

Is the House of Representatives Above the Law? A Look at the House Resisting the SEC’s Insider Trading Inquiry

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We all expect (or, at the very least, *should* expect) our elected officials in Congress to follow the laws that they impose on the public, prohibitions on insider trading included. A recent investigation by the Securities and Exchange Commission (“SEC”) into suspicious trades on Capitol Hill show that the House of Representatives (the “House”) may not agree, finding themselves to be above the laws that they create.

Background

In 2011, a [“60 Minutes” report](#) looked at trades by representatives and senators which appeared to be based on inside government information. The report was devastating, as it showed that members of Congress appeared to be above the law by trading based on material inside information without any repercussions. To show constituents that Congress is subject to the same laws as the public and as a response to President Obama’s State of the Union address which called for action on this issue, Congress adopted the [Stop Trading on Congressional Knowledge Act](#) (“STOCK Act”). The STOCK Act provides that members of Congress are “not exempt from insider trading prohibitions that arise under securities laws.” The chairman of the House Judiciary Committee, Representative Lamar Smith, [praised the legislation](#) stating that “the American people deserve to know that no one in any branch of government can profit from their office.” The STOCK Act appeared to be a step in the right direction when it came to restore public faith in the government as a law abiding body.

However, any law is meaningless if it is not followed and enforced. The question is now whether Congress will follow the STOCK Act, and the answers appears to be “no.”

The SEC’s Current Investigation

[As a recent study showed](#), insider trading is more pervasive than commonly believed and representatives in the House appear to be no strangers to illegal insider trading tips. The SEC is currently [investigating](#) trades in insurance companies that occurred after a change in the Medicare reimbursement rates. The SEC traced the source of the information to Brian Sutter, the staff director of the House Ways and Means Committee and has issued subpoenas to Mr. Sutter and his committee. [According to the SEC](#), Mr. Sutter spoke with a Greenberg Traurig lobbyist minutes before the lobbyist emailed a brokerage firm stating that “very credible sources” confirmed the Medicare change. The brokerage firm then issued an alert to its clients about the changes in the reimbursement policy, which caused an increase in the stock price of insurance companies that would benefit from the change.

Mr. Sutter and the committee have refused to comply with the SEC’s subpoenas. The general counsel’s office for the House responded to the subpoenas with [a letter](#) detailing a number of

reasons for not complying, such as that the subpoenas were “vague, confusing, overbroad, unduly burdensome, unlikely to lead to the discovery of admissible evidence, and otherwise improper” and even that the subpoenas were “repugnant to public policy” (a curious allegation given that Congress made this an issue of public policy by adopting the STOCK Act).

What the House Is Relying On

The House is now relying on the Constitution’s “speech or debate clause,” which protects against any outside inquiry into “legislative acts” in Congress. In *United States v. Brewster*, the Supreme Court defined a “legislative act” as “an act generally done in Congress in relation to the business before it,” with the caveat that political acts, which include a “wide range of legitimate errands performed for constituents, the making of appointment with government agencies, assistance in securing government contracts, preparing so-called news letters to constituents, news releases, and speeches delivered outside of Congress,” are not protected. Mr. Sutter’s involvement could be categorized as either a political or legislative act, which is where the debate arises from.

Next Steps

Congress has made it clear to the SEC that they would be willing to release some records if the SEC made a commitment that upon getting the records they would end any investigation into the House committee and Mr. Sutter. Clearly, this makes no sense and it is highly unlikely that the SEC would agree to an offer that sets a dangerous precedent and essentially curtails all power they have to investigate these inside trades. Currently, a hearing is scheduled for July 1, where a federal court will decide whether the SEC’s subpoenas for testimony and production of documents are enforceable. Regardless of which party will win this battle in the district court, the war will be far from over as the case will most likely be appealed to the United States Court of Appeals for the Second Circuit, and even the U.S. Supreme Court.

What Does It All Mean?

Congress is essentially saying that the STOCK Act is meaningless. The House’s refusal to cooperate with the SEC’s investigation [shows that](#) “the STOCK Act was more about responding to negative public than a step toward greater accountability for misuse of confidential information.” Cue the public outrage.

For a broader overview of insider trading, see [A Look at the Past, Present, and Expected Future of Insider Trading](#) (PDF), also available [here](#).