

Beware Intense Insider Trading Scrutiny In Current Climate

By **Haimavathi Marlier and David Newman** (April 8, 2020, 5:30 PM EDT)

In February, Sen. Richard Burr, R-N.C., and a number of his colleagues sold stock after receiving confidential briefings on the potential impact of COVID-19 on the United States.[1] Shortly after these trades came to light, the calls began for regulators to investigate, and complaints were filed with the U.S. Department of Justice, the U.S. Securities and Exchange Commission, and the Senate Ethics Committee.[2]

Burr quickly released a statement that he “relied solely on public news reports to guide” his stock transactions and submitted the matter to the Senate Ethics Committee for investigation.[3] Other senators have since explained that their transactions were handled by third-party investment advisers.[4] But these responses have thus far done little to tamp down public scrutiny.

On March 23 — the first working day after news of these trades broke[5] — the co-directors of the SEC’s Division of Enforcement issued a public statement recognizing that “corporate insiders are regularly learning new material nonpublic information that may hold an even greater value than under normal circumstances” and reminding individuals that trading on the basis of such information violates the federal securities laws.[6] Just one week later, CNN broke the news that the FBI had reached out to Burr as part of a joint effort between the DOJ and the SEC to examine the senators’ transactions.[7]

This probe is the latest shot across the bow from the SEC, which has been warning against securities laws violations related to the ongoing pandemic. In February, the SEC issued an investor alert on COVID-19, noting that they were tracking online stock promotions claiming that certain publicly traded company products or services could “prevent, detect, or cure coronavirus.”[8]

Shortly thereafter, the SEC suspended trading in two companies for COVID-19-related statements in online promotional materials.[9] And throughout March, the SEC has repeatedly underscored insider trading prohibitions in the context of COVID-19, even as the SEC has extended conditional relief concerning companies’ filing and reporting obligations in consideration of disruptions related to the virus.[10]



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As Burr's example shows, the risks of such scrutiny extend even beyond regulators. On March 23, a shareholder in the Wyndham hotel chain (whose shares Burr had sold back in February) filed a lawsuit in the U.S. District Court for the District of Columbia, alleging, among other things, that Burr's sale violated the insider trading laws.

In sum, the suit claims that Burr's knowledge from confidential briefings on both the likelihood of an outbreak and the likely shortcomings of mitigation measures, like quarantines and shelter-in-place orders, amounted to material nonpublic information, or MNPI, regarding the impact of the virus on Wyndham's business operations.[11] The lawsuit noted that Wyndham's stock has fallen from \$59.16 per share on Feb. 19 to \$25.42 per share on March 23.

Whatever the truth about Burr's stock sales and the merits of the lawsuit, his case stands as a cautionary tale. Markets are volatile and insider trading is an area of intense scrutiny, by both public and private actors. And the reputational consequences can be immediate.

Companies should think critically about how to mitigate the risk that any employee — from C-suite insiders with access to detailed financial records to inventory clerks who notice an essential input hasn't arrived in weeks — finds themselves ensnared in an insider trading investigation. Although this can be challenging with so many people working remotely or perhaps not working at all, there are a few steps that they can take to mitigate such risk right now:

- Ensure that insider trading policies guard against trading on the basis of COVID-19-related MNPI by any employee;
- Identify groups within their organizations that have, or are likely to have, MNPI;
- Disseminate the organization's insider trading policies to the identified groups, and require these employees to confirm that they have received, read and understood the policies; and
- Consider sending the policies with an email identifying the potential MNPI and stating that trading on the basis of that information, or providing it to someone else so that they can trade, violates the law.

Companies may also consider more proactive measures, including:

- Imposing trading blackout periods where all or certain groups of employees are prohibited from trading in the company's securities;
- Using restricted securities lists;
- Implementing heightened preclearance requirements;
- Reviewing employee trades to identify bad actors; and
- Conducting employee trainings.

Few employees are privy to classified intelligence briefings. But in this climate, many employees, at all corporate levels, could have enough nonpublic information about their companies (and even their customers, suppliers and competitors) to trade on, putting themselves and their companies at great

legal risk. Taking these steps now may help companies mitigate the risk of SEC and other scrutiny, and help them stay out of the headlines.

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[1] Stephen Gandel, NYSE boss sold his own stock ahead of coronavirus market meltdown, CBS News (Mar. 20, 2020) available at <https://www.cbsnews.com/news/nyse-jeffrey-c-sprecher-kelly-loeffler-sold-company-stock-ahead-of-coronavirus-market-meltdown/>; Robert Faturechi & Derek Willis, Senator Dumped Up to \$1.7 Million of Stock After Reassuring Public About Coronavirus Preparedness, ProPublica (Mar. 19, 2020) available at <https://www.propublica.org/article/senator-dumped-up-to-1-7-million-of-stock-after-reassuring-public-about-coronavirus-preparedness>.

[2] DOJ, SEC & Ethics Complaints Filed Against Senators Burr, Feinstein, Loeffler & Inhofe for Possible Insider Trading & STOCK Act Violations, Common Cause (Mar. 20, 2020) available at <https://www.commoncause.org/press-release/doj-sec-ethics-complaints-filed-against-senators-burr-feinstein-loeffler-inhofe-for-possible-insider-trading-stock-act-violations/>; Request for Investigation of Sens. Richard Burr (R-NC) and Kelly Loeffler (R-GA), Citizens for Responsibility and Ethics in Washington, (Mar. 20, 2020) available at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2020/03/20164324/2020-3-20-Burr-and-Loeffler-insider-trading.pdf>.

[3] Richard Burr (@SenatorBurr), Twitter (Mar. 20, 2020) available at <https://twitter.com/SenatorBurr/status/1241008837479542786?s=20>.

[4] Senators Loeffler, Feinstein, Perdue and Inhofe have all stated that the trades were conducted by investment advisers. Aruna Viswanatha and Dave Michaels, Justice Department Investigating Lawmakers for Possible Insider Trading, Wall Street Journal (Mar. 30, 2020) available at <https://www.wsj.com/articles/justice-department-investigating-lawmakers-for-possible-insider-trading-11585586365>.

[5] Eric Lipton and Nicholas Fandos, Senator Richard Burr Sold a Fortune in Stocks as G.O.P. Played Down Coronavirus Threat, NYTimes (Mar. 19, 2020) available at <https://www.nytimes.com/2020/03/19/us/politics/richard-burr-stocks-sold-coronavirus.html>; Faturechi & Willis, *supra* note 1.

[6] Stephanie Avakian & Steven Peikin, Statement from Stephanie Avakian and Steven Peikin, Co-Directors of the SEC's Division of Enforcement, Regarding Market Integrity, SEC (Mar. 23, 2020) available at <https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity>.

[7] David Shortell et al, Exclusive: Justice Department reviews stock trades by lawmakers after coronavirus briefings, CNN (Mar. 30, 2020) available at <https://www.cnn.com/2020/03/29/politics/justice-stock-trades-lawmakers-coronavirus/index.html>.

[8] Office of Investor Education and Advocacy, Look Out for Coronavirus Related Investment Scams, SEC (Feb. 4, 2020), available at: https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_coronavirus.

[9] Securities and Exchange Commission (SEC) Order for Halt in trading of Aethlon Medical (NASDAQ: AEMD) Stock, Aethlon Medical (Feb. 10, 2020), available at: [https://www.aethlonmedical.com/news-media/press-releases/detail/408/securities-and-exchange-commission-sec-order-for-halt-in-.](https://www.aethlonmedical.com/news-media/press-releases/detail/408/securities-and-exchange-commission-sec-order-for-halt-in-); Release No. 34-88265, Trading Suspension: Eastgate Biotech Corp. (Feb. 24, 2020), available at: <https://www.sec.gov/litigation/suspensions/2020/34-88265.pdf>.

[10] Avakian & Peikin, *supra* note 5; see also SEC Provides Conditional Regulatory Relief and Assistance for Companies Affected by the Coronavirus Disease 2019 (COVID-19)(Mar. 4, 2020), available at: <https://www.sec.gov/news/press-release/2020-53> (“[W]here a company has become aware of a risk related to the coronavirus that would be material to its investors, it should refrain from engaging in securities transactions with the public and to take steps to prevent directors and officers (and other corporate insiders who are aware of these matters) from initiating such transactions until investors have been appropriately informed about the risk.”).

[11] Complaint, *Jacobson v. Burr*, No. 120 1:20-cv-00799, (Mar. 23, 2020, D.D.C.) available at <https://www.courthousenews.com/wp-content/uploads/2020/03/Jacobson-v-Burr-2020-03-23.pdf>.