



**Common Cause Statement to the  
Senate Committee on Homeland Security and Governmental Affairs**

December 1, 2011

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Common Cause

Common Cause is a national nonpartisan advocacy organization founded in 1970 by John Gardner as a vehicle for ordinary citizens to make their voices heard in the political process. On behalf of our 300,000 members and supporters, Common Cause appreciates the opportunity to submit this statement to this Committee regarding insider trading and congressional accountability.

Recent press reports concerning Congressional insider trading raise serious questions about the strength of our nation's laws that guard against profiting or trading on material nonpublic information.<sup>1</sup> Under current law, individuals are prohibited from trading on the basis of material nonpublic information in violation of a duty of trust and confidence.<sup>2</sup> However, the state of the law is far from a beacon of clarity, and its nuances are absent from the United States Code.<sup>3</sup> In the wake of thin statutory guidance, insider trading law has largely taken shape in court decisions interpreting Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5.<sup>4</sup>

Although there is no explicit provision of law that specifically exempts anyone – members of Congress and their staffs included – from insider trading, much of the uncertainty around what is prohibited centers on the elastic concept of materiality and the scope of fiduciary duties. The definition of what exactly constitutes “material” inside information, and to whom duties of trust and confidence extend, does not relieve members of Congress, their staff, or any other federal employee from the bounds of the law or each chamber's ethics rules.<sup>5</sup> No one is above the law. Members of Congress and their staff owe a duty to their constituents and the Constitution, and information they glean in closed-door negotiations, away from the eyes of the public and the market, must not serve as a catalyst for trading and profiting.

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<sup>1</sup> *60 Minutes* (CBS television broadcast Nov. 13, 2011); Brody Mullins, Tom McGinty & Jason Sweig, *Congressional Staffers Gain from Trading in Stocks*, WALL ST. J., Oct. 11, 2010, at A1.

<sup>2</sup> See *United States v. O'Hagan*, 521 U.S. 642 (1997); *Dirks v. SEC*, 463 U.S. 646 (1983); *Chiarella v. United States*, 445 U.S. 222 (1980).

<sup>3</sup> *Preventing Unfair Trading by Government Officials Before the H. Subcomm. on Oversight and Investigations of the H. Financial Serv. Comm.*, 111th Cong. 3 (2009) (testimony of Peter J. Henning, Professor of Law, Wayne State University Law School).

<sup>4</sup> See *id.*; 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

<sup>5</sup> Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. Rev. 1106, 1138 (2011).

The law should be clear: members of Congress, their staff, and all federal employees, must not trade or profit on the basis of information that is not available to the general public, but is obtained solely because of their position in government service. Moreover, financial disclosure statements should be enhanced to ensure compliance with these matters. The “Stop Trading on Congressional Knowledge Act” (STOCK Act) begins to address both of these concerns.

American citizens must have faith that their elected representatives are protecting the public interest. Congress must be held to the highest standard of accountability. Unfair gain by virtue of public position cannot be tolerated, and brighter lines concerning insider trading on Capitol Hill and in other branches of government will strengthen our democracy. Closing any perceived loopholes will ensure that in the future, the mere fact that an official obtained material nonpublic information via Congressional business will not serve as a defense to insider trading.

Common Cause supports the introduction of the bipartisan STOCK Act and calls on this Committee to closely examine how it can serve as the vehicle to strengthen the law on matters of insider trading. The momentum that this legislation has gained on both sides of the aisle is encouraging, and Congress should act to pass a bill that clarifies once and for all that trading on Congressional knowledge violates the law and undermines public trust in government.