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NEWSLETTER

SEC Pushes Political Intelligence Investigation Against U.S. House

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By Robert L. Walker

The U.S. Securities and Exchange Commission (SEC) continues to push the insider trading enforcement envelope to cover cases involving alleged tips of "political intelligence" from federal government sources, as confirmed in a recent filing in the U.S. District Court for the Southern District of New York. The SEC's continued push in the political intelligence arena comes despite recent developments in the law of insider trading in the federal courts that have caused the SEC and federal prosecutors to retrench, in other ways, their enforcement efforts.

On October 5, 2015, the SEC, through its New York Regional Office, filed a letter with U.S. District Judge Paul G. Gardephe in Manhattan in an attempt to move the court to rule on a long-pending action seeking enforcement of investigative subpoenas issued by the SEC in May 2014 to the Committee on Ways and Means of the U.S. House of Representatives and to a then-senior Health Subcommittee staffer. The SEC issued its subpoenas as part of its investigation into 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 federal government of material, nonpublic information regarding a change in Medicare Advantage reimbursement rates favorable to the insurers. The SEC originally sought enforcement of its subpoenas to the Ways and Means Committee and to the now-former senior staffer in June 2014.

As the exchange of court filings in this matter shows, since June 2014 lawyers for the SEC and lawyers for the House Office of General Counsel have sparred repeatedly over one do-or-die issue: Does the

Authors

Robert L. Walker
Of Counsel, Deputy General Counsel
202.719.7585
rlwalker@wiley.law

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Speech or Debate Clause of the U.S. Constitution confer blanket immunity to both the Ways and Means Committee and to the former House staffer such that the SEC's investigative subpoenas to them are unconstitutional and unenforceable?

In its October 5, 2015 letter to Judge Gardephe, the SEC cites a September 28, 2015 ruling by the U.S. District Court for the District of New Jersey in the pending corruption prosecution of U.S. Senator Bob Menendez. The SEC views that Menendez ruling as adding to what it calls "the overwhelming weight of authority previously by the Commission that [the House's] wholesale refusal to respond to the Commission's lawful subpoenas through a blanket and unsupported assertion of privilege under the [Speech or Debate] Clause is utterly baseless under the law." As additional support for its position, the SEC, in a footnote, also cites a recent ruling by the Third Circuit in the pending prosecution of Congressman Chaka Fattah in federal court in Philadelphia.

Not surprisingly, in its October 9, 2015 response to the SEC's October 5 letter, the House Office of General Counsel, on behalf of both the Ways and Means Committee and the former staffer, dismisses the SEC's most recent arguments. Regarding the court's decision in the Menendez case, the House attorneys argue that "even assuming it was correctly decided in the context of the law in its own circuit, a proposition on which we do not comment," that decision "has no bearing on the instant case."

Interestingly, the SEC's October 5 letter in the House subpoena enforcement matter was filed on the same day that the Supreme Court of the United States announced its decision not to review the decision by the U.S. Court of Appeals for the Second Circuit in the matter of the U.S. v. Newman and Chiasson. In that matter, in summary, the court ruled that, to prove an insider trading violation by a recipient of a tip of material, nonpublic information, the government had to prove that the recipient (tippee) knew (or, in the civil context at least, should have known) both that the original source of the information (tipper) provided the information in breach of a duty of trust and confidence and that the tippee knew that the tipper had breached this duty for some specific personal benefit. The Second Circuit's decision, and the Supreme Court's determination to let that decision stand, have been widely seen as slamming the brakes—at least temporarily—on expansionist insider trading enforcement efforts of recent years by both the SEC and the Department of Justice, particularly the U.S. Attorney's Office for the Southern District of New York.

And yet the SEC is moving forward in its novel and controversial effort to investigate the Congress in an insider trading case. To many, in following this path the SEC is only doing what Congress directed it to do by passing the Stop Trading on Congressional Knowledge (STOCK) Act of 2012: holding Members and staff of Congress to the same standards of insider trading investigation and enforcement as are applied to other participants in the securities trading arena.

The SEC closed its October 5 letter to Judge Gardephe with this observation on the apparent stalemate with the House: "If the Commission is to conduct a meaningful investigation into this matter, it must be able to review relevant documents and take testimony from relevant witnesses promptly, before memories fade and the investigative trail grows cold." But whether the Constitution permits such a "meaningful investigation" in the congressional context remains the difficult, undecided, and dispositive question.