

Working From Home? Beware Insider Trading, Tipping Risks

By **Dixie Johnson and Lauren Konczos** (May 10, 2023, 5:37 PM EDT)

We all know we should not be telling work secrets — like confidential client information — to people outside of work. But work-related changes that affect our own lives — work routine, office space, special meetings, travel, long hours and late nights, and other breaks — often feel safe to share. Similarly, it can feel safe to speculate with a loved one about something you do not know but think might be happening.

The U.S. Securities and Exchange Commission's recent insider trading cases suggest otherwise.

In four different cases within the past year, the SEC sued traders alleging that they deduced material, nonpublic information, or MNPI, through communications with a loved one. In some cases, the commission did not even describe the communications in which this information was shared — the agency simply alleged that the trader deduced MNPI from the loved one, whose confidences the trader had a duty to protect.

As the SEC becomes more adept at surveillance for unusual trading patterns, and especially as we continue to work from home part or full time, we should expect more investigations into our communications with loved ones who manage their own trading portfolios. Even if an investigation concludes that the worker was an "inadvertent tipper" and therefore should not be charged, the investigation itself will be burdensome and intrusive — especially if the trader is charged — as these SEC enforcement allegations from the past year illustrate.

Doesn't Take Much To Build an Insider Trading Investigation

SEC v. Abdelkader, the commission's most recent insider trading case to highlight, filed on March 7 in the U.S. District Court for the Northern District of California, involves a husband deducing, apparently from information his wife told him, that Audentes Therapeutics, her employer, was a likely acquisition target.[1]

The SEC alleges that by Oct. 10, 2019, the wife "learned of a series of events from which she was able to deduce, and from which reasonable investors would be able to deduce, that Audentes was likely in the process of being acquired."

The commission does not mention the husband in these events or refer to any specific communications



Dixie Johnson



Lauren Konczos

between the married couple, but it does assert that the husband made the same deduction and that approximately seven to eight days after his wife learned about the events, he purchased 35 call options, plus a limit order for 15 call options that were filled on Nov. 18, 2019.

In early December that year, three days after Audentes **publicly announced its acquisition**, the husband sold his call options and recognized \$81,581 in profits. The husband settled the SEC's charges without admitting or denying the allegations, paying the commission the amount of "ill-gotten gains," with interest, and a one-time civil penalty for a total of \$172,150.39.

Notably, the husband settled with the SEC, even though the complaint did not reference any specific conversation he had with his wife regarding the likely acquisition. The complaint simply infers that such a conversation took place by noting that their relationship "included a history, pattern, and practice of sharing confidences," which the husband breached when he purchased the call options.

The complaint also does not allege that his trading in call options was out of the norm for his trading — circumstantial evidence that the SEC sometimes relies upon in proving scienter. Viewed as a whole, the complaint suggests that the wife was likely investigated just as much, if not more, than her husband, as it tracks her actions at work to demonstrate that she reasonably deduced the acquisition was likely.

Family Updates May Be Confidential

Another example — SEC v. Daniel, also in the Northern District of California — involves an individual who was charged in August 2022 and later settled with the SEC for insider trading based on information he received from his mother.[2]

Their relative, a senior employee of Cypress Semiconductor Corp., sometimes worked in a home office. From February to June 2019, the trader's mother stayed in the employee's home, and in late April 2019, the trader also came to visit.

On April 28, the employee hosted a party and invited other Cypress employees. During the party, the trader observed the Cypress employees meeting together in the employee's home office. The SEC purported that the Cypress employees discussed a potential acquisition plan during that meeting, although there was no allegation that the trader overheard or otherwise knew this.

The trader returned home, and about a month later during a call with his mother — presumably about something else — he learned that the family member was working on urgent issues involving a likely **imminent acquisition** of Cypress. Three minutes later, the trader contacted his brokerage firm.

The SEC emphasized that he "was an inexperienced trader and had not made any trades in securities for approximately 10 years."

After updating the paperwork and transferring the necessary funds to his account, the trader bought 1,366 Cypress call option contracts. Here, the SEC used unusual trading to bolster their scienter allegation: that the trading resulted from the information he learned from his mother, not from normal trading activity.

After the trader sold the contracts, he realized a net profit of \$349,588. The SEC required him to pay double that amount to cover disgorgement and a one-time penalty, plus almost \$40,000 in prejudgment interest, to resolve the matter.

It seems likely that the family member also faced scrutiny by Cypress, which undoubtedly had to answer a post-acquisition Financial Industry Regulatory Authority request for a list of who was aware of the acquisition before it was announced, and whether those individuals recognized names on a list of traders. The trader's mother almost certainly had to testify, which cannot have been pleasant for either her or the trader.

Insider Trading Is Not Romantic

Two additional cases brought by the SEC within the last year also demonstrate that, while we would hope our romantic relationships are safe from insider trading, that is sometimes not the case.

In one case, SEC v. Markin in the U.S. District Court for the Southern District of New York, the commission alleged that due to the COVID-19 pandemic, a law firm associate's boyfriend "often stayed for multiple days at a time" at her apartment, where she worked for her firm's client Merck in connection with its tender offer **to acquire** Pandion.[3] The SEC claimed that she "engaged in frequent telephone calls regarding the deal" and kept a binder of documents for the acquisition at home.

On July 25, 2022, the SEC charged her then-boyfriend and his friend with insider trading after they misappropriated MNPI from her.

When investigating insider trading cases, the SEC asks very intrusive questions about relationships, and this situation was no exception.

The SEC alleged that although the associate and her boyfriend were in a relationship for only approximately seven months — during which the boyfriend stayed at her apartment for an extended time from January to February 2021 — they "shared confidences, including discussions about each other's families and plans of marriage."

The commission used these facts to demonstrate that the relationship imbued the boyfriend with a duty not to trade, which he breached. Breach of a duty is one of the elements of an insider trading violation.

In total, the boyfriend purchased 2,270 shares of Pandion stock, obtaining profits of over \$82,000. He also tipped his friend about the upcoming acquisition, and both went on to tip, directly or indirectly, more than 20 people to trade in Pandion stock. The friend purchased 35,382 shares in total and obtained ill-gotten gains of over \$1.3 million.

The complaint noted the quid pro quo of the exchange: In return for the boyfriend's gift of MNPI to his friend, the boyfriend expected a "lavish thank-you gift," which he received in the form of a Rolex watch, paid expenses for a joint vacation to Hawaii and a meal at a three-Michelin-starred restaurant that cost over \$1,000.

Given these facts, it is not surprising that both were also criminally charged.[4]

The indictment alleged that the boyfriend lied to the associate to conceal his illegal trades after they had ended their relationship and while he was preparing to go to Quantico, Virginia, for training at the FBI Academy.[5]

Prosecutors also asserted that the boyfriend received a call from the associate, by then his former

girlfriend, asking him why his name had appeared in a FINRA inquiry into Pandion stock trading, and he falsely told her that he had not traded in Pandion stock.

The boyfriend then went on to make another false statement to the FBI that he had purchased the stock due to a recent earnings report and new board member addition, asserting that he did not know his former girlfriend had worked on the transaction. The boyfriend clearly did not follow the first rule of holes: When you are in one, stop digging.

On April 10, 2023, the friend pled guilty to one count of securities fraud — a significant reduction from the 22 charges contained in his indictment — and agreed to forfeit his ill-gotten gains.[6]

Likely as a result, he also entered into a partial consent judgment with the SEC on May 3 to resolve the nonmonetary relief against him, with the monetary relief reserved for later resolution after his sentencing in the criminal matter — and potentially after he cooperates in the cases against the boyfriend.[7] The boyfriend's criminal case is still pending, with the civil matter stayed until the criminal case is resolved.

In another working-from-home case — SEC v. Moscatiello in the U.S. District Court for the District of New Jersey — in June 2022, the SEC charged an individual with insider trading after he misappropriated MNPI from his domestic partner regarding the **acquisition** of Virtusa Corp. by Baring Private Equity Asia.[8] The complaint highlighted the trader's breach of trust and confidence that he owed his partner, with whom he "had been in a committed relationship for approximately four years and had lived together for approximately two years."

The SEC noted that his partner was a marketing employee of Virtusa, an information technology company. According to the SEC, she learned on Sept. 8, 2020, that Virtusa was likely to be acquired and that she would be working on the public announcement of the impending acquisition.

She was working from home full time at that point, like many of us were during the pandemic. So, when the marketing employee spent the rest of Sept. 8 on the phone and told her partner that she needed to work through the evening, he apparently took note. She then participated in a video call from 11:30 p.m. to 12:16 a.m. in her home office, adjacent to the bedroom they shared.

When the market opened on the morning of Sept. 9, 2020, her partner purchased 250 Virtusa call options for \$27,621. The SEC alleged that he placed the trades from his office, not from home, to conceal the trades from the employee.

BPEA and Virtusa announced the acquisition on Sept. 10, and the partner immediately sold the options, realizing \$89,904 in illicit profits. The complaint flagged that (1) it was the first time the partner had ever purchased Virtusa securities, even though he was an active trader with multiple brokerage accounts; (2) his purchase consisted of 100% of the total volume of Virtusa options trading purchases on Sept. 9; (3) his trade was an outlier because he typically held investments for longer periods of time; (4) he typically discussed his trading with the employee but kept this trade a secret; and (5) it was his most profitable trade of 2020.

He settled with the SEC, disgorging his illicit profits and paying prejudgment interest and a one-time civil penalty for a total of \$183,686. The marketing employee was not charged.

Looking Ahead

Take these cases as a warning that the SEC will investigate when there is a close relationship between anyone who works for or provides services to a public company that has MNPI, and an individual who trades in that company's securities.

Further, the SEC will assume, and may eventually rely on circumstantial evidence to assert, that the trader had MNPI when trading. This is not new — we have been reporting annually about cases like this for more than a decade.[9] But challenges — pandemic-related and otherwise — continue to present themselves when people bring work home.

Inadvertent tippers face expensive and intrusive investigations all the time, so consider taking a few extra precautions by informing your loved ones of the risk, even those you could never imagine trading, to save them and yourself a lot of heartache.

Dixie Johnson is a partner and Lauren Konczos is an associate at King & Spalding LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Complaint, SEC v. Abdelkader, 4:23-cv-01032 (N.D. Cal. Mar. 7, 2023).

[2] Complaint, SEC v. Daniel, 3:22-cv-04711 (N.D. Cal. Aug. 17, 2022).

[3] Complaint, SEC v. Markin, 1:22-cv-06276 (S.D.N.Y. July 25, 2022).

[4] Press Release, Dep't of Just., U.S. Attorney Announces Charges in Four Separate Insider Trading Cases Against Nine Individuals, Including Former U.S. Congressman, Former FBI Agent Trainee, Tech Company Executives, and Former Investment Banker (July 25, 2022).

[5] Indictment, United States v. Markin, 1:22-cr-00395 (S.D.N.Y. July 25, 2022).

[6] Consent Preliminary Order of Forfeiture / Money Judgment, United States v. Markin, 1:22-cr-00395 (S.D.N.Y. April 10, 2023).

[7] Proposed Judgment, United States v. Markin, 1:22-cr-00395 (S.D.N.Y. May 3, 2023).

[8] Complaint, SEC v. Moscatiello, 1:22-cv-04323 (D.N.J. June 29, 2022).

[9] See Dixie L. Johnson & Lauren O. Konczos, Working from Home? Stay Alert to Avoid Insider Trading or Tipping Liability!, King & Spalding LLP Client Alert (Jan. 25, 2023); Dixie L. Johnson, Matthew B. Hanson & Lauren O. Konczos, Reviving the Holiday Gathering This Year? Avoid Adding Insider Trading Liability to the Mix., King & Spalding LLP Client Alert (Dec. 20, 2021); 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).