. Chilling Effect of Insider Trading Spillover

This Part provides a theoretical framework for analyzing how the SEC's reliance on internal corporate compliance policies as public enforcement tools can expand legal liability beyond statutory or common law duties. This framework highlights the unintended regulatory burdens that arise when insider trading policies become *de facto* legal obligations in public enforcement proceedings.

A. Insider Trading Spillover

Insider trading spillover occurs when a company's insider trading policy, originally designed to guide and constrain employees' trading behavior, becomes a foundation for external legal

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[227] RESTATEMENT (THIRD) OF AGENCY § 8.06 (AM. L. INST. 2006)(detailing the strict requirements for a principal to validly *consent* to conduct that would otherwise constitute a breach of the agent's fiduciary duty) (emphasis added). *See* United States v. O'Hagan, 521 U.S. 642, 654–55 (1997) ("[I]f the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no 'deceptive device' and thus no § 10(b) violation . . . .").

[228] Chiarella v. United States, 445 U.S. 222, 228 (1980).

[229] United States v. O'Hagan, 521 U.S. 642, 657 (1997).

[230] *See Reframing the Misappropriation Theory, supra* note 193, at 1256-59 (introducing the concept of "brazen fiduciary," who discloses to the source that he plans to trade on the nonpublic information.); Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1344-46 (2009).

[231] *See, e.g.,* Richard W. Painter, Kimberly D. Krawiec & Cynthia A. Williams, *Don't Ask, Just Tell: Insider Trading After* United States v. O'Hagan, 84 VA. L. REV. 153, 179-80 (1998); Kim, *supra* note 206, at 1004. *Cf.* Zachary J. Gubler, *Insider Trading as Fraud*, 98 N. C. L. REV. 533, 583 (2020) (defending the absence of liability for the brazen fiduciary under a contractual fraud theory).

[232] *See supra* Table 5.

[233] *Cultures of Compliance*, *supra* note 63; Elise Maizel, *Illegal Corporate Cultures*, 75 DUKE L. J. 1(2025).

enforcement.[234] To mitigate legal and reputational exposure, particularly amid regulatory ambiguity, companies often implement internal policies that exceed what the law strictly requires.[235] When enforcement agencies invoke noncompliance with these internal, precautionary policies as evidence of federal securities law violations,[236] the boundary between voluntary compliance measures and mandatory legal obligations can become blurred.[237] Companies supply an element of a federal offense while playing no part in the federal enforcement that follows.[238]

This shift can create a perverse incentive for companies in designing their insider trading policies. Instead of fostering stronger internal compliance on trading activities, the risk of insider trading spillover discourages companies from adopting proactive internal compliance measures, fearing that expansive prohibitions in policies may later be used against employees in enforcement proceedings. Over time, this may lead to a gradual erosion of internal accountability as companies seek to mitigate liability risk.

The SEC's approach in *Panuwat* exemplifies this dynamic. Medivation, the trader's employer, had an insider trading policy that broadly prohibited trading in the stock of any other publicly traded company.[239] Federal securities laws do not explicitly require such expansive restrictions. Yet, the SEC relied on Medivation's internal policy to define the scope of prohibited conduct in its first enforcement action against trading in a peer company's stock.[240] This strategy signals that companies with more restrictive internal policies may be subject to heightened regulatory scrutiny, potentially discouraging companies from implementing rigorous insider trading policies.

B. Chilling Effects on the Internal Compliance Function

Insider trading spillover can chill internal compliance functions. Although internal policies are meant to reinforce corporate governance and mitigate company-specific risks,[241] companies may become less willing to develop proactive compliance programs. When adherence to policies offers no protection from liability, employees become less likely to report or seek guidance from companies,

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[234] *Cf.* Verity Winship, *Enforcement Networks*, 37 YALE J. ON REG. 274 (2020)(situating agency enforcement within networks of cooperating actors).

[235] *Compliance Process*, *supra* note 44.

[236] COVINGTON ALERT, *supra* note 103 ("If the SEC's interpretation of Rule 10b-5 in the context of so-called 'shadow trading' gains traction in other courts, public companies will have to be mindful that greater enforcement in the context of shadow trading is forthcoming. These companies and their employees will face more enforcement risk as a result.").

[237] *Cf.* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2078 (2016) ("Compliance is a de facto government mandate imposed upon firms by means of ex ante incentives, ex post enforcement tactics, and formal signaling efforts. The imposition of governance structures aimed at compliance is a novel exercise of government power.").

[238] *Cf.* Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467 (2020) (describing agency mandates that conscript firms to police third parties). Insider trading spillover inverts that model in two respects: (1) these policies are adopted voluntarily rather than under mandate, and (2) they govern the company's own employees rather than outside contracting partners.

[239] The scope of prohibited trading in Medivation's insider trading policy was contested, but the court upheld the SEC's interpretation at multiple stages of the proceedings. *See supra* Part I.B.

[240] SEC 2024 Enforcement Results, *supra* note 202, ("SEC v. Panuwat . . . the first trial based on alleged insider trading in a peer company.").

[241] SEC Rule Release, *supra* note 41 ("[D]ecisions as to specific provisions of the policies and procedures are best left to the [company].").

and the upward flow of information suffers. This dynamic may ultimately leave companies and their employees more vulnerable to regulatory risks.

1. Chilling Effect on Companies

As regulators increasingly invoke internal policy breaches as grounds for legal liability, companies confront a growing dilemma: maintaining strong compliance measures can raise enforcement exposure, while scaling them back could signal a retreat from compliance commitments, potentially inviting adverse reactions from both the market and regulators.[242] This regulatory dynamic pressures companies into adopting more defensive legal strategies instead of focusing on substantive compliance.

To navigate this challenge, companies seek ways to insulate themselves from their employees' potential liabilities.[243] This approach manifests in disclaimers that explicitly detach corporate liability from employee liability instead of fostering meaningful compliance engagement. Companies issue legal caveats stating that adherence to internal policies does not guarantee immunity from external enforcement, leaving employees without clear guidance on compliance. For instance, eBay's insider trading policy instructs employees to exercise their "appropriate judgment" when trading in the securities of companies with which the company has a "Market Connection."[244] Although the policy defines this term,[245] individual employees are not well suited to determine whether such market connection exists without specialized expertise. The company still can argue that it provided sufficient warnings and that any violation resulted from employees' independent decisions.

Prioritizing defensive mechanisms over substantive guidance actively strips compliance programs of their preventive value. Without clear guidance that helps employees identify and mitigate risk, compliance efforts remain largely reactive to misconduct, which offers little value in preventing it. Companies may fear that an overly detailed compliance program could later be used against them as evidence of knowledge or willful neglect. That concern may lead companies to weaken their policies or frame them in vague terms to limit future liability. This approach creates compliance frameworks that prioritize risk minimization for the company rather than fostering a strong ethical culture among employees.[246]

2. Chilling Effect on Employees

The chilling effect also extends to employees, who may perceive compliance departments as adversarial rather than protective. When companies explicitly state that adherence to internal policies or compliance personnel's guidance does not shield employees from potential federal liability,[247]

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[242] *See* James Tillen et al., *DOJ Creates New Burden for Compliance Officers*, CORPORATE COMPLIANCE INSIGHTS (Aug. 7, 2020), https://www.corporatecomplianceinsights.com/doj-new-burden-compliance-officers/ ("In particular, a decision to scale back any compliance program components requires memorializing the rationale to establish the reasonableness.").

[243] *See* Faith Stevelman & Sarah C. Haan, *Boards in Information Governance*, 23 U. PA. J. BUS. L. 179, 241-42 (2020) ("[I]nternal compliance, and risk management policies . . . reflect past corporate conduct and shape future conduct of the firms' constituencies.").

[244] eBay Inc., Insider Trading Policy, 9. Consequences of Violations.

[245] *Id.* 8. Other Definition ('Market Connection' exists with "any other company whose stock price could reasonably be expected to be impacted by certain Material Non-Public Information about eBay.").

[246] *See* Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 L. & CONTEMP. PROBS. 47 (2020).

[247] *See, e.g.*, FactSet Research Systems, Inc. Securities and Insider Trading Policy V.(2) (Last Revision Effective Date: July 1, 2023).

employees have little incentive to engage with internal compliance resources.[248] The absence of assurance in compliance guidance discourages employees from seeking advice or clarification.[249] This resulting erosion of trust can significantly impair the upward flow of information within a company because employees who cannot rely on internal legal or compliance personnel for protection are more likely to remain silent about potential misconduct rather than risk personal liability.[250] By discouraging employees from sharing critical information or raising concerns, companies inadvertently blind themselves to potential violations, directly defeating the early-detection function of corporate compliance programs and making them more vulnerable to regulatory scrutiny and enforcement actions.

Furthermore, this environment of self-preservation can lead to the over-deterrence of trading activities among the workforce. Faced with the reality that internal policies operate as liability traps rather than legal shields, risk-averse employees will often abandon lawful trading rather than navigate legal gray areas.[251] Such a chilling effect on legitimate, informed trading is difficult to reconcile with the foundational goals of insider trading regulation, which seeks to protect market integrity and efficiency while permitting lawful market participation.[252] In this light, the insider trading spillover that drives a legitimate segment of investors away from the market is a disproportionate and counterproductive outcome.

Chilling effects at both the corporate and employee levels can transform compliance programs from preventive tools into liability traps. This shift weakens internal control of misconduct and undermines the broader regulatory objective of fostering ethical business practices through proactive internal oversight. Over time, it threatens to erode the integrity of compliance programs, and create a corporate culture where compliance is viewed as a source of risk rather than a safeguard against it.

IV. Policy Implications

The preceding discussion in Part III, which explores the theoretical implications of recent legal developments alongside evolving trends in insider trading policies, leads to a fundamental question: Who should have the authority to define insider trading? As this Article has demonstrated and argued, recent judicial decisions endorsing companies' tailored definitions of prohibited insider trading can potentially shift the locus of authority from the SEC and the courts to the companies. This emerging dynamic potentially has profound implications for the balance of power in the regulation of insider trading, as it grants private companies considerable influence over a domain traditionally governed by public enforcement. In light of these shifts, Part IV proposes practical recommendations for companies and the courts to address these evolving challenges and recalibrate the framework for insider trading regulation.

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[248] *Cultures of Compliance*, *supra* note 63.
[249] *See* Geeyoung Min, *The Employees' Dilemma: Balancing Internal Reporting, Whistleblowing, and Insider Trading Risks*, 48 SEATTLE U. L. REV. 439 (2025).
[250] *Id.*
[251] *Cf.* Tom R. Tyler, WHY PEOPLE OBEY THE LAW (2006).
[252] *Cf.* Kevin R. Douglas, *Owning Trading Opportunities*, 21 FIU L. REV. 1 (forthcoming 2026) ("[T]he current prohibition is best explained by an equal-trading-opportunities rationale clothed in the language of a property-rights-in-information rationale—not by any stand alone property [or fiduciary duty] rationale.").

A. Implications for Companies

The expanding role of corporate insider trading policies creates challenges for companies managing compliance and enforcement risks. As the SEC increasingly relies on corporate internal policies for enforcement, companies should evaluate whether their policies mitigate liability or expose them to greater regulatory scrutiny. This Section provides recommendations for companies on designing an insider trading policy.

1. Rethinking Blanket Prohibitions in Insider Trading Policies

Even if blanket prohibitions were initially adopted with the well-intentioned aim of reducing employee violations, [253] evolving regulatory and legal developments have introduced unintended consequences that warrant reconsideration.[254] Given their unilateral authority to revise internal policies without shareholder or regulatory approval, companies are well-positioned to adapt to these developments efficiently and cost-effectively. Blanket prohibitions can also expose employees to vague compliance expectations and increase liability risks under federal law, particularly under the misappropriation theory as applied in *Panuwat*. [255] This dynamic blurs the line between internal governance and federal enforcement by making the scope of insider trading violations partly contingent on rules adopted by individual companies. [256]

The chilling effect of insider trading spillover on employee information-sharing is particularly concerning, as it weakens internal reporting channels and reduces the likelihood of early detection and resolution of violations. [257] To address these risks, companies could consider more targeted prohibitions that ban trading in the employer's stock and the stock of companies with which the employer has a duty of trust and confidence. If companies choose to extend trading prohibitions to include competitors or peers with no direct relationship of trust or confidence, they could provide a concrete list of those companies rather than leaving these determinations to employees. Such a list

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[253] Across various regulatory domains, companies frequently adopt internal norms that exceed the requirements of external laws. *See, e.g.*, Simone S. Hicks et al., *Rethinking Clawback Policies for the 2025 Compensation Season*, DEBEVOISE & PLIMPTON (Nov. 20, 2024), https://www.debevoise.com/-/media/files/insights/publications/2024/11/rethinking-clawback-policies-for-the-2025.pdf?rev=ee92f732667c4f228d3d7ff307fd4583&hash=09BE51802EE13AEE5F088AC8DA602976 ("Over 70% of the [401 S&P 500] companies in [Dragon GC's] study have implemented clawback policies that go beyond Dodd-Frank requirements."); Daniel A. Crane, *Intellectual Liability*, 88 TEX. L. REV. 253, 265-69 (2009) (noting how antitrust pressure incentivizes intellectual property rights (IPRs) holders to abandon strong property protections in favor of a liability-based framework as a preemptive measure to avoid potential antitrust liability). *Cf.* The Ninth Circuit Court ruled that the breach of private contract itself does *not* trigger a violation of federal antitrust law. FTC v. Qualcomm, Inc., 969 F.3d 974, 995 (9th Cir. 2020) ("[T]he FTC still does not satisfactorily explain how Qualcomm's alleged breach of this contractual commitment *itself* impairs the opportunities of rivals.").

[254] *Compliance Process*, *supra* note 44.

[255] Regardless of whether *Panuwat* is reversed on appeal, the internal disciplinary consequences of breaching a blanket prohibition will persist. *See* Kayla Kershen, SEC v. Panuwat*: The Federal Pursuit of Shadow Trading*, 17 BROOK. J. CORP. FIN. & COM. L. 151, 154 (2023) ("Together, these provisions 'assure that dealing in securities is fair and without undue preferences or advantages among investors.'").

[256] *See* Todd Haugh & Suneal Bedi, *Valuing Corporate Compliance*, 109 IOWA L. REV. 541, 549 (2024) ("[P]rimary purpose is to deter employees and managers from committing legal violations, both criminal and civil.").

[257] *Compliance Process*, *supra* note 44.

could serve as the company's application of the materiality standard on behalf of employees[258] and provide evidence of the company's efforts to reduce violations through clearer guidance.[259]

2. Reevaluating Corporate Disclaimers in Insider Trading Policies

Companies should reconsider the use of disclaimers in their insider trading policies, particularly hard disclaimers,[260] as they can fundamentally undermine the goals of effective compliance programs.[261] Under a hard disclaimer, employees seeking assistance from compliance personnel receive neither guidance nor protection. Furthermore, the information shared in such interactions can be used against them, chilling their willingness to report potential issues or seek advice. Some companies go even further, recommending that employees hire personal legal counsel for potential insider trading concerns.[262] Hiring a personal lawyer, however, would not be a viable option for the vast majority of employees unless a serious issue had already materialized. This approach leaves employees without meaningful resources to navigate complex compliance scenarios, widening the gap between employees and the support systems they need to act ethically and lawfully.

Furthermore, whether disclaimers accompanying blanket prohibitions will shield companies from liability for employee violations is still in question because the enforceability of these disclaimers remains largely unlitigated. Courts may ultimately limit or void them as contrary to public policy if they unfairly shift regulatory risk onto employees. They may also backfire if courts or regulators view them as attempts to deflect accountability and consequently evaluate the company's compliance program less favorably in enforcement actions or litigation.[263] A balanced approach that combines robust compliance policies with meaningful protections for those who comply would better align corporate and regulatory interests, demonstrating that the company's compliance programs are not mere formalities but functional tools for mitigating risks of insider trading violations.

B. Implications for Courts

To what extent should trading by employees be prohibited?[264] This question takes on heightened significance in light of the prevalence of blanket prohibitions on trading in corporate

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[258] *See, e.g.,* Stephen Thau, Paul Rugani & Nina Ganti*, Shadow Trading Verdict Is Red Flag for Private, Public Companies*, BLOOMBERG L. (Apr. 9, 2024), https://news.bloomberglaw.com/business-and-practice/shadow-trading-verdict-is-red-flag-for-private-public-companies ("Greater specificity, including a list of specific key other companies, when known, helps provide clarity to corporate insiders and reduces reliance on interpretation.").

[259] Relatedly, stand-alone policies should include the exact dates of their adoption and any subsequent amendments, along with a detailed history of revisions. This information will offer employees clear guidance on the company's expectations, and provide investors with better insights into how the company mitigates risks related to insider trading and protects material nonpublic information.

[260] *See supra* Tables 5-6.

[261] *See supra* Part II.C.

[262] McKesson Corporation, *supra* note 48.

[263] *See Compliance Process*, *supra* note 44, at 214; Jennifer Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops* at 2, Working Paper (2018).

[264] *See Ambiguous Quest for Edge*, *supra* note 55, at 948 ("For the outsider, merely possessing nonpublic information is not enough: '[T]here is no general duty to forgo market transactions 'based on material, nonpublic information.'" Sometimes you just get lucky, and the law is okay with that.") (quoting Chiarella v. United States, 445 U.S. 222, 233 (1980)). *Cf.* Kevin R. Douglas, *How Fatal Ambiguity Undermines Effective Insider Trading Reform*, 48 J. CORP. L. 353, 362-366 (2023) (describing both breach of fiduciary duty rationales as hiding continued commitments to parity of information and other forms of economic equality).

policies.[265] The *Panuwat* decision potentially has far-reaching implications, as it could transform the heightened scrutiny imposed by internal policies into a source of external enforcement, particularly given the prevalence of such broad prohibitions.[266]

Under the classical and misappropriation theories, federal insider trading liability generally requires the breach of a duty arising from a fiduciary relationship or a similar relationship of trust and confidence.[267] Expansive trading prohibitions in corporate policies, however, can stretch these boundaries to prohibit anyone from trading with material nonpublic information. The *Panuwat* court upheld this policy-based extension under the misappropriation theory,[268] which can permit the language of a private corporate policy to influence the practical reach of federal insider trading law. This interpretation is concerning because this approach could potentially expand the boundaries of illegal insider trading to align with the equal access theory of *SEC v. Texas Gulf Sulphur*,[269] the broadest insider trading prohibition in history. Such a result would also contradict *Chiarella v. United States*,[270] where the Supreme Court held that a "duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information."[271] Instead, the Court required a "duty to disclose arising from a relationship of trust and confidence,"[272] and explained that trading on MNPI alone is not sufficient to establish insider trading liability absent an underlying fiduciary or similar relationship.[273]

This shift can allow the SEC to circumvent established legal precedent, which limits insider trading liability to breaches of fiduciary duty or similarly recognized relationships,[274] and instead rely

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[265] *See supra* Part II.B.

[266] *See supra* Table 2.

[267] *See* Lisa M. Fairfax, *Whitman and the Fiduciary Relationship Conundrum*, 89 FORDHAM L. REV. 409, 413 (2020)(quoting United States v. O'Hagan, 521 U.S. 642, 652 (1997)). For a comprehensive discussion on the governing law to establish fiduciary relationship, *see also* Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 WASH & LEE L. REV. 1189 (1995).

[268] Order denying defendant's motion for summary judgment, SEC v. Panuwat, 702 F. Supp. 3d 883 (N.D. Cal. Nov. 20, 2023) (No. 21-cv-06322), at 12 ("The SEC's allegations fit under two underlying principles: that the misappropriation theory "reaches trading by corporate outsiders, not insiders," and that information may be material to more than one company…. The first is grounded in precedent, the second in commonsense.").

[269] SEC v. Texas Gulf Sulphur, 401 F.2d 833, 848 (2d Cir. 1968) (en banc) ("[A]nyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed."), cert. denied, 394 U.S. 976 (1969).

[270] Chiarella v. United States, 445 U.S. 222, 232-33 (1980). *See* A.C. Pritchard & Robert B. Thompson, A HISTORY OF SECURITIES LAW IN THE SUPREME COURT 127 (2023) ("*Chiarella v. United States* and *Dirks v. SEC* . . . validated the use of fraud law to combat insider trading, while cabining it within a fiduciary duty framework narrower than the Second Circuit's approach" in *SEC v. Texas Gulf Sulphur*.); *see also*, Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 SMU L. REV. 1589, 1589 (1999); Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1639, 1655 (2004). *Cf.* Onnig H. Dombalagian, *Texas Gulf Sulphur and Information Disclosure Policy*, 71 SMU L. REV. 713 (2018) (discussing the case's enduring influence on disclosure policy and securities law practice despite its later doctrinal retrenchment).

[271] Chiarella v. United States, 445 U.S. 222, 235 (1980). *See also*, *Expanding Misappropriation Theory to "Shadow" Insider Trading*, *supra* note 34 ("[I]n Chiarella v. United States, Justice Powell's majority opinion expressly rejected that [disclose or abstain] proposition, explaining that 'a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information.'").

[272] Chiarella v. United States, 445 U.S. 222, 230 (1980).

[273] Chiarella v. United States, 445 U.S. 222, 228 (1980).

[274] For a substantive, doctrine-based criticism of the Panuwat case, *see Expanding Misappropriation Theory to "Shadow" Insider Trading*, *supra* note 34 ("Shadow trading thus moves the SEC a long way in the direction of restoring the equal access to information theory the Supreme Court long ago rejected.").

on individual companies' privately ordered internal policies as the basis for the enforcement.[275] To align more closely with the existing legal framework, however, courts may need to exercise caution in allowing corporate insider trading policies to expand the boundaries of prohibited trading in ways that could effectively resuscitate the equal access theory, rejected on the ground that insider trading laws are not designed to enforce fairness in access to information but to address misuse of confidential information in violation of legal duties.[276]

Furthermore, using corporate policies as external enforcement tools raises additional concerns because these policies are not equivalent to enforceable contracts, such as non-disclosure agreements (NDAs).[277] Unlike NDAs, insider trading policies often function as internal guidelines and often lack the specificity required to establish clear legal obligations.[278] In particular, to limit their own liability, companies frequently characterize these policies as mere guidelines.[279] It is therefore questionable whether employees ought to face public enforcement actions for failing to adhere to internal policies that are not intended to carry the force of law.[280]

Given these considerations, courts should approach the reliance on internal policies as a primary basis for external enforcement with caution. The SEC's use of such policies to expand insider trading liability risks creating a pathway that could effectively circumvent the established legal precedent through the private ordering of companies' internal guidelines.

Conclusion

The SEC's reliance on corporate insider trading policies as an enforcement tool has the potential to significantly reshape the regulatory landscape of insider trading. By effectively delegating regulatory power to private companies, this approach expands insider trading liability beyond the traditional fiduciary duty framework. This insider trading spillover, where internal definitions of prohibited trading trigger external enforcement beyond the traditional legal contours of insider trading, raises concerns about its chilling effect on corporate compliance functions. Companies may hesitate to engage proactively with compliance systems, fearing that internal policies could inadvertently serve as a basis for federal enforcement.

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[275] *See* Lisa M. Fairfax, *From Equality to Duty: On Altering the Reach, Impact, and Meaning of the Texas Gulf Legacy*, 71 SMU L. REV. 729 (2018); A.C. Pritchard, *The SEC, Administrative Usurpation, and Insider Trading*, 69 STAN. L. REV. ONLINE 63 (2016) ("Congress, not administrative agencies, should take responsibility for enacting criminal prohibitions in a democracy committed to the rule of law."); Nicholas Calcina Howson, *Enforcement without Foundation? – Insider Trading and China's Administrative Law Crisis*, 60 AM. J. COMP. L. 955 (2012).

[276] Chiarella v. United States, 445 U.S. 222, 227 (1980).

[277] United States v. Chow, 993 F.3d 125 (2d Cir. 2021).

[278] Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 259 (1991) ("Contractual bans on trading were customary long before federal law entered the picture.").

[279] *See supra* note 221.

[280] Furthermore, not all corporate policies, including codes of ethics or employee handbooks, are automatically binding. Their enforceability often depends on whether employees have expressly agreed to be bound by these policies. From the perspective of employees, the enforceability of corporate policies is crucial as it directly shapes their behavior and their perceived obligations within the organization. *See* Jonathan R. Macey, *From Fairness to Contract: The New Direction of the Rules Against Insider Trading*, 13 HOFSTRA L. REV. 9 (1984). However, whether these internal policies rise to the level of binding agreements remains unsettled in both legal doctrine and practice. *See, e.g.*, Barbara Gardner, *Are Corporate Policies Legally Binding – Or What's in Your Contract?, Gardner Employment Law*, GARDNER EMPLOYMENT LAW (Feb. 11, 2021), https://gardneremploymentlaw.com/blog/are-company-policies-legally-binding/ ("While a company's policies themselves are not legally binding contracts, the policies must nevertheless be followed as a practical matter. Policies and procedures are necessary for employers to deal with the difficult but essential area of workforce management.").

These concerns are particularly pressing in light of this Article's findings. Blanket prohibitions remain dominant, restricting employees from trading in the securities of any publicly traded companies. At the same time, the growing use of corporate disclaimers explicitly warning that compliance with corporate policies does not shield employees from federal liability exacerbates legal uncertainty and discourages employees from sharing information. This misalignment between internal compliance and regulatory enforcement risks weakening compliance functions rather than strengthening them.

To mitigate these risks, this Article recommends that companies refine their insider trading policies by reconsidering the use of blanket prohibitions that may inadvertently expose employees to federal enforcement actions. Instead, companies can strengthen internal compliance through collaborative information-sharing between companies and employees, rather than structuring policies in ways that separate corporate liability from individual employees' insider trading violations. Courts should also exercise caution in permitting insider trading cases that rely primarily on corporate policy breaches, ensuring that liability is grounded in a clear legal framework rather than internal corporate policies.

Ultimately, corporate insider trading policies should function as tools of internal governance rather than triggers for public enforcement. By drawing a clear boundary between internal compliance and external enforcement, this Article emphasizes the need for a regulatory framework that preserves the integrity of corporate compliance programs while ensuring that insider trading liability remains firmly rooted in legal principles, not shifting to corporate internal policies.

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