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## Reviving the Holiday Gathering This Year? Avoid Adding Insider Trading Liability to the Mix.

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As we each cautiously approach the holidays with our own versions of in-person holiday parties and family gatherings, and with many of us now exploring the “hybrid” working environment, we are here to remind you that insider trading and tipping liability poses a serious threat no matter where you may find yourself this holiday season.

For the past decade, our team has highlighted cases demonstrating the hardships of friends and family members unwittingly caught up in insider trading cases.<sup>1</sup> This year’s developments serve as cautionary tales to be on the lookout as you reconnect with family and friends, both in person and remotely. Even those who unknowingly provide a tip and are never actually charged with a violation may nevertheless feel like they have also landed on the naughty list—the legal bills, reputational damage, and impact on work and personal relationships that these cases can cause will ruin more than just your holiday. So be cautious while you’re having fun!

### BE CAREFUL VENTING TO YOUR SPOUSE

On August 18, 2021, the SEC charged a 60-year-old woman from the Chicago suburbs for insider trading ahead of a tender offer by pharmaceutical company H. Lundbeck A/S to acquire Alder BioPharmaceuticals, Inc., where her husband was a senior human resources manager.

According to the complaint, Denise Grevas worked from home—a circumstance we all know well at this point and about which we warned in our last installment.<sup>2</sup> Grevas “spent her time actively trading stocks on a daily basis,” according to the complaint, which added that she “regularly watched television programs about securities trading, read financial literature, and closely tracked certain biopharmaceutical stocks.”<sup>3</sup>

The complaint alleged that Grevas’s husband learned about the pending tender offer in his role as a senior human resources employee at Lundbeck. He was asked to prepare compensation and separation packages for certain executives as a member of Lundbeck’s due diligence



team for the Alder tender offer. The SEC alleged that Grevas learned the material nonpublic information when her husband called to complain about the additional acquisition-related work he had been asked to perform. He apparently “blurted out Alder’s name during the conversation.”

Without telling her husband, Grevas purchased 30,800 shares of Alder stock in five brokerage accounts under her control, trading nearly every trading day until Lundbeck’s announcement. After Lundbeck announced the tender offer, Alder’s share price increased 84%, allowing Grevas to obtain gains of \$286,960.

The SEC’s complaint underscored at several points that they did not view Grevas’s husband as being at fault. For example, the SEC stated that the husband “expected Grevas to keep the information about his work on the Alder tender offer confidential and did not have reason to believe that she would trade on the information.” The complaint also stated that, after Lundbeck announced the acquisition and Grevas informed her husband about her trades, he “became upset with Grevas, telling her that she should not have traded in Alder stock because he was an insider and knew about the acquisition.” That said, the complaint also noted that the husband had resigned from his position at Lundbeck in 2020, an apparent acknowledgment of the professional setbacks he faced as a consequence of his wife’s trades.

Grevas agreed to pay a civil penalty in an amount to be determined by the court at a later date.<sup>4</sup> The U.S. Attorney’s Office for the Northern District of Illinois also brought criminal charges against Grevas in a parallel action, in which Grevas pled guilty to securities fraud and agreed to make restitution.<sup>5</sup> Her sentencing is scheduled for February 2022, and she faces up to 20 years in prison.<sup>6</sup>

## FRIENDS CAN BECOME FOES

Two cases brought by the SEC last year demonstrate the need to be cautious in our relationships with friends and neighbors. On September 25, 2020, the SEC brought insider trading charges against Eric Hill, alleging that he obtained nonpublic information from a close friend about a potential merger involving Piedmont Natural Gas Company, Inc.<sup>7</sup> The friend and Hill had known each other for twenty years. They went to the same college, vacationed together, worked together at the same consulting firm, and the friend was in Hill’s wedding party. (Imagine the scope of the investigation confirming those allegations.) The friend had a history of sharing work-related confidential information with Hill, expecting that Hill would maintain the information’s confidentiality. The complaint alleged that, based on this relationship, Hill owed his friend a duty of trust and confidence.

The friend worked at an actuarial consulting firm that assisted Piedmont in managing the company’s retirement benefit plans. In that role, the friend was entrusted with nonpublic information about a potential merger and was told by Piedmont executives to keep the information confidential. Later that day, however, the friend conveyed this information to Hill. Then, within fifteen minutes of the friend informing Hill of the merger, Hill called his broker and purchased Piedmont securities, acquiring \$6,799.75 in Piedmont options and \$41,830 in Piedmont stock throughout the course of one week. Hill went so far as to post on an online stock trading message board that he was hopeful about a Piedmont merger, even though he was the only one to purchase the relevant options. After the merger was announced, Hill sold all of his Piedmont stock and options, reaping profits of \$380,677.

On September 30, 2021, Hill entered into a final judgment under which he admitted fault and agreed to pay a civil penalty in an amount to be determined by the court at a later date.<sup>8</sup> In a parallel action, the U.S. Attorney’s Office for the Western District of North Carolina brought criminal charges against Hill, and he pled guilty to violations of Sections 10(b) and 32 of the Securities Exchange Act of 1934.<sup>9</sup> Hill was sentenced to twelve months of probation.<sup>10</sup>

Similarly, on May 4, 2020, the SEC brought insider trading charges against Zhuobin Hong (“Ben Young”) and his wife Caixia Jiang after they were allegedly tipped by their close friends and neighbors, Chairman of Company A (“Mr. A”) and his wife (“Mrs. A”), based on their nonpublic knowledge of a potential acquisition of Sagent Pharmaceuticals, Inc.<sup>11</sup>



While Company A and Sagent were in discussions on a potential acquisition, Mr. A and his wife were in constant communication with the defendants given they lived across the street from each other, and as seen by phone records showing frequent phone calls between all of the parties. Hong and Jiang opened Hong Kong-based trading accounts in the names of China-based relatives and began to purchase Sagent stock. Their sons also began purchasing Sagent stock. The defendants purchased or caused to be purchased over 1.17 million shares of Sagent stock at a cost of over \$16.8 million. When the acquisition was announced, the defendants sold the shares for combined gains of more than \$8.5 million.

The defendants and Mrs. A were subpoenaed to testify and invoked the Fifth Amendment. Mr. A was asked to voluntarily provide information and refused to cooperate. At this point, it is not clear from the filings whether the SEC has elected not to charge Mrs. A and Mr. A, or if they still might do so in the future.

### THE SEC IS STILL ON THE LOOKOUT FOR DIRECT TIPPING

We also want to remind you that direct tipping cases are alive and well, and that our close proximity to nearby friends and family can build the foundation of a tipping scheme. A case with a very interesting recent turn of events offers a prime example. On December 11, 2020, the SEC charged William D. Wright, the former Corporate Controller of CEB Inc., and Christopher J. Clark, Wright's brother-in-law, with insider trading in advance of a public announcement that CEB would be acquired.<sup>12</sup> Wright and Clark lived less than two miles from each other and communicated by phone, text, and in person. Clark coached their daughters' basketball team, and they saw each other at family holiday events. (Again, imagine how intrusive this government investigation would have felt—but this is how insider trading and tipping charges are built.)

The complaint alleged that Wright tipped Clark in the months before the merger announcement. Clark purchased highly speculative, out-of-the-money call options in CEB and told his son to purchase similar options. Clark liquidated his wife's IRA, almost maxed out a line of credit, and took out a loan on his car to fund additional purchases. These options were so speculative that Clark and his son were the only people to buy them on all but one of the days they traded.

The final consent judgment against Wright ordered a civil monetary penalty of \$240,934 and a bar against Wright from serving as an officer or director of a public company for two years.<sup>13</sup> When Clark went to trial, however, the Eastern District of Virginia dismissed the case before Clark could even argue his defense because the judge said "he had not heard any direct evidence or even circumstantial evidence that Clark had obtained any confidential information or acted on it" in the SEC's case in chief.<sup>14</sup> While the result was certainly a success for Clark, the cost of him having to battle the investigation, these charges, and the trial, not to mention potentially losing his job and damaging his personal relationships, reveals the need to avoid all appearances of impropriety when it comes to nonpublic material information, even if the end result is no liability.

### PENALTIES AFTER *LIU*

One common theme in the above cases, other than the repercussions of discussing work with your loved ones, is their lack of a disgorgement penalty, most likely due to the Supreme Court's decision in *Liu v. SEC*.<sup>15</sup> While the National Defense Authorization Act extended the statute of limitations on disgorgement for insider trading from five years to ten years beginning in January of this year, the number of insider trading cases brought with a request for disgorgement has decreased following *Liu*. In that case, the Court found that the SEC was bound by "longstanding equitable principles" that would place limitations on the imposition of disgorgement.<sup>16</sup> Therefore, it is unclear how the new statutory authority explicitly granting the SEC the power to "require disgorgement" comports with the SEC's obligation to follow "longstanding equitable principles." When combining such a limitation with the difficult reality of the SEC finding real investor victims and running a cost-effective distribution for disgorgement penalties, however, it is possible that the SEC will simply seek larger penalties in place of disgorgement.<sup>17</sup>



## DON'T JUMP TO PUT A RULE 10B5-1 PLAN ON YOUR WISHLIST

The SEC's renewed interest in Rule 10b5-1 plans is an additional risk when it comes to potential insider trading liability. In June of this year, SEC Chairman Gary Gensler said 10b5-1 plans have resulted in "real cracks in our insider trading regime" that could be resolved with new disclosure requirements and limitations.<sup>18</sup> Then, on December 15, the SEC announced proposed amendments to Rule 10b5-1 that would impose a cooling-off period before trading can commence under a plan, require directors and officers to certify that they are not aware of any material nonpublic information when they enter into the plans, limit the number of single-trade plans to one per twelve-month period, and prevent overlapping trading plans.<sup>19</sup> The comment period for the proposed rule will be open for forty-five days.

While no enforcement actions have arisen following Gensler's comments thus far, the SEC has recently pursued a company for lacking the proper internal controls for 10b5-1 plans, signaling that greater scrutiny on senior executives with 10b5-1 plans could be on the horizon.<sup>20</sup>

## A POTENTIAL NEW YEAR'S RESOLUTION FOR CONGRESS

Congress is pursuing its own action to combat insider trading. The Insider Trading Prohibition Act, introduced this past spring by Rep. Jim Himes (D-CT), would statutorily bar individuals from trading in a security while "aware of material, nonpublic information relating to such security . . . if such person knows, or recklessly disregards, that such information has been obtained wrongfully, or that such purchase or sale would constitute a wrongful use of such information."<sup>21</sup> The bill would make it illegal for traders to provide material nonpublic information to individuals who trade on the information or spread it to others who trade, but would shield employers from derivative liability for wrongdoing by their employees. It would also be a rare legislative development in insider trading law, which has long been based on judicial decisions around broader anti-fraud prohibitions.

While similar bills have passed in the House but were later blocked by the Senate, Rep. Himes's bill was approved in the House with over one hundred Republican votes on May 18, 2021, and many expected it might pass in the Democrat-controlled Senate.<sup>22</sup> Another year is available for passage during the current session of Congress, so watch this space.

So, we again implore you to avoid mixing insider trading and tipping liability into your holiday plans this year. Being held liable, or even just investigated, can be painful and expensive—no matter whether the investigators are enforcing a new statute or decades of judicial decisions. Staying out of trouble starts with keeping your confidential information safe.

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<sup>1</sup> See Dixie L. Johnson, Matthew B. Hanson & Kelli Gulite, [Quarantine Your Sensitive Business Information to Avoid Inadvertent Tipping Liability](#), KING & SPALDING LLP CLIENT ALERT (Apr. 10, 2020); 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: Avoid 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); Dixie L. Johnson & Robert Greffenius, [Insider Trading by Friends and Family: When the SEC Alleges Tipping](#), BUS. LAW TODAY (Aug. 18, 2011).

<sup>2</sup> See Dixie L. Johnson, Matthew B. Hanson & Kelli Gulite, [Quarantine Your Sensitive Business Information to Avoid Inadvertent Tipping Liability](#), KING & SPALDING LLP CLIENT ALERT (Apr. 10, 2020).

<sup>3</sup> Complaint, SEC v. Grevas, No. 1:21-cv-04390 (N.D. Ill. Aug. 18, 2021), <https://www.sec.gov/litigation/complaints/2021/comp25174.pdf>.

<sup>4</sup> Litigation Release, Sec. & Exch. Comm'n, SEC Charges Illinois Resident with Insider Trading (Aug. 18, 2021), <https://www.sec.gov/litigation/litreleases/2021/lr25174.htm>.

<sup>5</sup> Information, United States v. Grevas, No. 1:21-cr-00512 (N.D. Ill. Aug. 18, 2021), <https://www.justice.gov/usao-ndil/press-release/file/1425846/download>; Plea Agreement, United States v. Grevas, No. 1:21-cr-00512 (N.D. Ill. Oct. 21, 2021), <https://www.justice.gov/usao-ndil/press-release/file/1444021/download>.

<sup>6</sup> Press Release, Dep't of Just., Suburban Chicago Woman Guilty of Insider Trading (Oct. 21, 2021), <https://www.justice.gov/usao-ndil/pr/suburban-chicago-woman-guilty-insider-trading>.

<sup>7</sup> Complaint, SEC v. Hill, No. 3:20-cv-00536 (W.D. N.C. Sept. 25, 2020), <https://www.sec.gov/litigation/complaints/2020/comp24919.pdf>.

<sup>8</sup> Judgment as to Eric M. Hill, No. 3:20-cv-00536 (W.D. N.C. Sept. 30, 2021).

<sup>9</sup> Bill of Indictment, United States v. Hill, 3:20-cr-00331 (W.D. N.C. Sept. 17, 2020) (filed under seal); Plea Agreement, United States v. Hill, 3:20-cr-00331 (W.D. N.C. July 1, 2021) (filed under seal).

<sup>10</sup> Judgment, United States v. Hill, 3:20-cr-00331 (W.D. N.C. Oct. 29, 2021).

<sup>11</sup> Complaint, SEC v. Hong, No. 2:20-cv-04080 (C.D. Cal. May 5, 2020), <https://www.sec.gov/litigation/complaints/2020/comp24810.pdf>.

<sup>12</sup> Complaint, SEC v. Clark, No. 1:20-cv-01529 (E.D. Va. Dec. 11, 2020), <https://www.sec.gov/litigation/complaints/2020/comp24982.pdf>.

<sup>13</sup> Judgment as to William D. Wright, SEC v. Clark, No. 1:20-cv-01529 (E.D. Va. Oct. 18, 2021).

<sup>14</sup> See Dean Seal, [SEC Handed Rare Midtrial Defeat in Insider Trading Case](#), LAW360 (Dec. 14, 2021), <https://www.law360.com/compliance/articles/1448811>.

<sup>15</sup> Liu v. SEC, 140 S. Ct. 1936 (2020).

<sup>16</sup> William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (2021).

<sup>17</sup> See, e.g., Russ Ryan, [What Just Happened to SEC Insider Trading Disgorgement?](#), ON SECOND THOUGHT... (Oct. 2, 2020), <https://www.linkedin.com/pulse/what-just-happened-sec-insider-trading-disgorgement-russ-ryan/>.

<sup>18</sup> Gary Gensler, Chairman, Sec. & Exch. Comm'n, Prepared Remarks CFO Network Summit (June 7, 2021), <https://www.sec.gov/news/speech/gensler-cfo-network-2021-06-07>.

<sup>19</sup> Press Release, Sec. & Exch. Comm'n, SEC Proposes Amendments Regarding Rule 10b5-1 Insider Trading Plans and Related Disclosures (Dec. 15, 2021), <https://www.sec.gov/news/press-release/2021-256>.

<sup>20</sup> Press Release, Sec. & Exch. Comm'n, SEC Charges Andeavor for Inadequate Controls Around Authorization of Stock Buyback Plan (Oct. 15, 2020), <https://www.sec.gov/news/press-release/2020-258>.

<sup>21</sup> Insider Trading Prohibition Act, H.R. 2655, 117th Cong. (2021).

<sup>22</sup> See Dean Seal, [House Vote Sends Explicit Ban on Insider Trading to Senate](#), LAW360 (May 18, 2021), <https://www.law360.com/articles/1385344/house-vote-sends-explicit-ban-on-insider-trading-to-senate>.