Securities Litigation and Enforcement
Investigations, Compliance and Defense

Insider Trading Issues Raised by News of Senators' Reported Trades

By: Stephen L. Ascher, Charles D. Riely and Jeremy H. Ershow

As the world coped with the Coronavirus (COVID-19) pandemic, news spread that four senators made well-timed sales of well-chosen securities before the market started its precipitous decline—at a point in time when the federal government was still minimizing the risk of a pandemic. While the political condemnation was swift and definitive, the question of liability for insider trading is more nuanced and fact-intensive: if the senators are investigated by the Department of Justice or Securities and Exchange Commission (SEC), counsel will likely argue that the information the senators had was already in the public domain. The key issue will be whether the closed-door briefings included distinctive nonpublic facts that gave the senators unique insight into the impending crisis and its likely impact on securities markets. Several senators have also stated that the securities trades were made by others. These assertions will likely be tested by a detailed reconstruction of the communications between the senators, their family members and any others responsible for administering the accounts. Even if the senators prove somebody else placed the trade, investigators will carefully review whether the senators tipped any material nonpublic information to the people managing their accounts. Ultimately, legal liability is less assured than the political fall-out.

The STOCK Act

The Stop Trading on Congressional Knowledge (STOCK) Act, passed in 2012, makes members of Congress and their staff subject to the same insider trading laws that apply to the general public; it was designed to address a perceived gap in the insider trading laws.[1] To fill that perceived gap, the Act provides that such people are bound by a duty not to misuse the information they obtain by virtue of their position and also explicitly says that members of Congress and their staff are not exempt from insider trading law.[2]

Did the Senators Trade on Public or Nonpublic Information?

According to public reports, Senator Richard Burr, Senator Jim Inhofe, Senator Diane Feinstein and Senator Kelly Loeffler sold stock prior to the market's precipitous fall from COVID-19. Senator Loeffler also reportedly bought stock in a company that offers teleconferencing software—a company whose business may improve with widespread teleworking. These transactions are raising concerns because senators received nonpublic briefings on the impending pandemic. Senator Burr's sales are under particularly intense scrutiny because he is the head of the intelligence committee and may have received additional, classified information concerning the impact of COVID-19 on the United States. As a result, the investigations of the trades at issue are likely to focus on whether the information he received was nonpublic and, to the extent he received nonpublic information, whether that incremental information was material.

Information is nonpublic until it is disseminated in a way "to achieve a broad dissemination to the investing public generally and without favoring any special person or group."[3] "To constitute non-public information under the Act, information must be specific and more private than general rumor."[4]

If there was nonpublic information, the question will turn to whether this incremental information was material. In this context, information is generally considered "material" when there is a substantial likelihood that a reasonable investor would consider it important in making his or her investment decisions.[5]

In traditional insider trading cases, courts regularly evaluate the defense that there was relevant information already in the public domain, and accordingly the allegedly illicit trades were not based on nonpublic information. For example, in *SEC v. Mayhew*, the Second Circuit upheld liability for insider trading for a defendant who had made timely trades before the public announcement of a merger, notwithstanding that there had been rumors and press reports on the subject before the trade, because the defendant had received "new information, acquired privately, [which] transformed the likelihood of [the] merger from one that was certainly possible at some future time to one that was highly probable quite soon."[6]

Here, investigators will ask a similar question familiar to investigations of politicians: what did the senators know and when did they know it? It was publicly reported that China was struggling to deal with the impact of COVID-19 at least as early as January. It was also known that the virus would have at least a secondary impact on the United States.

The senators may argue that, if anything, their sales were motivated by a greater appreciation of the already public facts given their intense focus on these issues. The senators may also argue that they properly disclosed all of the trades at issue, negating any inference of fraudulent intent. These defenses may be complicated, however, for any senator who made contemporaneous public statements downplaying the social or economic danger.

Practical Issues in Comparing Public versus Nonpublic Information for Senators

In investigating precisely what the senators knew, one potential stumbling block for investigators will be the Speech and Debate Clause (the "Clause"), which may impede investigators from discovering the full substance of classified or confidential briefings received by the senators.

The provision of the Constitution provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."[7] The "central role" of the provision is "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary ...."[8]

The Speech and Debate Clause has been used by a staff of a Congress person to resist disclosure in at least one previous STOCK Act insider trading investigation. In 2014, the SEC investigated allegations that the staff director of the Health Subcommittee of the House Ways and Means Committee tipped off lobbyists for Humana about unannounced increases in Medicare reimbursements.[9] The Southern District of New York resolved the production dispute mostly in the government's favor, explaining that "the Speech or Debate Clause does not provide protection for information communicated by a member or aide to a member of the public."[10] The court's holding, however, was dependent upon the third party nature of the documents at issue. This is because, as the court explained in its reasoning, the Clause protects "integral part[s] of the deliberative and communicative processes by which Members participate," including both legislative work and "Congressional information gathering activities."[11] In an investigation here, the senators may argue that closed door briefings to Congress on emerging threats meet that threshold test, such that the details of the briefings are within the Clause's grant of absolute immunity. However, anything communicated by the senators to third parties (such as the people who controlled their accounts) would almost certainly have to be produced.

---

[1] Pub. L. No. 112-105, 126 Stat. 291 (April 4, 2012) ("STOCK Act")

[2] STOCK Act § 4(a).

[3] *Dirks v. SEC*, 463 U.S. 646, 653 n. 12 (1983).

[4] *SEC v. Mayhew*, 121 F.3d 44, 50 (2d Cir. 1997) (internal citations and quotations omitted).

[5] *Id.* at 51-52.

[6] *Id.*

[7] U.S. Const., art. I, § 6, cl. 1.

[8] *Gravel v. United States*, 408 U.S. 606, 617 (1972).

[9] *SEC v. The Committee on Ways and Means of the U.S. House of Representatives and Brian Sutter*, Dkt. 1:14-mc-00193 (S.D.N.Y.).

[10] *Sec. & Exch. Comm'n v. Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 245 (S.D.N.Y. 2015).

[11] *Id.* at 235-36.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

Click here to visit our COVID-19 / Coronavirus Resource Center

Contact Us

Stephen L. Ascher

sascher@jenner.com | Download V-Card

Charles D. Riely

criely@jenner.com | Download V-Card

Jeremy H. Ershow

jershow@jenner.com | Download V-Card

Meet Our Teams

Securities Litigation and Enforcement

Investigations, Compliance and Defense

Practice Leaders

Stephen L. Ascher

Co-chair, Securities Litigation and Enforcement
sascher@jenner.com
Download V-Card

Howard S. Suskin

Co-chair, Securities Litigation and Enforcement
hsuskin@jenner.com
Download V-Card

Anthony S. Barkow

Co-chair, Investigations, Compliance and Defense
abarkow@jenner.com
Download V-Card

Christine Braamskamp

Co-chair, Investigations, Compliance and Defense
cbraamskamp@jenner.com
Download V-Card

Katya Jestin

Co-chair, Investigations, Compliance and Defense
kjestin@jenner.com
Download V-Card

Reid J. Schar

Co-chair, Investigations, Compliance and Defense
rschar@jenner.com
Download V-Card