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Criminalizing Insider Trading from Wall Street to K Street: Taking Stock of the STOCK Act



Recent court filings have confirmed that the U.S. Department of Justice and the Securities and Exchange Commission are continuing to conduct parallel criminal-civil investigations involving insider trading on Capitol Hill.

Most notably, DOJ and the SEC allege that a Congressional staffer provided a lobbyist with information regarding healthcare reimbursement- rate policy, and that the lobbyist leaked the information to Height Securities LLC, a privately held broker-dealer. The investigation has grown to implicate 44 investment funds, including some of the nation's largest hedge funds and asset-management advisors. Until 2012, it was somewhat ambiguous whether criminal and civil penalties against insider trading covered material nonpublic information disclosed by federal lawmakers and their staffs. As Robert Khuzami, the Securities and Exchange Commission's former Director of Enforcement had conceded, extending insider trading law to the legislative process had no "direct precedent." In theory, uncertainty regarding insider trading law's tenuous reach over Capitol Hill ended on April 4, 2012, when Congress enacted the Stop Trading on Congressional Knowledge Act (the "STOCK Act"). The STOCK Act's most notable feature is that it expressly applies insider trading law to public officials, including federal legislators, their staffs, members of the judicial and executive branches, as well as other government employees. Based on "a duty arising from a relationship of trust and confidence to the Congress, the U.S. Government, and American citizens with respect to material, nonpublic information derived from such person's position," the statute prohibits federal lawmakers and their employees from "tipping" (that is, trading on or disclosing) material nonpublic information learned through the course of their work in exchange for a personal benefit. The law also penalizes stock trading by "tippees" who know or should have known that a tipper provided information by breaching his or her duty. Despite the STOCK Act's basic appeal, the statute raises thorny questions that turn on the very nature of legislative interactions. For example, what constitutes a "personal benefit" on Capitol Hill? Some benefits that flow from the exchange of information on Capitol Hill, such as constituent goodwill, are often vague, intangible, and highly attenuated. Imagine, for example, that a small-business owner telephones his Congressman's office regarding the passage of a bill that will enable a large national corporation to expand significantly and undermine his local business. To address the constituent's

anxiety, the Congressman's office provides information meant to reassure the businessman that the bill is unlikely to pass. Unbeknownst to the Congressman, the relieved constituent then opportunistically uses the information to execute a profitable short sale on the large corporation's stocks. Did illegal insider trading occur? The answer to this question depends in part on whether the goodwill generated by the tip is viewed as a personal benefit to the Congressman or his staff. This simplistic example illustrates a basic situation faced by federal lawmakers and their staffs every day. Defining "material nonpublic information" in the Congressional setting is equally challenging. Legislators, their staff, lobbyists, and professional observers of the legislative process, such as political intelligence analysts, exchange information prolifically. It therefore can often be difficult, if not impossible, to identify the determinative source of ultimate viewpoints and decisions. For example, consider a hedge fund that hires a political intelligence firm to help guide an investment decision that an upcoming Congressional vote could affect. The firm will base its analysis on a complex mosaic of data points, possibly including everything from confidential discussions with legislative staffers to a front-page article in "Politico." Parsing through questions of "materiality" and to what extent information is "public" is no easy task. And while some of these questions may be answered over time, they will not all have simple answers.

Authors

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