

**APRIL 10, 2020**

For more information,
contact:

Dixie Johnson
+1 202 626 8984
djohnson@kslaw.com

Matthew Hanson
+1 202 626 2904
mhanson@kslaw.com

Kelli Gulite
+1 202 626 2903
kgulite@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania Avenue,
NW
Washington, D.C. 20006-
4707
Tel: +1 202 737 0500

Quarantine Your Sensitive Business Information to Avoid Inadvertent Tipping Liability

If you are reading this during April 2020, you're probably reading it from somewhere in your own home — and probably near the friends and loved ones with whom you're living in close quarters during this time of remote work, quarantines, and social distancing. Under these circumstances, we all struggle just to get things done, let alone to preserve business confidences from people in the next room. But protecting confidential information can be crucial to protecting your family and friends.

We're here to remind you of the danger of unwittingly becoming the source of material non-public information, tempting those under the same roof to illegally trade or to pass the information on for others to trade.¹

Each year for nearly a decade, we have chronicled cases brought against family members, close friends, and other trusted advisers (including therapists² and security guards³) who misappropriated information from a company insider. In many instances, the insiders were entirely unaware they were the source of a tip. They may not actually be charged with a violation, or even directly named in the SEC's charging documents against the ultimate trader. Even so, being the source of an unwitting tip can result in expensive legal bills and cause damage to personal relationships, work relationships, and professional reputation. So, take a moment to read these vignettes and rededicate yourself to quarantining any material non-public information away from your friends and family.

SECURE SENSITIVE FILES

Last May, the SEC brought an insider trading case against a snooping houseguest who traded ahead of a merger that he learned about by surreptitiously rifling through a folder of confidential documents in a long-time friend's home.⁴ Brian Fettner, who agreed to settle the case without admitting or denying the allegations, had been friends with the general counsel of Cintas Corporation since the two met in middle school. One morning, Fettner stumbled across a folder on his friend's desk that was labeled with the code name for a contemplated merger between Cintas



and uniform-maker G&K Services, Inc. The folder contained merger documents and a draft nondisclosure agreement. Fettner read at least some of the documents, according to the SEC.

Apparently without ever saying anything about the discovery to his friend, Fettner used a mobile device later that day to purchase approximately \$300,000 of G&K shares. Fettner purchased more G&K shares in the coming days and even persuaded his father and girlfriend to purchase G&K shares. The price of G&K stock jumped following the August 16, 2016 announcement of the merger, and the trades placed made at least \$250,000 in illegal profits.

Fettner agreed to settle the case and pay a penalty of \$252,995. His ex-wife and former girlfriend were named as relief defendants because Fettner had placed his trades in their accounts. Both agreed to disgorge trade profits, with interest.⁵ The general counsel was not charged, but one can imagine the pain and expense caused at the newly merged company as the SEC investigated whether he should be.

SPEAK SOFTLY

In July 2019, the SEC brought insider trading charges against two men who traded on information that one of them overheard from a work call his brother-in-law took about ongoing merger diligence.⁶ Balaji Sundarraj agreed to settle the charges without admitting or denying the SEC's findings. Sundarraj and his brother-in-law, an associate in the corporate department of a law firm, had a close relationship. Sundarraj frequently visited his sister and brother-in-law's house; they lived on the same street. Sundarraj knew that his brother-in-law sometimes worked on confidential matters from home, and he knew to keep what he learned about that work confidential.

When working from home one day in late April 2016, the brother-in-law took a call regarding a potential acquisition of Opower, Inc. He did not realize, however, that Sundarraj could hear his conversation from the next room. Within the next couple of days, Sundarraj told his friend and colleague David O' Brien about the potential acquisition. The two then met at a public library to research Opower from a computer that they believed couldn't be traced back to them. Sundarraj and O'Brien then purchased more than \$175,000 of Opower shares. The day Oracle publicly announced the deal, Sundarraj and O'Brien both sold their Opower stock for nearly \$35,000 in profits.

To settle the charges, the two men agreed to disgorge their profits from the trades, along with prejudgment interest, and were assessed civil penalties totaling \$57,850, so nearly twice as much as their would-be profits.

According to the SEC, the law firm associate had taken steps to ensure any sensitive materials he was working on would be protected, and the government certainly cannot expect everyone who works from home to soundproof their home office. The associate himself was neither charged, nor even named in the SEC's charging documents against Sundarraj and O'Brien. That said, we suspect he was involved in the SEC's investigation as a witness at the very least. With many company insiders and professionals working from home and in close quarters with friends and family members, it is important to remember: take extra care with information that you know would be market-moving or that might tempt others in the house to trade.

GO PAPERLESS AND USE A PRIVACY SCREEN

Quarterly earnings may be disappointing for many companies this spring, although some bright spots may appear even in this volatile market. Either way, protecting anticipated results protects loved ones, too. In September, the SEC charged two men for trading on positive earnings news that one of them learned from his long-time girlfriend, an executive at Ulta Beauty Inc.⁷ The executive and her long-term boyfriend, Geoffrey Homer, a broker turned professional recruiter, often spent time together at each other's homes. The couple frequently discussed work and business successes. Over the course of their relationship, Homer's girlfriend forwarded him multiple confidential work emails. For example, she forwarded Homer emails containing nonpublic information about Ulta's sales and vendor relationships so that he could



print them out for her. She also once forwarded Homer a congratulatory email that she received after a successful quarter. And, on several occasions, she emailed Homer nonpublic information about Ulta's recruitment needs.

Homer tipped that information multiple times to his childhood friend, Keith Daubenspeck. Apparently to build the sense that Homer's tips to Daubenspeck were given as some form of repayment, the SEC's complaint alleged that Daubenspeck had loaned money to Homer since they were in their 20s and that he had once offered Homer a job. Imagine the level of intrusion into the lives of all involved, especially the Ulta executive, as the SEC investigated who had acted improperly.

Ultimately, SEC investigators concluded that Daubenspeck purchased more than \$1.5 million in Ulta stock. In total, Daubenspeck profited more than \$111,000 from buying Ulta stock ahead of the August 2015 and February 2016 earnings announcements.

On September 5, the SEC charged both Daubenspeck and Homer. Daubenspeck agreed to settle the case without admitting or denying the allegations, and he agreed to disgorge \$111,472 (plus prejudgment interest) with a matching civil penalty totaling \$111,472.⁸ Several months later, on December 16, Homer also settled and agreed to pay a civil penalty. The court is scheduled to rule on the that civil penalty on May 8.⁹

TALK WITH LOVED ONES ABOUT SOMETHING OTHER THAN WORK

Companies uncover possible insider trading and tipping, too. Earlier this year, a high-profile financial company reportedly launched an internal investigation into the actions of a London-based managing director, after her ex-boyfriend, Marc Demane Debih, confessed in open court that he misappropriated non-public information about her clients.¹⁰ During a separate insider trading trial, Debih testified that he extracted information about three potential acquisitions from the managing director by asking her seemingly ordinary questions about her work. He was then able to identify the acquirers by secretly conducting independent research.

The financial company publicly cleared the managing director after a two-week long internal investigation.¹¹ The company noted that they identified "no concerns" about her conduct in relation to the statements made by Debih, and that the managing director "retains our full support and remains a valued senior member of the team." Imagine, though, having to reveal very personal information to an employer in order to help them become comfortable she wasn't at fault. She and the company both had to endure public embarrassment, all due to an untrustworthy boyfriend.

People who are going to steal will find a way to do so, but having a policy and practice of protecting confidential information can help prevent such painful experiences later. We're all already secluded with people we hopefully chose wisely and can trust. But it's a good idea to discourage them from picking up a new hobby of stock trading during these volatile times (or let them know they are obligated not to trade on information learned in the household during these times). Maybe if they listen, problems will be avoided.

FRESH REMINDER FROM THE SEC'S ENFORCEMENT STAFF

Perhaps with these types of cases in mind, the SEC Division of Enforcement's co-directors, Stephanie Avakian and Steven Peikin, issued a statement on March 23, 2020 pointing out that, "in these dynamic circumstances, corporate insiders are regularly learning new material nonpublic information that may hold an even greater value than under normal circumstances."¹² Information that might not previously have been viewed as material will be reviewed anew, in hindsight, potentially creating new risks. One result of these dynamics, the co-directors said, is that "a greater number of people may have access to material nonpublic information than less challenging times." They cautioned those with access, including directors, officers, employees, and consultants and other outside professionals, to "be mindful of their obligations to keep this information confidential and to comply with the prohibitions on illegal securities trading."



Of course, insider trading is one of many risks involving company secrets in the current environment,¹³ all of which underscore the need to protect those secrets. SEC personnel also are working from home these days, and insider trading investigations can be built, in large part, on digital analyses of trading, paired with concurrent digital communications between traders and their suspected tippers. These are just the types of cases the SEC staff can continue developing apace while working remotely themselves. Given the Co-Directors' announcement, we expect to have many cases to write about in our next annual installment. Hopefully not about you. Please stay safe out there.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,100 lawyers in 21 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising." View our [Privacy Notice](#).

ABU DHABI	BRUSSELS	DUBAI	HOUSTON	MOSCOW	RIYADH	SINGAPORE
ATLANTA	CHARLOTTE	FRANKFURT	LONDON	NEW YORK	SAN FRANCISCO	TOKYO
AUSTIN	CHICAGO	GENEVA	LOS ANGELES	PARIS	SILICON VALLEY	WASHINGTON, D.C.

¹ This is just the latest installment in what has, regrettably, become an annual tradition. See, e.g., Dixie L. Johnson, Aaron W. Lipson & Matthew B. Hanson, [Stay Vigilant: The Government Shutdown Didn't Shut Down Insider Trading Enforcement](#), King & Spalding LLP Client Alert, Mar. 20, 2019; Dixie L. Johnson, Richard H. Walker, & Matthew B. Hanson, [Loose Lips Still Sink Ships: Inadvertent Tipping in 2017](#), LAW360, Dec. 21, 2017; Dixie L. Johnson, Alana L. Griffin, & Matthew B. Hanson, [Avoid Inadvertent Tipping This Holiday Season](#), LAW360, Dec. 21, 2016; Dixie L. Johnson & Matthew B. Hanson, [Post-Newman Reality: Investigations Involving Unwitting "Tips" to Close Friends and Relatives Will Continue](#), King & Spalding LLP Client Alert, Oct. 8, 2015; Dixie L. Johnson & Matthew B. Hanson, [Friends and Family: Keeping Loved Ones Safe from Insider Trading Temptations](#), King & Spalding LLP Client Alert, Dec. 8, 2014; Dixie L. Johnson, [Maintaining Client Confidences During the Holidays: Avoiding Accidental Tipping](#), Fried, Frank, Harris, Shriver & Jacobson LLP, Dec. 23, 2013; Dixie L. Johnson & Matthew B. Hanson, [Accidental Tipping: The Wrong Kind of Holiday Present for Family and Friends](#), Fried, Frank, Harris, Shriver & Jacobson LLP, Dec. 14, 2012; Dixie L. Johnson & Robert Greffenius, [Topics to Avoid in Holiday Conversation: Religion? Politics? Work!](#), Fried, Frank, Harris, Shriver & Jacobson LLP, Nov. 30, 2011; and Dixie L. Johnson and Robert Greffenius, [Insider Trading by Friends and Family: When the SEC Alleges Tipping](#), BUSINESS LAW TODAY, Aug. 18, 2011.

² SEC v. Peer, No. 2:17-cv-01865 (W.D. Wash. Dec. 14, 2017), <https://www.sec.gov/litigation/complaints/2017/comp24012.pdf>.

³ SEC v. Alpert, No. 17-Civ-1879 (S.D.N.Y. Mar. 15, 2019), <https://www.sec.gov/litigation/complaints/2017/comp23780.pdf>.

⁴ SEC v. Fettner, et. al., No. 9:19-cv-80613 (S.D. Fla. May 7, 2019), <https://www.sec.gov/litigation/complaints/2019/comp-pr2019-67.pdf>.

⁵ Final Judgment, SEC v. Fettner, et. al., No. 9:19-cv-80613 (S.D. Fla. May 30, 2019).

⁶ In the Matter of Balaji Sundarraj, et. al., SEC Administrative Proceeding File No. 3-19261 (Jul. 23, 2019), <https://www.sec.gov/litigation/admin/2019/34-86435.pdf>.

⁷ SEC v. Daubenspeck, et. al., No. 1:19-cv-05939 (N.D. Ill. Sept. 5, 2019), <https://www.sec.gov/litigation/complaints/2019/comp24587.pdf>.

⁸ Final Judgment as to Keith Daubenspeck, SEC v. Daubenspeck, et. al., No. 1:19-cv-05939, (N.D. Ill. Oct. 1, 2019).

⁹ Final Judgment as to Geoffrey Homer, SEC v. Daubenspeck, et. al., No. 1:19-cv-05939, (N.D. Ill. Dec. 16, 2019).

¹⁰ Bob Van Voris, [Goldman Sachs Begins Probe After Insider-Trading Testimony](#), BLOOMBERG NEWS, Jan. 9, 2020, <https://www.bloomberg.com/news/articles/2020-01-09/goldman-sachs-begins-probe-after-insider-trading-testimony>.

¹¹ Bob Van Voris, [Goldman Finds 'No Concerns' Over Secrets Stolen by a Banker's Ex](#), BLOOMBERG NEWS, Jan. 16, 2020, <https://news.bloomberglaw.com/banking-law/goldman-finds-no-concerns-over-secrets-stolen-by-a-bankers-ex>.

¹² Statement from Stephanie Avakian and Steven Peikin, Co-Directors of the SEC's Division of Enforcement, Regarding Market Integrity, U.S. Securities and Exchange Commission, Mar. 23, 2020, <https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity>.

¹³ See, e.g., Stephen E. Baskin, Kenneth L. Steinthal, Jill A. McWhirter & Rajesh D. Patel, [COVID-19 Impacts on Businesses and Their Intellectual Property Rights](#), King & Spalding LLP Client Alert, Mar. 27, 2020, <https://www.kslaw.com/news-and-insights/covid-19-impacts-on-businesses-and-their-intellectual-property-rights>.