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NEWSLETTER

The House Claims "Absolute Immunity" in Refusing to Comply with SEC Investigative Subpoenas; Rep. Slaughter Vows to Re-Introduce "Political Intelligence" Regulation Legislation this Congress

July 2014

On June 20, 2014, enforcement attorneys from the New York Regional Office of the Securities and Exchange Commission (SEC) applied to Judge Paul Gardephe of the U.S. District Court for the Southern District of New York for an order requiring the House Committee on Ways and Means, and a senior Health Subcommittee staffer, to show cause why they should not be ordered to produce documents (and, in the case of the staffer, to provide testimony) as called for by investigative subpoenas issued by the SEC on May 6, 2014, in an ongoing insider trading inquiry. By issuing subpoenas to the House, the SEC has put the STOCK Act of 2012 (which "affirmed" that Members and staff of Congress, and all other federal government officials and employees, were not exempt from insider trading prohibitions under the federal securities laws) squarely at odds with the Speech or Debate Clause of the U.S. Constitution, which immunizes Members and staff of Congress from inquiry by any individual or entity outside of Congress into "legislative acts." The outcome of this matter could determine whether the STOCK Act has dramatically changed the landscape of insider trading enforcement against Congress—and against those who may receive and pass on "political intelligence" or "tips" from Congress—or whether insider trading enforcement in the congressional context will remain, as a practical matter, non-existent.

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The SEC's Formal Investigation

The SEC issued the subpoenas now under judicial review in connection with a formal insider trading investigation begun on April 13, 2013. This SEC investigation concerns allegations that spikes in trading volume and in the value of the securities of certain health insurance companies on April 1, 2013, may have resulted from the leak from the government of material, nonpublic information regarding a change in Medicare Advantage reimbursement rates favorable to the insurers. More specifically, according to the SEC's filings with the court, the agency is investigating the source, or sources, of information based on which a D.C. lawyer/lobbyist emailed a securities firm analyst about 50 minutes before the close of trading on April 1, 2013, to the effect that a rate change favorable to the insurers was expected to be announced by the U.S. Centers for Medicare and Medicaid Services (CMS) later that afternoon. The securities firm released a "flash report" advisory on this rate change to clients that same day about 20 minutes before the close of trading. According to the SEC, "[w]ithin 5 minutes of the release of the flash report . . . trading volume and prices of stocks of certain health insurers rose precipitously." Trading then closed at 4 PM. CMS then announced the rate change publicly at about 4:15 PM that day.

The House Opposes the SEC's Subpoena Enforcement Action

In its July 4, 2013, response in opposition to the SEC's application to the court to enforce its subpoenas, the House Office of General Counsel invoked a number of grounds, including: the doctrine of sovereign immunity (which, the House General Counsel argues, provides that Congress, as a branch of the sovereign government of the United States, cannot be sued—even by a co-equal branch of that same government—unless it explicitly consents to be sued); lack of personal jurisdiction by the court, in New York, over the Health Subcommittee staffer, in Washington, DC; and "long-settled federal common law establish[ing] that, absent exceptional circumstances, high ranking government officials"—such as the subcommittee staffer—"may not be forced to testify in litigation to which they are not parties."

The principal ground, however, on which the House General Counsel relies in opposing the SEC's investigative subpoenas is the Speech or Debate Clause of the Constitution. This clause—at Article I, Section 6, clause 1—provides that "for any speech or debate in either House, [members of the House and Senate] shall not be questioned in any other place." The House General Counsel has asserted that, in undertaking its investigation of the Committee on Ways and Means and of the subcommittee staffer, "[w]hat the SEC has done is embark on a remarkable fishing expedition for congressional records—core legislative records" and, because the SEC is subpoenaing legislative records and inquiring into legislative acts all "within the sphere of legitimate legislative activity," the Committee and the staffer are "absolutely immune" from compelled production of documents and information to the SEC. House General Counsel has asked Judge Gardephe to dismiss the SEC's suit to enforce its subpoenas or, alternatively, to transfer the matter to federal court in Washington, DC.

The SEC's Response to the House

The SEC's response to the House's motion to dismiss, and memorandum in support thereof, was due on July 16, 2014. In its initial memorandum filed in support of its June 20, 2014, application for an order to show cause, the SEC found it "particularly puzzling" that the House was refusing to provide documents or testimony in connection with the agency's insider trading inquiry "as it appears contrary to the spirit of recent legislation," that is, the STOCK Act. The SEC argued that, in passing the STOCK Act, Congress "made clear that disclosure of non-public information does not constitute legitimate legislative activity" and, thus, such disclosure was not covered by legislative immunity under the Constitution. The SEC attempted to turn the language of the STOCK Act against the language of the Speech or Debate Clause: "Two years ago, Congress affirmed in the STOCK Act that a leak of material nonpublic information obtained by employees or Members of Congress derived from their official positions constitutes a breach of duty owed to Congress and the public as a whole, and thus could give rise to a violation of the securities laws." Of course, a statutory restriction cannot trump a constitutional protection, so the key to the SEC's action to enforce its subpoenas under relevant Supreme Court case law is whether, with respect to specific pieces of information requested or specific acts inquired into by the SEC, the court finds that such information and such acts were not, in fact, directly related to core legislative activities but were, instead, only casually or incidentally related to legislative affairs.

Wider Implication for the Government Affairs/Political Intelligence Community

The government affairs community, and others who interact with Congress on a regular basis, should pay close attention to the progress and outcome of the SEC's action to enforce its subpoenas against the House. If, as the SEC argues in its action, the leak of material nonpublic information from Congress is not, as a legal matter, a "legislative act" protected by Speech or Debate Clause immunity, then—to avoid potential exposure in an insider trading enforcement matter—those who receive such information from Congress must take care that they do not pass the information on to others who they have reason to believe may make securities trades based on that information. Further, the SEC's issuance of subpoenas to the House in an insider trading investigation has re-awakened congressional proponents of legislation to regulate "political intelligence" professionals. In response to initial press stories in June that the SEC had issued subpoenas to the House, Rep. Louise Slaughter (D-NY), one of the primary authors of the STOCK Act, said on June 19, 2014, that the "news demonstrates why it is essential to shine a light on the political intelligence industry, which generates more than $400 million each year through gleaning information from the halls of government and selling it to Wall Street to inform investment decisions." At the same time, Rep. Slaughter announced her plans to re-introduce "a bill to require disclosure of political intelligence activities during the 113th Congress."