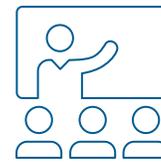


# Insights and Trends

## Evolving Practices for 10b5-1 Plans

Companies are becoming more focused on their 10b5-1 plan policies for their insiders as well as the oversight of these policies. Since the adoption of Rule 10b5-1 in 2000, the number of plans has grown steadily. Insiders at 54% of S&P 500 companies used 10b5-1 plans in 2017 compared to 26% 14 years ago.<sup>1</sup> These plans continue to receive significant attention from legislators, regulators, the press, legal commentators, academics, investors and shareholder-focused organizations as insider trading remains a key issue. As plan usage increases and the landscape around these plans evolves, companies and boards are increasingly adopting or formalizing existing policies to regulate plan usage — which raises various policy design and oversight issues.

Morgan Stanley, Shearman & Sterling LLP and the NASPP recently surveyed public companies' practices relating to 10b5-1 plans. The recent survey results provide additional insights into plan practices and build on the survey results from 2015.<sup>2</sup>

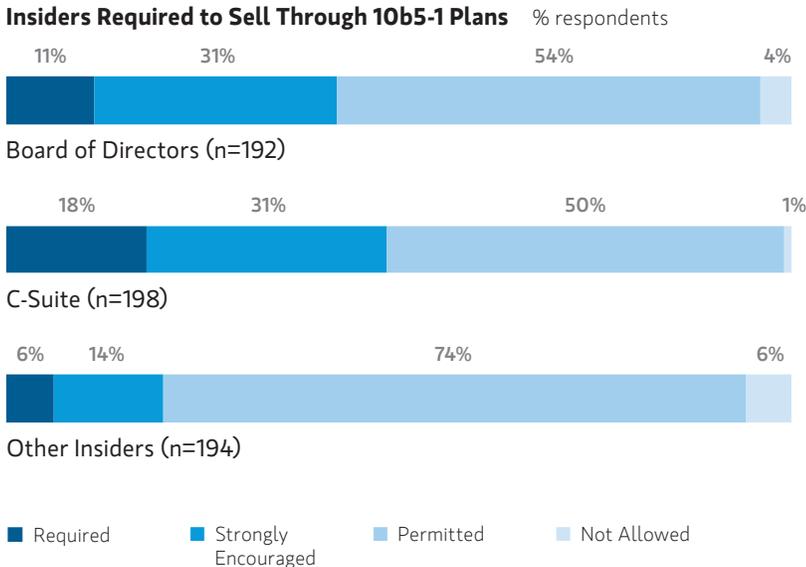


### What Is a Rule 10b5-1 Plan?

It is commonly thought of as a “prearranged” sales plan, it is required the plan be adopted at a time when the insider did not possess material non-public information (MNPI). These plans allow an insider to have predetermined trades in his or her company’s stock executed regardless of whether the insider had MNPI about the company at the time of these trades.

## Company Approach to Use of 10b5-1 Plans

For each group below, which best describes your company's approach to the use of 10b5-1 plans?



In the **2015 Society Survey** and **2015 NASPP Survey**, **9%** and **14%**, respectively, of respondents indicated that board members were required to sell pursuant to 10b5-1 plans

In the **2015 Society Survey** and **2015 NASPP Survey**, **14%** and **20%**, respectively, of respondents indicated that the C-Suite was required to sell pursuant to 10b5-1 plans



**TAKEAWAY** Nearly half of companies surveyed require or strongly encourage 10b5-1 plans for the C-Suite, and over 40% of companies surveyed require or strongly encourage 10b5-1 plans for directors.

## Company Review/Approval Process of 10b5-1 Plans

Which best describes your company's review/approval process of 10b5-1 plan documents for company insiders?



**TAKEAWAY** 99% of companies surveyed review or review and approve the trading schedule/selling parameters.

## Concerns When Reviewing 10b5-1 Plans

Which of the following are concerns of the company when reviewing the trading instructions/parameters of 10b5-1 plans of company insiders? (n=121)

Potential noncompliance with company stock ownership or holding period requirements	<b>62%</b>
Frequency of potential sales due to number of Form 4 filings that will be made	<b>44%</b>
Amount of shares being sold	<b>38%</b>
Time period over which shares could be sold	<b>33%</b>
Use of unusual formulas	<b>26%</b>
Frequency of transactions due to administrative concerns	<b>20%</b>
Level of discretion granted to the broker	<b>15%</b>
Use of stop-loss orders	<b>14%</b>
Use of price floors/limit orders	<b>13%</b>
Use of market order	<b>12%</b>
Concern over potential discovery of the trading parameters in a litigation/investigation	<b>8%</b>
Other	<b>4%</b>

## 10b5-1 Plan Policy Restrictions in Company Policies

What policy restrictions regarding 10b5-1 plans do you have in your company's insider trading or other corporate policy?

2018 NASPP Survey  
(n=125)

% respondents

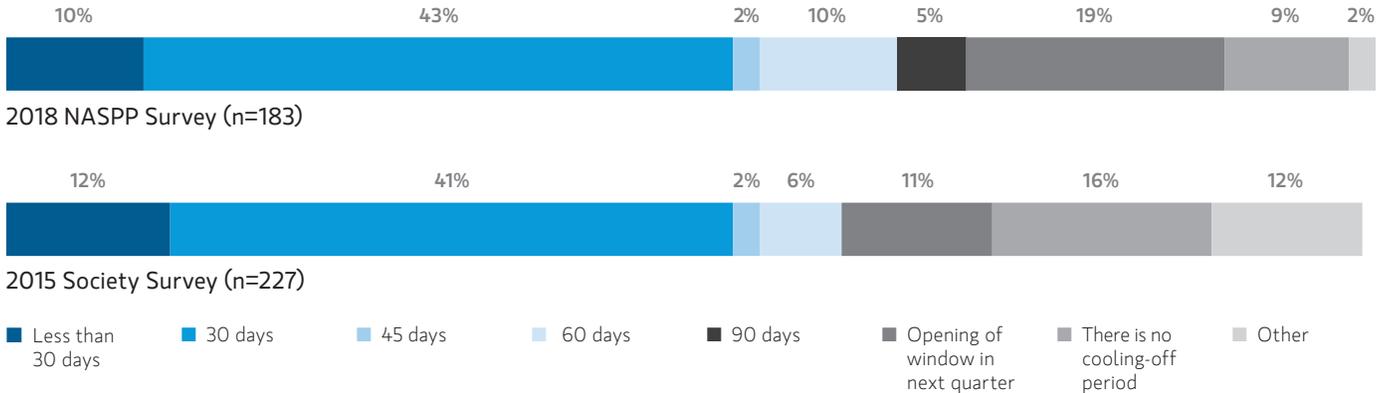


**TAKEAWAY** Many companies have specific 10b5-1 policies or include restrictions in their insider trading policies

## Cooling-Off Period

What is the typical length of the mandatory cooling-off period in plans entered into by company insiders (i.e., the time between the date the plan is signed and the date of first possible sale under the plan)?

### Length of Cooling-Off Period



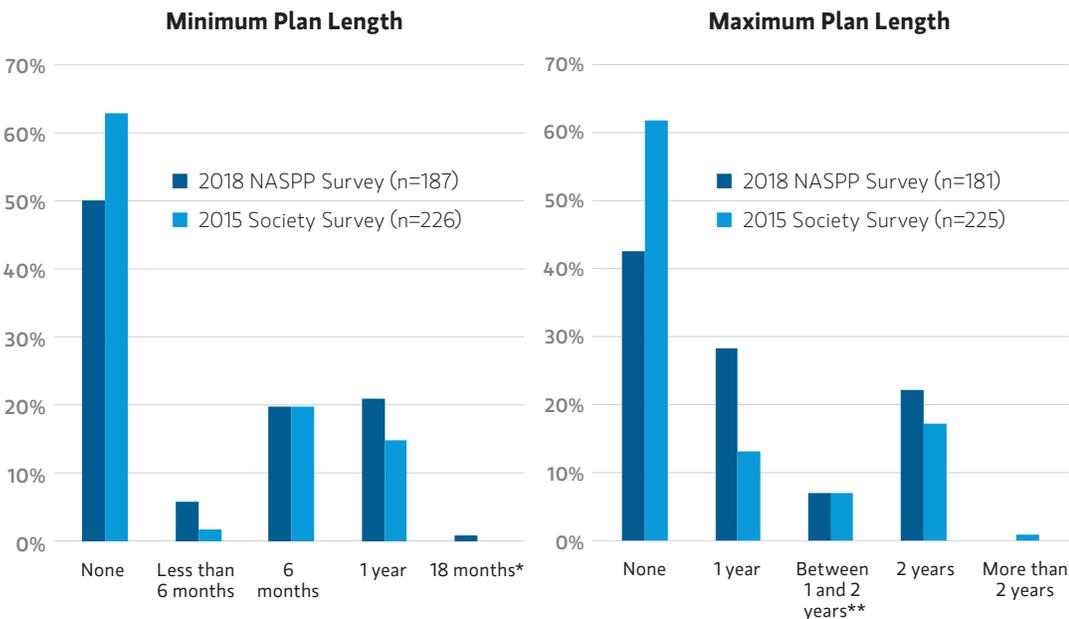
**TAKEAWAY** While 30 days is the most common cooling-off period, more companies are moving toward extending the cooling-off period to the opening of window in next quarter—19% in 2018 NASPP Survey vs. 11% in 2015 Society Survey.

## Minimum and Maximum Plan Length

What is the minimum and maximum plan length typically allowed by your company for a 10b5-1 plan of a company insider?

\*This choice was not available in the 2015 Society Survey.

\*\*2018 NASPP Survey answer choice was "18 months"; 2015 Society Survey answer choice was "Between 1 and 2 years"

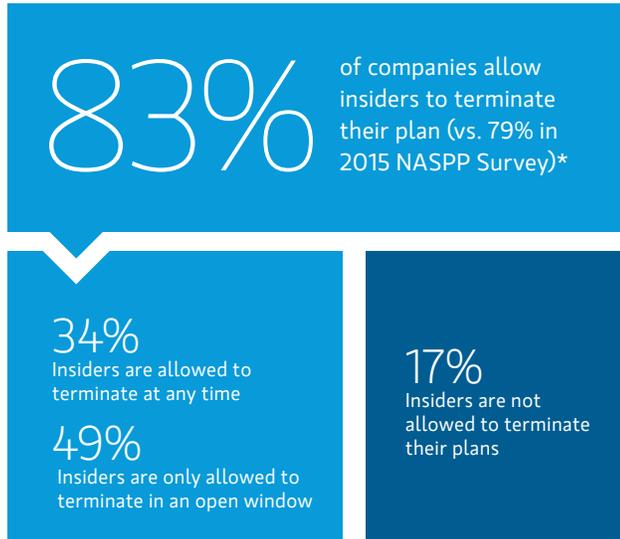


**TAKEAWAY** Minimum and maximum plan lengths are becoming more prevalent as the 2018 NASPP Survey reported a significant increase in the number of companies that imposed conditions on the minimum/maximum plan length.

## Terminations

Which best describes your company's approach to termination of 10b5-1 plans by company insiders? (n=187)

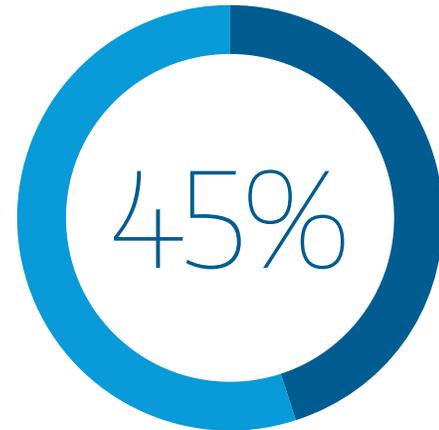
### Approach



\*The relevant 2015 NASPP Survey question was: "Do you permit employees to terminate 10b5-1 plans?"

Does your company typically limit the frequency of amendments/terminations (e.g., no more than one termination per year)? (n=145)

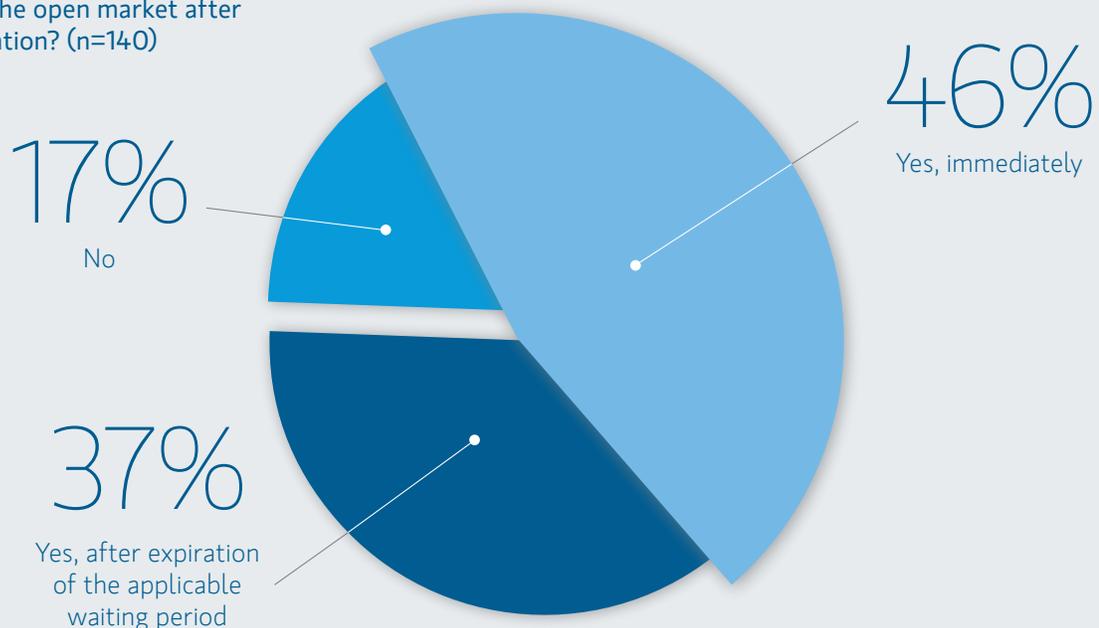
### Limitations



of companies typically limit the frequency of amendments/terminations such as no more than one termination per year (vs. 52% in 2015 Society Survey)

## Sales After Termination

Are company insiders allowed to sell into the open market after plan termination? (n=140)



## Plan Amendments

Which best describes your company's approach to imposition of a waiting period before trading can recommence after an amendment/modification to a 10b5-1 plan by a company insider?

### Company Approach to Imposition of Waiting Period Before Trading Can Recommence

	(n=158)
No waiting period is imposed	23%
14-day waiting period is imposed	4%
30-day waiting period is imposed	23%
45-day waiting period is imposed	3%
60-day waiting period is imposed	7%
90-day waiting period is imposed	3%
Waiting period imposed until opening of next trading window	22%
Other waiting period is imposed	1%
Amendments/modifications are not allowed	14%

If an amendment to an insider's 10b5-1 plan is allowed (regardless of the length of any waiting period), what typically happens to the original plan?

### Status of Original Plan Once Amendment to Insider's 10b5-1 Plan Is Allowed

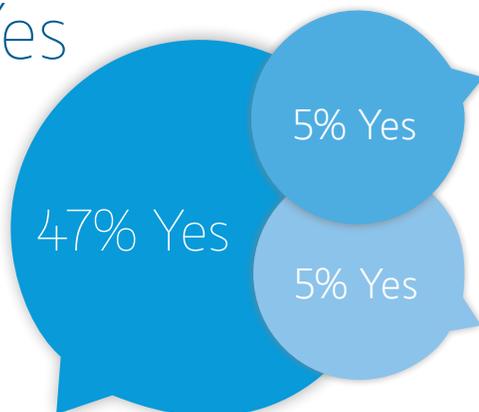
	2018 NASPP SURVEY (n=123)	2015 SOCIETY SURVEY (n=81)
<b>No "Gap" Approach</b> Original plan remains in effect and sales can continue to be executed under the original plan after the amendment adoption date until sales are permitted under the amended plan	33%	31%
<b>"Gap" Approach</b> Original plan becomes null and void immediately (i.e., from the amendment adoption date), forcing the participant to leave the market until sales are permitted under the amended plan	67%	69%

## Selection of a Broker

Do you require company insiders to use a brokerage firm preselected by the company? (n=151)

### Requirement to Use Preselected Brokerage Firm

57% Yes



Require company insiders to use one brokerage firm preselected by the company, which is the **same firm** as the company's stock plan record-keeper/administrator

Require company insiders to use one brokerage firm preselected by the company, which is a **different firm** from the company's stock plan record-keeper/administrator

But allow company insiders to choose among multiple brokerage firms preselected by the company



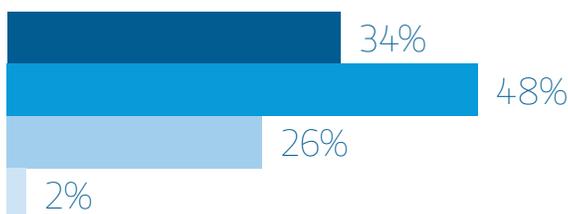
All company insiders can use their own brokerage firm

## Suspensions

Do the 10b5-1 plans entered into by company insiders typically have a suspension provision? (multiple answers possible) (n=146)

% respondents

- No
- Yes, for legal, regulatory or contractual reasons
- Yes, for any reason deemed by the company
- Yes, for other specifically enumerated situations



**TAKEAWAY** Suspension provisions should clearly identify objective triggering events that suspend 10b5-1 plans, and such provisions should not permit insiders and the company to retain control in deciding whether a particular event would trigger suspension of the plan.

## When Trading Under a Plan Is Permitted

Do you permit company insiders to sell shares through their 10b5-1 plans during regularly scheduled quarterly blackout periods?

% respondents

- No
- Prohibit some or all senior executives; allow other insiders
- Yes, allow all insiders
- Other\*



2018 NASPP Survey (n=149)



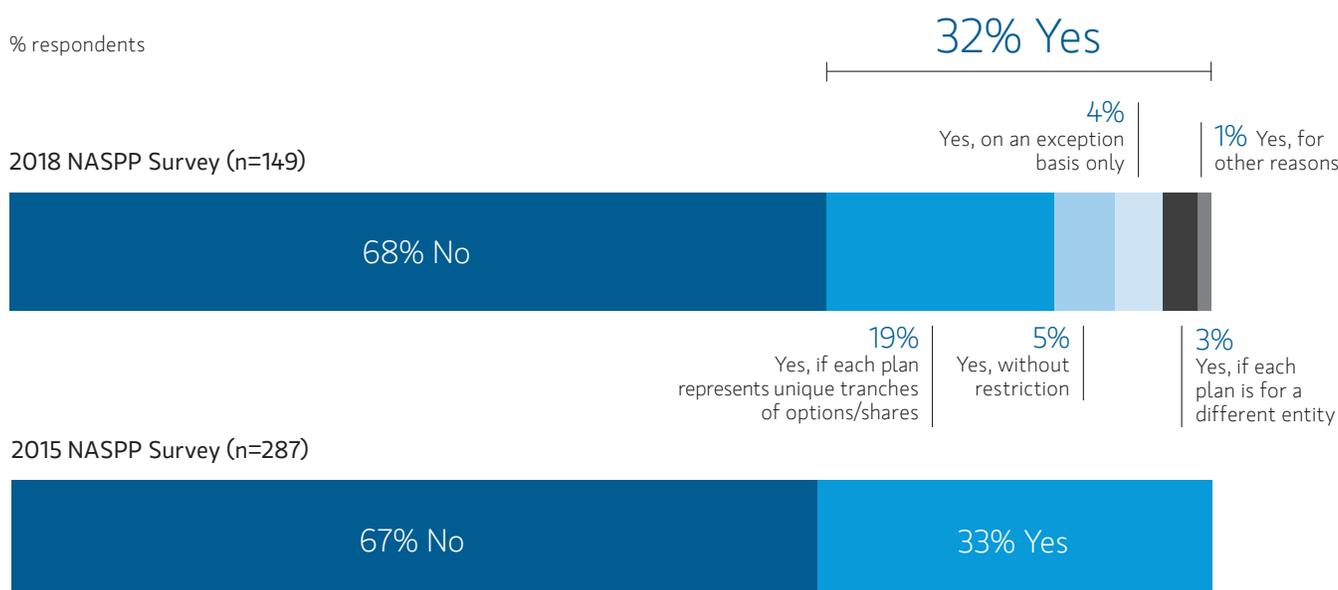
2015 Society Survey (n=212)

\*"Other" was not a answer choice in the 2018 NASPP Survey

## Multiple, Concurrent Plans

Have you permitted company insiders to have multiple, concurrent 10b5-1 plans?

% respondents



\*2015 NASPP Survey only offered two answer choices, "Yes" or "No."

The Morgan Stanley, Shearman & Sterling LLP and NASPP Survey revealed interesting trends in the management of 10b5-1 trading plans. If you would like to review your company's plan practices and insider trading policies, please contact Stephen Giove of Shearman & Sterling LLP at 212-848-7325 or at [sgiove@shearman.com](mailto:sgiove@shearman.com), or Morgan Stanley Executive Financial Services at [executivefinancialservices@morganstanley.com](mailto:executivefinancialservices@morganstanley.com).

<sup>1</sup>The Washington Service tracks insider trading information filed with the Securities and Exchange Commission. The above numbers are compiled by The Washington Service from Form 4 and 8-K filings in the periods listed. Information herein was obtained from sources believed reliable, but the accuracy and completeness thereof cannot be guaranteed. Information contained herein is subject to change. January 7, 2018. Reprinted with the permission of The Washington Service. 301-913-5100 [www.washingtonservice.com](http://www.washingtonservice.com).

1. Based on companies in the S&P 500 Index as of December 31 of each reporting year.
2. Number of S&P 500 companies with one or more Form 4s filed during the reporting year.
3. Number of S&P 500 companies with one or more 10b5-1 Plan trades filed during the reporting year.

<sup>2</sup> The 2015 Morgan Stanley and Shearman & Sterling LLP Survey, completed by members of the Society for Corporate Governance, and the 2015 Morgan Stanley and NASPP Plan Practices Survey, completed by members of the NASPP.

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1. PDPs should be approved by the compliance officer or general counsel of the company.
2. A PDP may require a cessation of trading activities at times when lockups may be necessary to the company (i.e., secondary offerings, pooling transactions, etc.).
3. A PDP does not generally alter the restricted stock or other regulatory requirements (e.g., Rule 144, Section 16, Section 13D) that may otherwise be applicable.
4. PDPs that are modified or terminated early may weaken or cause you to lose the benefit of the affirmative defense.
5. Public disclosure of PDPs (e.g., via press release) may be appropriate for some insiders.
6. Most companies will permit PDPs to be entered into only during open window periods.
7. Morgan Stanley, as well as some issuers, imposes a mandatory waiting period between the execution of the PDP and the first sale pursuant to the PDP.

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