



In a somewhat rare decision, U.S. District Judge Gardephe of the SDNY granted a motion to stay his previous order regarding the scope of the SEC's ability to subpoena information from Congress, pending its appeal to the Second Circuit.

As noted in our [previous post](#), the SEC is investigating the House Ways and Means Committee under the STOCK Act, which extends the insider trading laws to Congress – including staff members and other government employees. On November 13, 2015, Judge Gardephe issued a 76-page opinion which ordered the Committee to produce certain documents in compliance with a subpoena issued by the SEC. The court found that any Congressional immunity had been waived by the passage of the STOCK Act, but that the Speech or Debate Clause of the Constitution "provides a non-disclosure privilege for documents that fall within the 'sphere of legitimate legislative activity.'" Thus, the court protected any internal documents to the extent they relate to

information "concerning planned future legislative activity," but ordered the production of documents that fall outside that realm. In evaluating the respondents' motion to stay his prior order, the Judge considered four factors: 1) the likelihood of success; 2) whether there would be irreparable injury absent a stay; 3) whether the stay would substantially harm the SEC; and 4) the public interest. In weighing these factors, the court acknowledged that, practically speaking, "asking the district court . . . to find that its own order is likely to be reversed" is a standard that will rarely – if ever – be satisfied. As such, the court used a more lenient standard of whether there "are serious questions going to the merits of the dispute." Though the SEC argued that this more lenient standard is inappropriate when the dispute involves a "government action taken in the public interest," and the court conceded that is true for a private entity seeking to stay government action, the court emphasized that in the unusual situation before him the litigants are "two co-equal branches of government . . . and each claim to represent the public interest." Specifically, one of the "serious questions" in the case is how courts should weigh the public interest in enforcement of the STOCK Act against the public interest in appropriately interpreting the Speech or Debate Clause. This will be an interesting case to follow on appeal as there are novel issues concerning two equal branches of government competing for power and protection. As Judge Gardephe noted, "the Circuits are split on the issue of whether the Speech or Debate Clause provides a non-disclosure privilege for 'legislative act' documents," and there are no other reported cases involving a federal agency seeking to enforce a subpoena directed to Congress. The SEC would view a broad interpretation of the Speech or Debate Clause as limiting its ability to enforce the STOCK Act, whereas a narrow interpretation could be viewed as undermining protections intended by the Speech or Debate Clause of the Constitution.

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