

TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENATE

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COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

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INSIDER TRADING AND CONGRESSIONAL ACCOUNTABILITY

* * *

Washington, D.C.

December 1, 2011

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Committee on Homeland Security and Governmental Affairs

Insider Trading and Congressional Accountability

Thursday, December 1, 2011

SHEET 1 PAGE 1

1 INSIDER TRADING AND CONGRESSIONAL ACCOUNTABILITY
2 - - -
3 THURSDAY, DECEMBER 1, 2011
4 United States Senate,
5 Committee on Homeland Security and Governmental Affairs,
6 Washington, D.C.
7 The Committee met, pursuant to notice, at 2:34 p.m., in
8 Room SD-342, Dirksen Senate Office Building, Hon. Joseph I.
9 Lieberman, Chairman of the Committee, presiding.
10 Present: Senators Lieberman, Carper, McCaskill,
11 Tester, Begich, Collins, Coburn, Brown, and Johnson.
12 OPENING STATEMENT OF CHAIRMAN LIEBERMAN
13 Chairman Lieberman. For some reason, this is the first
14 time in my memory that I have arrived earlier than Senator
15 Collins so--oh, there she is.
16 [Laughter.]
17 Senator Collins. Right on cue.
18 Chairman Lieberman. But you still hold the record for
19 punctuality.
20 The hearing will come to order. Good afternoon. A
21 recent book by Peter Schweizer and a story on that book or
22 based on it on "60 Minutes" have raised the very serious
23 question of whether Members of Congress have been using
24 "insider information" to make investments that enable them
25 to make money they could not have made if they were not

PAGE 2

1 Members of Congress.
2 The Members of Congress who have been specifically
3 accused have denied the allegations. Our purpose here this
4 afternoon is not to determine the guilt or innocence of
5 individual cases. Our purpose is to determine whether the
6 existing law is sufficient to prevent and punish
7 congressional insider trading.
8 Perceptions are very important in public service. That
9 means that if the law seems to allow Members of Congress to
10 take advantage of their public position for personal gain,
11 the trust that needs to exist between the American people
12 and our Government will be further eroded than it already
13 is.
14 So what is the state of the law governing insider
15 trading by Members of Congress?
16 It will surprise most people to learn that there is no
17 explicit prohibition in our laws against insider trading by
18 anyone, including Members of Congress. That is to say, the
19 term "insider trading" is not mentioned or defined in
20 statute. All the investigations and prosecutions of insider
21 trading over the years by the Securities and Exchange
22 Commission or the Department of Justice have been carried
23 out pursuant to the broad anti-fraud provisions of the
24 Securities Exchange Act of 1934, which makes it unlawful, in
25 section 10(b), and I quote, to "use or employ, in connection

PAGE 3

1 with the purchase or sale of any security--any manipulative
2 or deceptive device or contrivance in contravention of such
3 rules"--this sounds like it was written not in 1934 but in
4 1734--"and regulations as the Commission may prescribe as
5 necessary or appropriate in the public interest for the
6 protection of investors."
7 The specific rules making insider trading illegal are
8 found in a large body of SEC regulatory activities pursuant
9 to section 10(b), that broad anti-fraud statute I just read
10 and court decisions interpreting those activities. The
11 rules against insider trading now clearly encompass not just
12 corporate "insiders" but others who have bought and sold
13 securities based on material, nonpublic information they
14 obtained and used in violation of a duty of trust.
15 Now, I gather that some have said that Congress has
16 exempted itself from these insider trading rules, but that
17 is not true. In fact, in a statement submitted to our
18 Committee for the record for this hearing, the Director of
19 Enforcement at the Securities and Exchange Commission makes
20 clear that the Commission has authority to prosecute such
21 wrongful conduct, declaring, and I quote, "trading by
22 congressional Members or their staffs is not exempt from the
23 Federal securities laws, including the insider trading
24 prohibitions."
25 [The prepared statement of Mr. Khuzami for the record

PAGE 4

1 follows:]

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 2 PAGE 5

1 Chairman Lieberman. This afternoon, we are going to
2 hear testimony that a Member of Congress or a congressional
3 staffer who buys or sells stock based on inside information
4 they obtain as a result of their job not only violates
5 congressional ethics rules, but violates the securities laws
6 as well.

7 On the other hand, we are going to hear testimony that
8 the law is not as clear as it needs to be and that Congress
9 should specifically proscribe congressional insider trading.

10 I am with the second school of thought. In my opinion,
11 whether or not there is currently clear and conclusive
12 evidence that Members of Congress or staff members have
13 benefitted financially from insider information and whether
14 or not the SEC believes it can act against Members of
15 Congress for insider trading under its existing authority,
16 there ought to be a law that explicitly deters such
17 unethical, illegal behavior by Members of Congress and
18 punishes it when it happens.

19 Our goal today is to sort out the facts and determine
20 precisely what legal reforms are needed to ensure that
21 regulators and law enforcers have the tools they need to
22 bring to justice Members of Congress and our staffs who defy
23 the public trust by using insider information for personal
24 gain.

25 Our first witnesses today, who we will call on in a

PAGE 7

1 trading by Members of Congress illegal would strengthen the
2 "foundations of our national policy," in Washington's words,
3 and I hope in a small way will help repair the breach that
4 exists today between our Government and our people.

5 Senator Collins.

6 OPENING STATEMENT OF SENATOR COLLINS

7 Senator Collins. Thank you, Mr. Chairman.

8 Unfortunately, I do not have an eloquent quote to begin my
9 hearing with to take up where you left off today, but I do
10 want to thank you for holding this hearing to examine
11 whether or not current laws are adequate to prevent Members
12 of Congress from engaging in insider trading. I very much
13 appreciate your inviting our two colleagues Senator Brown
14 and Senator Gillibrand to describe the bills that they have
15 proposed to address this concern. I am a cosponsor of
16 Senator Brown's bill, which is known as the "STOCK Act," and
17 I look forward to learning more about Senator Gillibrand's
18 bill today. This hearing is an important step in our
19 efforts to ensure that Members of Congress are not profiting
20 from trading on insider information.

21 Recent press reports on "60 Minutes" and elsewhere
22 demonstrate why this Committee must explore the application
23 of existing laws to Congress and identify what actions may
24 need to be taken to close possible loopholes that undermine
25 the public's confidence in this institution.

PAGE 6

1 short while, will be Senators Kirsten Gillibrand of New York
2 and Senator Scott Brown of Massachusetts, a valued member of
3 this Committee, both of whom have taken the lead in the
4 Senate in introducing legislation to deal with this problem,
5 and that legislation has been referred to our Committee,
6 which is why we are convening this hearing today.

7 The point that we are focused on today is narrow, but
8 it touches on much broader values and realities. The fact
9 is that the American people's faith in their elected
10 representatives is the cornerstone around which our
11 democratic republic was built. When that faith ebbs, as it
12 now has, to historic lows, we must increase our efforts to
13 ensure that the people who did us the honor of sending us to
14 Washington to represent them are confident that our only
15 business is their business.

16 I have been reading a lot about George Washington
17 lately, and as is so often the case, he said something long
18 ago--in fact, on the first day of our new Government--that
19 seems relevant to our hearing today, and I quote: "The
20 foundations of our national policy will be laid in the pure
21 and immutable principles of private morality, and the
22 preeminence of free Government [will] be exemplified by all
23 the attributes which can win the affections of its citizens
24 and command the respect of the world."

25 Adopting a new law that explicitly makes insider

PAGE 8

1 Elected office is a place for public service, not
2 private gain. As demonstrated by the recent press stories,
3 however, there are questions about whether lawmakers have
4 been exempt--either legally or practically--from the reach
5 of our laws prohibiting insider trading.

6 The recent allegations come at a time when the public's
7 faith in Congress is already extremely low. A recent Gallup
8 poll shows that 69 percent of the American public has little
9 or no confidence in Congress. Other polls show that
10 Americans rate Members of Congress at or near the bottom of
11 the list when it comes to perceived honesty and ethical
12 standards.

13 This erosion of public trust is not confined to
14 Congress, but taints the public's entire view of our Federal
15 system. Why does this matter? Well, with so many critical
16 challenges facing our country, if the American public does
17 not believe that the decisions that we are making are in
18 their interests rather than our interests, it will be next
19 to impossible to tackle the truly significant problems that
20 we face. And we must address the concerns that underpin the
21 public's skepticism. We need to assure the American people
22 that we are putting their interests above our own.

23 Seven years ago, economist Alan Ziobrowski published a
24 study that showed that the stock portfolios held by U.S.
25 Senators in the mid-1990s outperformed the market by nearly

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 3 PAGE 9

1 12 percent per year. Mr. Ziobrowski concluded from his data
2 that Senators have "a definite informational advantage over
3 other investors," though he also was careful to point out
4 that his results "should not be used to infer illegal
5 activity." In his words, "Current law does not prohibit
6 Senators from trading stock on the basis of information
7 acquired in the course of performing their normal senatorial
8 functions."

9 A more recent study by the professor showed similar,
10 albeit less dramatic, investment returns for stock
11 portfolios held by Members of the House between 1985 and
12 2001. At the same time, however, not all experts who have
13 examined the data share the professor's conclusions or his
14 legal interpretations.

15 So the purpose of today's hearing is to analyze the
16 need for greater clarity in the scope of the insider trading
17 laws, and I am eager to hear the views and recommendations
18 of the witnesses on the legislation presented by our
19 colleagues to close any loopholes and also to explore
20 whether this is simply a matter of insufficient enforcement
21 under the existing fraud laws.

22 Whatever the problem is, one thing is certain. We
23 should not be shielding Congress from laws that apply to
24 other Americans.

25 Thank you, Mr. Chairman.

PAGE 10

1 Chairman Lieberman. Thanks very much, Senator Collins.
2 Senator Gillibrand and Senator Brown, thanks for your
3 leadership here. You really seized the moment and, as soon
4 as this problem became evident, took real leadership. And
5 it is because you have introduced the bills that we are
6 here. We take your legislative proposals very seriously,
7 and it is Senator Collins' intent and mine to move to a
8 markup as soon as we can. So we welcome you here today.

9 It is always a difficult question when you have two
10 Senators who do you call on first. We have researched this
11 matter, and it turns out that Senator Gillibrand, by a small
12 amount, has more seniority, although it is clear that
13 Senator Brown is much older.

14 [Laughter.]

15 Senator Collins. And he is a member of our Committee.

16 [Laughter.]

17 Chairman Lieberman. Touche. Senator Gillibrand, go
18 ahead.

PAGE 11

1 TESTIMONY OF THE HONORABLE KIRSTEN E. GILLIBRAND,
2 A UNITED STATES SENATOR FROM THE STATE OF NEW YORK
3 Senator Gillibrand. Thank you, Mr. Chairman. I am
4 very grateful for your leadership. Ranking Member Collins,
5 thank you for your leadership. I appreciate you holding
6 this extremely important hearing and inviting me to offer my
7 testimony this afternoon. Your strong leadership together
8 is a shining example of how important it is to shine light
9 on an issue as important as fundamental fairness, and it is
10 a very important step forward on the path to restoring
11 American's faith in our Government, just as you said, Mr.
12 Chairman.

13 Like millions of Americans all across the country, I
14 was very surprised to learn that insider trading by Members
15 of Congress, their families, or their staff using non-public
16 information gained through their congressional work is not
17 clearly and expressly prohibited by law or by the rules of
18 Congress.

19 The American people need to know that their elected
20 leaders play by the exact same rules that they play by.
21 They also deserve the right to know that their lawmakers'
22 only interest is in what is best for the country, not what
23 is best for their own financial interests.

24 Members of Congress, their families, and their staff
25 should not be able to gain personal profits from information

PAGE 12

1 they have access to that everyday middle-class American
2 families do not. I simply believe that this is not right.
3 Nobody should be above the rules.

4 I have introduced a bipartisan bill in the Senate with
5 15 of our colleagues. Senators Rubio, Snowe, Johanns,
6 Tester, Stabenow, McCaskill, Klobuchar, Durbin, Blumenthal,
7 Bill Nelson, Reed, Cardin, Kerry, Sherrod Brown, and Baucus
8 have all offered this bill to close the loophole.

9 This STOCK Act legislation is very similar to the
10 legislation that was first introduced in the House by
11 Congresswoman Louise Slaughter and Congressman Tim Walz. So
12 I want to thank them for their longstanding commitment to
13 this issue and to the advocacy on it. I also want to
14 recognize my colleague Senator Scott Brown for requesting
15 today's hearing and for his very strong work on this issue
16 as well.

17 Our bill, which has received the support of at least
18 seven good-government groups, covers basic important
19 principles:

20 First, it says that Members of Congress, their
21 families, and their staff should be barred from buying or
22 selling securities on the basis of knowledge gained through
23 their congressional service or from using that knowledge to
24 tip off anyone else. The SEC and the CFTC must be empowered
25 to investigate these cases. To provide additional teeth,

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 4 PAGE 13

1 such acts should also be a violation of Congress' own rules,
2 to make clear that the activity is not only illegal but
3 inappropriate for Members of Congress.

4 Members should be required to disclose the major
5 transactions--of \$1,000 or more--within 90 days, providing
6 dramatically improved oversight and accountability from the
7 current annual reporting requirements.

8 Lastly, individuals doing political intelligence work--
9 contacting Members of Congress, their staffs, and other
10 individuals to gain information and help with investment
11 decisions--should have to register as lobbyists to provide
12 additional oversight of this industry.

13 There are those who do not want us to succeed and pass
14 this common-sense legislation the American people expect.
15 Some critics will say that the bill is unnecessary or
16 already covered under current statutes. I have spoken with
17 experts tasked in the past with investigations of this
18 nature, and they strongly disagree. We must make it
19 unambiguous that this kind of behavior is illegal.

20 Others may say that the legislation is too weak, so let
21 me be very clear. Our mission here is to pass a strong bill
22 with teeth in it that will make any and all insider trading
23 clearly illegal and a violation of our congressional rules
24 for all Members of Congress, their entire families, and
25 their staff. As we move forward, there will be technical

PAGE 15

1 Chairman Lieberman. Thanks, Senator Gillibrand.
2 Senator Brown, in fact, as our colleague said,
3 requested this hearing and asked us to do it as soon as we
4 can, which is why we are here today.
5 Senator Brown, it is all yours.

PAGE 14

1 changes in the language to improve the bill and to ensure
2 that the final product meets this goal. Anything less is
3 unacceptable.

4 As my home State newspaper the Buffalo News recently
5 noted, "The STOCK Act would ensure that it is the people's
6 business being attended to." This is a step that we must
7 take to begin to restore America's trust in this very broken
8 Congress.

9 Thank you again, Senators Lieberman and Collins. I am
10 very grateful that you held the hearing today.

11 [The prepared statement of Senator Gillibrand follows:]

PAGE 16

1 TESTIMONY OF THE HONORABLE SCOTT P. BROWN, A
2 UNITED STATES SENATOR FROM THE STATE OF
3 MASSACHUSETTS

4 Senator Brown. Thank you, Mr. Chairman and Ranking
5 Member Collins. Being new here, until the "60 Minutes"
6 piece came out, I had no knowledge that something like this
7 was even allowed. And as a result of that, I wanted to do
8 something about it to try to make a difference.

9 There was a "60 Minutes" piece which obviously featured
10 a segment about Members of Congress and their alleged
11 insider trading advantage, which garnered widespread public
12 attention, as you referenced.

13 You know, it is interesting. When you even have to
14 hear about things like this that happen apparently in
15 Washington, there is clearly something wrong. And you
16 referenced it, Mr. Chairman. There is a breakdown of trust.
17 We need to re-establish that connection and let people know
18 that we are subjected to the same laws and rules that they
19 are. We should not be passing laws and then not have to
20 adhere to them. And their trust in Congress is at an all-
21 time low, and that is disturbing.

22 It is more important than ever to have Members of
23 Congress affirm that we live by those very same laws that we
24 pass for everyone else in our country. We should be held to
25 the same and, quite frankly, I think a higher standard than

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 5 PAGE 17

1 the members of the general public and should not be able to
2 profit based on nonpublic information.

3 That is why I introduced the STOCK Act of 2011,
4 obviously, and I greatly appreciate you jumping on it. It
5 does not surprise me at all that both of you would move
6 quickly to address something that affects our body in such a
7 dramatic way. This obviously affects members and employees
8 of Congress as well as the executive branch employees from
9 using nonpublic information obtained through their public
10 service for the purposes of investing or otherwise making a
11 personal financial gain.

12 Consider this: A Member of Congress hears during a
13 meeting that a program will be cut or there is something
14 going to happen dramatically, and then they go in and either
15 buy or sell his or her stock to score a profit or avoiding
16 losses when the news breaks. And under current law, the
17 Congressman would likely walk away with a fatter investment
18 account. For everyone else, it would mean jail time, and
19 that is not right.

20 Arguing that the current law already applies to Members
21 of Congress, as you referenced in your initial opening, and
22 that we do not need it, I disagree. If it is in effect,
23 then why haven't they done something about these sorts of
24 things? There has not been one prosecution. If the SEC has
25 all this power, why haven't they used it?

PAGE 18

1 The mere existence of this debate is enough to show
2 that we must clarify and define the blanket affirmative duty
3 that we have as Members of Congress to the American people
4 pertaining to confidential nonpublic information. Not
5 defining this duty will leave an absolute gap--and it is
6 clear that it has left a gap--of uncertainty that invites
7 abuse, intentional or otherwise, and contributes to a
8 breakdown of trust among the American people. And that is
9 just not right.

10 This legislation is directly aimed at correcting this
11 problem that academics such as Professors Ziobrowski, which
12 you referenced, and Bainbridge have identified. In his
13 work, Professor Ziobrowski's work found that Members of
14 Congress' investments may have benefitted from an
15 informational advantage over members of the general public.
16 And in the recent book, "Throw Them All Out," author Peter
17 Schweizer, a fellow at the Hoover Institute, reports that
18 Members of Congress are making a killing in real estate by
19 approving the use of Federal funds for projects that will
20 enhance the value of buildings or lands that they actually
21 own. And that is not right.

22 As Members of Congress, we all know we have access to
23 information that the public does not--through classified
24 briefings, closed conference reports, and personal
25 conversations with Government officials. All of these

PAGE 19

1 sources can give us nonpublic information that we could find
2 of significant value and trade accordingly. Not only do we
3 have that access, we create information and policy as well,
4 and we can influence things that way.

5 When we act on legislation or negotiate legislative
6 language, frequently that legislation has real financial
7 consequences to many different industries in this country.
8 And because we have that access and we create information,
9 we must not, absolutely not betray the public's trust in
10 everything that we do for our own personal gain.

11 I believe--and I know you two do, and everybody on this
12 Committee does--that diminishing public trust is why you
13 called the hearing today. I suspect we will hear from
14 witnesses today that say that the existing laws and rules
15 are sufficient--Senator Gillibrand referenced it; you did,
16 Mr. Chairman--and I respectfully disagree. I say, "Like
17 really?" Then, once again, why are we here? Why was the
18 piece run? Why has something not been done? Basic
19 questions. There has been no successful prosecutions of
20 members or their staff, and I believe the uncertainty that
21 exists around the legal framework provides an excuse for
22 enforcement officials and agencies to avoid the politically
23 difficult task of policing Congress, especially when we
24 control the purse strings of many of those agencies. We
25 must absolutely close this loophole.

PAGE 20

1 I believe that the vast majority of members and staff
2 of Congress are here to serve their constituents' best
3 interests. They are people of good will, and they are not
4 here to line their pockets. But by explicitly prohibiting
5 the use of material nonpublic information for personal gain,
6 we will vastly increase the transparency that everyone
7 always kind of talks about here, but sometimes it just does
8 not get done.

9 The legislation I have introduced is similar to the
10 bipartisan legislation that has been introduced in the House
11 for many a year now. Back in the 109th Congress, I know
12 that Congresswoman Slaughter and Chairman Baird actually
13 filed, and now Congresswoman Slaughter and Congressman Walz
14 have continued their effort in this regard, and it is
15 getting more and more support. So I want to thank them for
16 their efforts.

17 The media attention has obviously brought a good eye to
18 this, and the American people are watching what we do. They
19 watch more than ever, especially with all the new media
20 opportunities out there.

21 I am not afraid of acting in the public's interest, and
22 that is why I introduced this legislation. It is critically
23 needed. And there are differences between our two bills.
24 Mine does not amend the ethics rules. It does not need a
25 67-vote threshold. It needs 51 votes. It makes it a lot

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 6 PAGE 21

1 easier to get it through. We can do the Senate resolution
2 side by side.

3 I would suggest and request that you take the best of
4 both bills, put them together, have us all join together in
5 a clearly bipartisan, bicameral manner, and get this thing
6 done. The American people deserve it. We will see if
7 politics will play a role in it or not. And it is up to us.

8 So I look forward to getting on that Committee chair
9 right there and asking some questions, so thank you.

10 [The prepared statement of Senator Brown follows:]

PAGE 23

1 Columbia Law School. I am having flashbacks to those
2 terrible days at law school. But, remember, here I am the
3 one who asks the questions.

4 [Laughter.]

5 Chairman Lieberman. It was not that way in law school.

6 And, finally, Robert Walker, of counsel at Wiley Rein
7 and former chief counsel and staff director of both the
8 Senate and House Ethics Committees.

9 Thanks to all of you for being here on relatively short
10 notice. You bring in various ways a wealth of experience
11 and information.

12 Ms. Sloan, we will begin with you. Your organization
13 has one of the best acronyms in Washington--CREW, Citizens
14 for Responsibility and Ethics in Washington. I know you
15 have worked together with a number of other public interest
16 groups that advocate legislation to deal with this insider
17 trading problem. Please proceed.

PAGE 22

1 Chairman Lieberman. Thanks very much, Senator Brown,
2 and thanks for your closing comments about the process. I
3 will note for the record that Senator Gillibrand was nodding
4 her head affirmatively, which is that there are some
5 differences between your two bills, but there are many more
6 similarities. And I hope that the two of you will be able
7 to work with Senator Collins and me to come up with a joint
8 bill. We may want to separate them. As you said, we will
9 probably want to have a separate resolution on the Senate
10 rules so that it will be separate from the legislative
11 proposal. But I am going to set a standard that may be hard
12 to meet, but if we work intensely, it would be great if we
13 can bring this before a markup of the Committee in December
14 before we break for the holidays. We tentatively have
15 scheduled a markup for December 14th or 15th, so let us set
16 that as the goal, and informed by the second panel, see if
17 we can put this together.

18 Thank you both very much.

19 Senator Gillibrand. Thank you, Mr. Chairman.

20 Chairman Lieberman. We will now call the second panel:
21 Melanie Sloan, executive director of Citizens for
22 Responsibility and Ethics in Washington; Donna M. Nagy,
23 professor of law at Indiana University Maurer School of Law;
24 Donald G. Langevoort is a professor of law at Georgetown
25 University Law Center; John Coffee, professor of law at

PAGE 24

1 TESTIMONY OF MELANIE SLOAN, EXECUTIVE DIRECTOR,
2 CITIZENS FOR RESPONSIBILITY AND ETHICS IN
3 WASHINGTON

4 Ms. Sloan. Thank you. Chairman Lieberman, Ranking
5 Member Collins, and other members of the Committee, thank
6 you for inviting me here today to join such a distinguished
7 panel.

8 No disrespect to any of you intended personally, but
9 the fact is America does not trust you. A full 46 percent
10 of Americans believe Congress is corrupt. Stories like the
11 one on "60 Minutes" a few weeks ago become such big news
12 because they confirm what so many people already believe:
13 that many of your colleagues use their positions not for the
14 public good but to feather their own nests.

15 My organization, CREW, has focused on misconduct of
16 Members of Congress for many years. We have seen and
17 complained of numerous legislators abusing their positions
18 to earmark projects to increase the value of their personal
19 real estate holdings, buy into companies that soon
20 thereafter surged in value, urging agencies to take actions
21 to financially benefit themselves or family members, and
22 pushing through legislation in apparent exchange for
23 campaign contributions, and, finally, even trading on inside
24 information.

25 As others have said, at no time in history has the

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 7 PAGE 25

1 public's view of Congress been quite so dismal. The jobless
2 rate is sky high, and a wide swath of the country is
3 suffering severe economic hardship, but Members of Congress
4 have never been richer. Sixty-six percent of Senators and
5 41 percent of House Members are millionaires. Members have
6 significant stock portfolios, but only some maintain their
7 assets in blind trusts. Whether or not it is accurate,
8 there is a widespread public perception that Members of
9 Congress are abusing their positions to enhance their
10 personal wealth.

11 Members are also willing to accept benefits, like
12 generous pensions and health care coverage, that most
13 Americans only dream about, while at the same time Congress
14 exempts itself from laws like those governing whistleblower
15 protections, workplace safety, and perhaps insider trading
16 that are applied to everybody else.

17 Notably, Presidential appointees requiring Senate
18 confirmation often have been required by the Senate to
19 divest themselves of interests in companies they will
20 oversee as part of the executive branch. But Senators are
21 under no such restrictions. For example, the Washington
22 Post found between 2004 and 2009, 19 of the 28 Senators on
23 the Armed Services Committee held assets in companies that
24 did business with the Pentagon. The Senate has refused to
25 require Senators to file campaign finance reports

PAGE 26

1 electronically, all the better to stop the media and
2 watchdogs from comparing campaign contributions with
3 legislative actions. And Congress, particularly the House
4 counsel's office, has been advancing a very aggressive
5 interpretation of the Speech or Debate Clause that allows
6 members who have engaged in serious crimes like bribery to
7 go unpunished.

8 Congress frequently refuses to enforce even its own
9 limited ethics rules, failing to police the conduct of
10 members except when it is so egregious it becomes fodder for
11 sensational, wall-to-wall, 24-hour news coverage.

12 I am not an expert on securities law, so I will leave
13 it to all these other esteemed panelists who are leaders in
14 this field to discuss whether and to what extent insider
15 trading laws already on the books apply to you. But given
16 that there has been no prosecution of a Member of Congress
17 for insider trading and only one Member of the House way
18 back in 1976 has ever been disciplined for any even remotely
19 related conduct, it is imperative that Congress pass a STOCK
20 Act soon. Members of Congress need to demonstrate to
21 America that you take our concerns about your ethics
22 seriously.

23 Undoubtedly, there are cases in which the Speech or
24 Debate Clause of the Constitution might prevent a
25 prosecution such as where a member traded on confidential

PAGE 27

1 information received pursuant to a committee inquiry. As a
2 result, not only should the STOCK Act provide a role for the
3 SEC and the Department of Justice in addressing such
4 conduct, but the House and Senate should also amend their
5 standing rules to make clear that such conduct is prohibited
6 and subject to specific disciplinary action, perhaps
7 including a financial penalty of 3 times the amount of a
8 profit obtained or a loss avoided.

9 Disclosures of trades also must be a key component of
10 any legislation. The 90 days permitted under the bills that
11 we have seen is far too long and should be cut back
12 dramatically. After all, electronic confirmations of trades
13 are often instantaneous, making such significant time delays
14 unnecessary.

15 Members of Congress should post information about
16 trades in an electronic searchable database. Further, as
17 with personal financial disclosure reports, the willful
18 failure to disclose such information should be punishable
19 under the False Statements Act.

20 The bottom line is that Americans are becoming
21 increasingly frustrated with a Congress viewed as part of
22 the 1 percent, more concerned with preserving that status
23 than in working to improve the standard of living of the
24 remaining 99 percent. Passing a STOCK Act would be a good
25 first step toward changing that image.

PAGE 28

1 Thank you.
2 [The prepared statement of Ms. Sloan follows:]

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 8 PAGE 29

1 Chairman Lieberman. Thank you, Ms. Sloan.
2 And now Professor Nagy from Indiana School of Law.

PAGE 31

1 The controversy surrounding the application of existing
2 law to Congress stems from the fact that Congress has never
3 enacted a securities statute that explicitly prohibits
4 anyone from insider trading. A STOCK Act would only address
5 one manifestation of this much larger malady.

6 In the absence of an express statutory prohibition, the
7 offense of insider trading has been prosecuted as a
8 violation of Section 10(b) of the Exchange Act and Rule 10b-
9 5. These provisions prohibit fraud in connection with the
10 purchase or sale of any security. The Department of Justice
11 also prosecutes insider trading as a criminal violation of
12 either Rule 10b-5 or the Federal mail and wire fraud
13 statutes. Thus, in the vast majority of instances, insider
14 trading is illegal only insofar as it can be deemed an act
15 of fraud.

16 Because the term "fraud" is not defined in these
17 statutes, the formidable task of determining illegal insider
18 trading has defaulted to the Supreme Court and lower Federal
19 courts. And in literally hundreds of cases, courts have
20 imposed liability where the traders were decidedly not
21 insiders of the issuer whose securities were traded.

22 For example, courts routinely impose liability in so-
23 called outsider trading cases involving family members who
24 trade on information entrusted to them by spouses or
25 relatives.

PAGE 30

1 TESTIMONY OF DONNA M. NAGY, C. BEN DUTTON
2 PROFESSOR OF LAW, INDIANA UNIVERSITY MAURER SCHOOL
3 OF LAW

4 Ms. Nagy. Chairman Lieberman, Ranking Member Collins,
5 and members of the Committee, I am honored with the
6 invitation to testify. My name is Donna Nagy, and I am the
7 C. Ben Dutton Professor of Law at Indiana University Maurer
8 School of Law. In my 17 years as a professor, I have co-
9 authored a treatise on insider trading, and I have written
10 many articles, including one published last May, on the
11 precise topic of today's hearing.

12 The articles sought to debunk what at the time was
13 becoming an urban myth: that Congress had exempted itself
14 or was somehow immune from the existing law that prohibits
15 insider trading. Congress in no way has sought to immunize
16 or exempt itself. Beyond that, the article concludes that
17 congressional insider trading is already illegal under
18 existing law.

19 Based on my research, I would expect a court to hold a
20 Member of Congress liable for any securities trading that is
21 based on material nonpublic information obtained through
22 congressional service if the SEC or DOJ successfully proved
23 the facts alleged. I acknowledge, however, that many
24 distinguished securities law scholars see shades of gray,
25 and some believe a court would rule likely the other way.

PAGE 32

1 Other outsider cases would include Federal and State
2 officials who trade on information obtained through
3 Government service, including an FDA chemist who pled guilty
4 last month and now awaits a likely prison sentence.

5 In misappropriation cases such as these, as in all
6 insider trading cases, the liability linchpin is a
7 securities trader who has breached a fiduciary-like duty of
8 trust and confidence by secretly profiting from the use of
9 material nonpublic information that rightfully belongs to
10 somebody else.

11 The Constitution refers repeatedly to public offices
12 being "of trust." Members also take an oath of office to
13 faithfully discharge their duties. So there should be
14 little doubt that members' undisclosed, self-serving use of
15 congressional knowledge constitutes a misappropriation that
16 would defraud the United States and the general public,
17 among others.

18 For a court to conclude otherwise, it essentially would
19 have to view nonpublic congressional knowledge as a perk of
20 office belonging to an individual member to do with as he or
21 she wished. Such a view would be strikingly inconsistent
22 with the tenets of representative democracy.

23 I recognize that a Member of Congress has never been
24 prosecuted for insider trading based on nonpublic
25 congressional knowledge. But the DOJ has used the Federal

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 9 PAGE 33

1 mail and wire fraud statutes to successfully prosecute
2 congressional officials for defrauding the United States and
3 the public through the undisclosed misappropriation of
4 congressional funds and tangible property. And the Supreme
5 Court has dictated that material nonpublic information
6 constitutes intangible property.

7 In sum, congressional insider trading violates the
8 broad anti-fraud provisions in Rule 10b-5 and the mail and
9 wire statutes.

10 My final point relates to one possible consequence of a
11 staff act. I applaud and endorse the motivation behind the
12 proposed legislation, but I am concerned that in the absence
13 of a modification to its wording, a STOCK Act could be
14 viewed as the only insider trading law that applies to
15 Congress. This risk is troubling because the proposed
16 legislation fails to reach a host of possible insider
17 trading scenarios that would almost certainly fall within
18 existing law.

19 Thank you very much for giving me this opportunity to
20 share my thoughts.

21 [The prepared statement of Ms. Nagy follows:]

PAGE 35

1 TESTIMONY OF DONALD C. LANGEVOORT, THOMAS AQUINAS
2 REYNOLDS PROFESSOR OF LAW, GEORGETOWN UNIVERSITY
3 LAW CENTER

4 Mr. Langevoort. Thank you, Chairman Lieberman, Ranking
5 Member Collins, and members of the Committee. My testimony
6 today strongly supports legislative efforts to explicitly
7 proscribe insider trading by Members of Congress and their
8 staffs, as intended by the various STOCK Act bills recently
9 introduced in the House and Senate.

10 There is no current exemption from the main thrust of
11 U.S. insider trading law for either members or staff, and
12 many forms of trading or tipping by such persons are
13 adequately proscribed under existing legal authority.
14 Indeed, as Professor Nagy has just told you, it is possible
15 that courts would rule that current insider trading law
16 adequately proscribes all abusive trading in securities on
17 Capitol Hill. I hope they would. But there is sufficient
18 doubt, especially in light of how courts recently have been
19 reading Section 10(b) and Rule 10b-5.

20 The primary weapon against insider trading cases like
21 this--the misappropriation theory--requires a showing that
22 the trader was in a fiduciary-like relationship to the true
23 owner of the information and deceptively stole information
24 entrusted to them. As applied to legislative activities on
25 Capitol Hill, this theft of someone else's secrets concept

PAGE 34

1 Chairman Lieberman. Thanks very much, Professor. That
2 was very helpful, and we will come back with some questions.

3 Next, Professor Donald Langevoort, professor of law at
4 Georgetown University Law Center. Thanks very much for
5 being here.

PAGE 36

1 does not fit neatly.

2 Yet the idea that Members of Congress or their staffs
3 can freely step ahead of ordinary investors to profit from
4 information acquired as a result of their legislative roles
5 is disturbing, to say the least. Congress should,
6 therefore, act to eliminate any doubt and state clearly that
7 both trading and tipping apply to members and staff.

8 An insider trading case against a member or even a
9 powerful staff person will always be a matter of great
10 political sensitivity, likely to be brought only to the
11 extent that the case factually and legally is very strong.
12 The external pressures to bring such cases, or not bring
13 them, will inevitably be great when any suspicions arise.
14 Leaving any ambiguity as to the question of whether, and to
15 what extent, the insider trading on Capitol Hill is unlawful
16 is hardly an encouragement to those matters that deserve to
17 be courageously investigated and pursued.

18 It would be extremely unfortunate were the SEC or
19 prosecutors to bring an action and have the member or staff
20 person raise the defense, which they surely would, that
21 service in Congress carries with it no fiduciary-like duty
22 with respect to Government confidences. That would be the
23 last headline Congress should want to see.

24 While I fully support the intent behind the STOCK Act
25 bills, the legislative language must be carefully crafted to

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 10 PAGE 37

1 assure that legislation does not create the very problem it
2 seeks to address: the perception that Congress has exempted
3 itself from insider trading law. If read as an exclusive
4 statement of Congress' insider trading restrictions, it is
5 at times too narrow, at times overbroad.

6 I am more than happy to work with the Committee and its
7 staff to resolve these problems, which I do not believe at
8 all reflects the true intent of the drafters.

9 Thank you.

10 [The prepared statement of Mr. Langevoort follows:]

PAGE 39

1 TESTIMONY OF JOHN C. COFFEE, JR., ADOLF A. BERLE
2 PROFESSOR OF LAW, COLUMBIA LAW SCHOOL

3 Mr. Coffee. Thank you, Chairman Lieberman and Ranking
4 Member Collins and other members of the Committee. I am
5 delighted to be here because I agree so almost completely
6 with my predecessor, Professor Langevoort. I am going to
7 edit out much of what I was going to say in support of what
8 he was saying and make just four points.

9 Point one, I believe Congress should act, but narrowly,
10 and I want to underline the words "but narrowly." While
11 reasonable people and reasonable professors can disagree--
12 and reasonable professors almost always do disagree--I think
13 there are clearly enough ambiguities in this field that you
14 need legislative action.

15 Senator Brown asked this point earlier: Why hasn't
16 there been enforcement? I think even very responsible U.S.
17 Attorneys would not prosecute criminally, would not indict,
18 if there is any uncertainty in the law. You do not indict
19 in a case where the law is 50/50, so that is a reason they
20 may have restrained their hands in cases where they could
21 have gone forward. So that is point one, that there is
22 ambiguity, and I think you should act, and Professor
23 Langevoort already said that.

24 Point two, which he alluded to but I want to say it a
25 little bit more fully, the proposed legislation has language

PAGE 38

1 Chairman Lieberman. Thank you, Professor. Let me
2 immediately accept your offer of assistance.

3 Truly, this is obviously a field--we have a purpose, I
4 think, most of us on the Committee, but this is a field of
5 law with a lot of precedent and a lot of complications. So
6 in trying to fix this problem, we do not want to create
7 other problems or create other appearances, as you said. So
8 I look forward to the question-and-answer period.

9 Next, John C. Coffee, Jr., is a professor of law at
10 Columbia Law School. We have quite a distinguished panel
11 here. Thank you for being here.

PAGE 40

1 that does not quite work. I want to say this respectfully,
2 but one of the key concepts in both the proposed bills is
3 that the information that you receive has to relate to
4 pending or proposed legislation before there is liability.
5 Unfortunately, that is not the most common case that we are
6 likely to see. I can imagine a Department of Defense
7 official calling a Congressman and saying, "You know that
8 bill you have been pushing us for 2 years to pass to give
9 that defense contract to that contractor in your district?
10 That defense contract will be announced tomorrow for \$5
11 billion." There is no legislation there. There is nothing
12 that under the existing language would make that criminal.
13 Frankly, Congressmen spend much of their time exercising
14 oversight, and that oversight function does not fall within
15 the pending or proposed legislation. That is flaw one.

16 Flaw two, there is a reference that you cannot trade in
17 securities of an issuer. Well, frankly, the most likely
18 trading that you are like to see would be in options or
19 futures or stock index products which are not securities of
20 an issuer. They are issued by financial dealers in the
21 market. They are not particular companies you are buying
22 into. You have to play with that language.

23 I think there is a difference in the two bills with
24 regard to whether tipping--as opposed to yourself receiving
25 information--by the Congressman is covered. I think that

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 11 PAGE 41

1 should be reconciled.

2 There are several places where you need to talk a
3 little bit about directly or indirectly because there could
4 be a chain of four or five people, and there could be a
5 distance between the Congressman and the tippee. I think
6 you want to cover those situations. These are all small
7 points that I will not go further into.

8 Let me go to my third point. Doing less is more.
9 Rather than attempting to write a detailed code that would
10 codify terms that have well-recognized judicial meanings,
11 like "material" and "nonpublic," it might be better to write
12 a very simple one-sentence statute. For example, such a
13 one-sentence statute could say, "A Member of Congress is a
14 fiduciary with respect to all material nonpublic information
15 that such person acquires in the performance of such
16 person's duties or that such person receives because of his
17 or her status as a Member of Congress."

18 That one sentence does it, and it does not require you
19 to define terms like "material" or "nonpublic." You would
20 just say that in interpreting this statute, the courts
21 should use the existing meaning under the Federal securities
22 laws of these terms.

23 If you attempt to do more, ambitious as it is, and have
24 a universal legislative statute, Congress has tried that
25 before and it has proven to be a disaster. I testified in

PAGE 43

1 broker or a bank, advising the broker or bank exactly what
2 you want done if stock prices fall, if different things
3 happen. I think that would solve most of these problems.
4 In addition, you could even instruct the SEC to give no-
5 action letters to you. And, finally, I think that you can
6 rely on the advice of counsel that if you get an opinion
7 from a lawyer with experience in the securities laws that
8 you are not engaged in using material nonpublic information.
9 I believe that no enforcer will proceed against you where
10 you have a reliable defense-of-counsel defense.

11 Thank you.

12 [The prepared statement of Mr. Coffee follows:]

PAGE 42

1 this field 30 years ago, in the 1970s and 1980s, and
2 Congress wisely backed off from writing a universal statute
3 and just changed the penalties and insider trading
4 sanctions. I think that is wiser because if you adopt
5 legislation with new terms, the Federal courts will spend 10
6 to 15 years resolving what those new terms means. There
7 will be conflicts in the circuit. None of us needs that
8 confusion.

9 Also, if you try to adopt comprehensive legislation, I
10 am afraid that every special interest group in the United
11 States will want a safe harbor for what they do, and you
12 will find that the statute will go from short to page after
13 page of proposed safe harbors. You do not need to do any of
14 that to deal with the real problem that concerns you, which
15 is Members of Congress. So I think you should keep it short
16 and simple.

17 Okay, last point. Members of Congress will face some
18 illiquidity if such a statute is adopted. That is a
19 necessary cost. But I want to advise you that I do not
20 think the problem of illiquidity is as great as you might
21 think. There are some special rules that the SEC already
22 has, most notably a rule called 10b5-1, that permits anyone,
23 including Members of Congress, to adopt what is called a
24 10b5-1 trading plan. This is different than a blind trust.
25 You can give very detailed instructions to a fiduciary, a

PAGE 44

1 Chairman Lieberman. Well, thank you. Again, very
2 helpful. We are not accustomed to drafting legislation as
3 brief as you suggest, but it is a very constructive
4 recommendation.

5 Robert Walker, as I mentioned at the outset, comes to
6 us with the unusual and very helpful experience of having
7 been chief counsel and staff director of both the Senate and
8 House Ethics Committees. Thanks for being here.

Committee on Homeland Security and Governmental Affairs

Insider Trading and Congressional Accountability

Thursday, December 1, 2011

SHEET 12 PAGE 45

1 TESTIMONY OF ROBERT L. WALKER, OF COUNSEL, WILEY
2 REIN LLP
3 Mr. Walker. Thank you, Chairman Lieberman, and thank
4 you, Ranking Member Collins and members of the Committee.
5 Thanks for the opportunity to address the important issue of
6 insider trading and congressional accountability.
7 I am not here to advocate against or for any version of
8 the STOCK Act. I will say, however, that in my view current
9 Federal insider trading prohibitions do apply fully to
10 Members and employees of Congress under the misappropriation
11 theory. And I will also say in my view as a former Federal
12 prosecutor, the law is more than 50/50 on that.
13 There are substantial proof problems in making out an
14 insider trading case in the congressional context, however;
15 in particular, proof that information traded upon was truly
16 nonpublic, may be an obstacle, probably would be an
17 obstacle, given the continual swirl of information in and
18 around the Capitol.
19 There is also a unique complicating factor to
20 prosecuting insider trading cases, at least some insider
21 trading cases in the congressional context. As already
22 alluded to, under the Speech or Debate Clause of the
23 Constitution, certain congressional actions and activities
24 cannot be cited or used as proof in legal actions against
25 members brought outside of Congress. But even the most

PAGE 46

1 sweeping conceivable legislation against congressional
2 insider trading could not trump constitutional speech or
3 debate privilege.
4 Within Congress itself, existing standards of conduct
5 do capture and do provide the basis for sanctioning a
6 congressional individual for profiting from securities
7 trades based on material nonpublic information gained
8 through his or her official position. Most directly,
9 paragraph 8 of the Code of Ethics for Government Service
10 states that a person in Federal Government service should
11 "never use any information coming to him confidentially in
12 the performance of governmental duties as a means for making
13 private profit."
14 Insider trading based on confidential congressional
15 information would be a clear violation of this provision,
16 and the mechanism for enforcement would be the congressional
17 ethics process. Having said this, it cannot be said as
18 clearly exactly what information would be considered
19 confidential within Congress for purposes of enforcement of
20 this code provision.
21 Under the rules of the House and Senate, there is no
22 blanket duty of confidentiality on the part of members and
23 staff. Senate rules, for example, basically leave it to
24 each committee and office to determine what information
25 before this is confidential. But relatively few committees

PAGE 47

1 of the Senate or of the House actually have specific rules
2 imposing duties of confidentiality on their members and
3 staffs. So paragraph 8 of the Code of Ethics does not
4 provide a systematic tool for addressing allegations of
5 congressional insider trading. Use of this provision for
6 pursuing insider trading allegations within Congress
7 requires a case-by-case analysis.
8 The current focus on insider trading in Congress does
9 provide the opportunity for the Senate and the House and
10 each of the committees to take a hard look at their rules
11 with respect to the definition, scope, and duties relating
12 to confidential information.
13 Apart from paragraph 8 of the Code of Ethics,
14 allegations of insider trading in Congress may be addressed
15 under the fail-safe standard of conduct, which enjoins
16 members and staff never to engage in conduct with may
17 reflect discredit on the House or Senate. If credible
18 allegations of securities trading by a member of employee
19 based on material nonpublic information were to come before
20 the Senate Ethics Committee, the House Ethics Committee, or
21 the House Office of Congressional Ethics, and these
22 allegations were more than mere insinuation, the allegations
23 would be pursued by the Ethics Committee as potentially
24 conduct reflecting discredit on the institution, and they
25 would be so pursued and investigated, regardless of whether

PAGE 48

1 any other specific law or rule were applicable.
2 Finally, let me turn to the issue of whether Members of
3 Congress may trade in or hold securities of companies or
4 industries that fall within the jurisdiction of their
5 committee assignments. As you know, recusal and divestment
6 are viewed in Congress as extraordinary and disfavored
7 remedies to potential conflicts of interest. The preferred
8 approach to monitoring and policing potential conflicts in
9 the legislative branch is through public financial
10 disclosure. The provisions of the proposed STOCK Acts that
11 would require public disclosure of securities transactions
12 within 90 days is consistent with and would extend this
13 approach. There would, of course, be a compliance burden on
14 members and staff, but there would also be a substantial
15 increase in the accessible pool of information based upon
16 which a member's constituents could form their own
17 ultimately conclusive and unappealable judgments as to the
18 appropriateness of the member's financial transactions and
19 as to the propriety overall of the member's conduct.
20 Thank you.
21 [The prepared statement of Mr. Walker follows:]

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 13 PAGE 49

1 Chairman Lieberman. Thank you, Mr. Walker.
2 We will go forward with questioning now, and we will
3 have 7-minute rounds for each Senator.
4 Based on the research that I did before I came into the
5 hearing today, I reached a tentative conclusion, informed by
6 the SEC opinion filed before, or the testimony filed with
7 the Committee today, that under existing law the SEC would
8 have the authority to pursue and prosecute Members of
9 Congress or staff for insider trading.
10 Based on the testimony that the witnesses have given, I
11 think now I come to a different kind of conclusion, which is
12 that there is genuine ambiguity in the law. My original
13 feeling was that we should legislate to make clear that
14 Members of Congress are included within laws against insider
15 trading because the existing state of the law, obviously, as
16 we have said earlier, insider trading is not mentioned or
17 defined in law. You have to take a two- or three-step jump
18 to get there.
19 But now you convinced me that there is ambiguity that
20 has to be resolved, and if I am hearing you, particularly
21 Professor Langevoort and Professor Coffee, it goes
22 particularly to this question of fiduciary duty. And as I
23 understand it, as you mentioned, Professor Nagy, the Supreme
24 Court really has set the law here because it has required
25 the interpretation on up, a person can be found to have

PAGE 50

1 committed insider trading if the person trades on the basis
2 of material nonpublic information, but only if the person is
3 breaching a fiduciary duty, which, as I understand it,
4 normally is to shareholders or the source of the nonpublic
5 information.
6 So the normal reaction--but it is not necessarily--the
7 normal reaction does not necessarily prevail in courts of
8 law. In other words, there is a separate vocabulary--would
9 be, "Well of course, Members of Congress have a fiduciary
10 duty." We have a duty to our constituents, to the law. But
11 your testimony leads me to now feel that that is ambiguous
12 because Members and Congress and our staffs are in such a
13 different relationship to this nonpublic material
14 information.
15 So I want to ask particularly the two of you,
16 Professors Langevoort and Coffee, and Professor Nagy, too,
17 if you want, to weigh in on the nature of the duty that must
18 be established. Is it a fiduciary duty? If so, how do we
19 define it? Or is it a broader duty of trust and confidence,
20 which is the kind of language that we normally would use or
21 that we think we have? Professor Langevoort, why don't you
22 go first?
23 Mr. Langevoort. Sure. The courts are still working
24 out the answer to that question. The Supreme Court
25 established the misappropriation theory in the context of a

PAGE 51

1 case involving a partner in a law firm who misappropriated
2 information belonging to the law firm and the firm's client.
3 That is a quintessential fiduciary relationship. A firm has
4 a right to sue a partner for breach of fiduciary duties,
5 duties of loyalty and care.
6 As you move away from settings in which there is an
7 employer, a boss, a principal who would be able to take
8 breach of fiduciary duty action against the person in
9 question, the ability to make the kind of argument that the
10 misappropriation theory clearly applies grows weaker.
11 As I said, I would hope that a court would make that
12 leap, but I am not confident.
13 Chairman Lieberman. Yes. Professor Coffee?
14 Mr. Coffee. Let me just add a word on that same line.
15 In an en banc decision of the Second Circuit--and "en banc"
16 means every judge on that circuit participated--they ruled
17 that husbands and wives are not fiduciaries to each other.
18 That will really surprise you. What more sensitive
19 relationship is there than husband and wife? But they were
20 not fiduciaries because the Second Circuit ruled that to be
21 a fiduciary, there has to be a relationship with
22 discretionary authority on one side and dependency on the
23 other, and the more it was equal, it was not a relationship
24 that was fiduciary in character.
25 Now, the SEC partially overruled that with respect to

PAGE 52

1 husbands and wives, but that definition that a fiduciary
2 relationship only exists when there is discretionary
3 authority on one side and dependency on the other is a very
4 high standard that neither Professor Langevoort nor I want
5 to see applied. No one wants to see it applied. But that
6 is why there is this ambiguity, and we think that because
7 there is ambiguity, there is no upside--no downside in
8 passing this legislation and considerable upside.
9 Chairman Lieberman. Right. So if I remember your one-
10 sentence proposal, it dealt exclusively with this question.
11 Am I right?
12 Mr. Coffee. Simply you are a fiduciary with
13 information you receive in the course of your work or your
14 status in Congress. The advantage of that is only that if
15 you start defining in legislation what "material" and
16 "nonpublic" means, there are going to be efforts by defense
17 counsel to say that is different and it was not satisfied in
18 this case.
19 Chairman Lieberman. Yes. So it would not be enough,
20 for instance, if we avoided the issue of fiduciary duty
21 altogether, for whatever reason, and simply declared in law
22 that Members of Congress may not trade on the basis of
23 material nonpublic information which they obtained only
24 because they were Members of Congress?
25 Mr. Coffee. You could possibly do it that way, but

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 14 PAGE 53

1 what you just said would not cover the tipping problem. You
2 want to cover both the tipper and the tippee who is a Member
3 of Congress.

4 Chairman Lieberman. Professor Nagy, do you want to get
5 into this?

6 Ms. Nagy. Yes, I do. Thank you, Senator.

7 The Chestman case that Professor Coffee mentioned, the
8 Securities and Exchange Commission felt that the Second
9 Circuit en banc had unduly narrowed what the Supreme Court
10 had set out in Chiarella, Dirks, and O'Hagan as the
11 relationship of trust and confidence, and in direct response
12 to the Chestman case, the Securities and Exchange Commission
13 promulgated a rule. Professor Coffee mentioned one aspect
14 of that rule: it creates a rebuttable presumption that
15 family members--parents, siblings, and spouses--owe duties
16 of trust and confidence to each other. But the rule has two
17 other provisions, and one talks in terms of histories,
18 patterns, and practices of exchanging confidences can create
19 the requisite duty of trust and confidence.

20 The other point that I would have is that if courts
21 routinely were applying the now-discredited Chestman
22 analysis to insider trading prosecutions that the Securities
23 and Exchange Commission or the Department of Justice bring,
24 we would see far fewer victories with the Securities and
25 Exchange Commission and the Department of Justice and far

PAGE 55

1 Court rulings.

2 The other conclusion I have, Senator Collins, is more
3 personal. I have actually understood what the three law
4 professors have said today, which says to me that I am more
5 prepared to go to law school now than I was when I went.

6 [Laughter.]

7 Chairman Lieberman. Senator Collins.

8 Senator Collins. Thank you, Mr. Chairman.

9 Professor Coffee, you made a very important point that
10 Members of Congress do more than just legislate. We act as
11 advocates for our constituents. We endorse public funding
12 for them through grants or contracts. We seek expert advice
13 on public policy in order to reach the right decisions. I
14 am thinking of how many of us during the financial crisis in
15 the fall of 2008 reached out to financial experts for
16 advice.

17 So I think this is a more complicated issue than it
18 first appears to make sure that when we do act that we are
19 not having a chilling impact on the responsibilities of
20 Members of Congress to their constituents.

21 So with that preface in mind, let me suggest a
22 completely different way of looking at this issue, and you
23 actually started to touch on it in your testimony, Professor
24 Coffee. What if, instead of trying to put into law a ban
25 that works to prevent what we would all think was improper

PAGE 54

1 fewer settlements. There have been cases involving within
2 relationships where one partner misappropriated information
3 from the other, clearly not a spousal relationship, and the
4 result was a prison term for the boyfriend who had
5 misappropriated from his attorney girlfriend.

6 Certainly the Chestman standard, a very high standard
7 of fiduciary relationship, would not have supported a prison
8 sentence in such a case. Trust and confidence is where the
9 Securities and Exchange Commission has put the emphasis on
10 the duty.

11 And I would ask you to imagine a situation where a
12 district court is faced with this hypothetical case. If a
13 district court were to conclude that a Member of Congress
14 does not owe a duty of trust and confidence to the United
15 States and to the American people, I would be shocked, and
16 we could all anticipate what the headlines the next morning
17 would be on that ruling, to which I would say the district
18 judge would likely find the requisite duty of trust and
19 confidence under existing law.

20 Thank you.

21 Chairman Lieberman. Okay. Very interesting.

22 Obviously this is important because we want to get this
23 done, but we are not, if I can use a metaphor from a
24 different area of activity, painting on a blank canvas.
25 There is a lot on the canvas in existing law and Supreme

PAGE 56

1 and should-be-illegal behavior, if we instead said that
2 Members of Congress cannot trade in individual stocks
3 themselves but must either limit their investments to mutual
4 funds or do as you suggest, adopt a mechanism approved by
5 the SEC to allow trading pursuant to a written plan that
6 gave detailed instructions to a person overseeing the
7 investments but the member does not make the trades, or
8 blind trust would be another opportunity for those who have
9 enough assets to have blind trusts? But what if we got at
10 it from that perspective? What would be your opinion of
11 that? I am going to ask the whole panel this.

12 Mr. Coffee. Well, I think that kind of 10b-5 plan is a
13 means of protection. I think many Congressmen would find it
14 an imposition if they were told that they had to use blind
15 trusts or 10b-5 plans, even when they had no information at
16 all. They might in some cases do this as a matter of pure
17 precaution, but I think they would find it an unnecessary
18 bit of overbroad regulation to say you cannot trade it all
19 because you are a Congressman.

20 I think if you recognize that you are going to
21 regularly come in contact with material information, you
22 would be well advised to use a 10b-5 plan, but the reason
23 you are using it really is that it might be criminal if you
24 traded in your own name based on your own decisions. So I
25 think these two things fit together. You have the

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 15 PAGE 57

1 prohibition, and then you have safe harbors. The safe
2 harbor would be a 10b-5 plan or an opinion of counsel, which
3 I think can often be obtained in many situations quite
4 quickly. So I think you need both of them together.

5 Senator Collins. Does anyone disagree with the
6 professor or want to add anything to that issue? Professor
7 Langevoort.

8 Mr. Langevoort. Let me add something besides the
9 reference to 10b5-1. You mentioned at the outset of your
10 question the possibility of moving Members of Congress away
11 from single stocks to other forms of financial instruments.
12 That is very difficult because we have discovered insider
13 trading is possible with respect to nearly every form of
14 financial instrument, including mutual funds of which we are
15 aware.

16 With respect to 10b5-1, it is important to know that
17 that is simply a rule--and Congress would have to face up to
18 this if it were to go that route--that says as long as you
19 execute those instructions at a time when you did not
20 possess material nonpublic information, then the fact that
21 the trade was executed after you came into possession of
22 such information does not make you liable. It simply moves
23 the time where we are looking at what did the person know,
24 when did they know it, and that does not make all that many
25 hard issues go away.

PAGE 58

1 Senator Collins. Professor Nagy, I would like your
2 comment, but I want to get to a different issue for you, so
3 if you could answer that quickly so that I have time for a
4 second issue for you.

5 Ms. Nagy. I think blind trusts might well be an
6 effective solution to much of the difficulty here. I will
7 leave it at that. Thank you.

8 Senator Collins. Mr. Walker?

9 Mr. Walker. Just briefly, you are right, Senator
10 Collins. Blind trusts are really a mechanism basically only
11 for people who have substantial assets because there are
12 administrative costs, and they are only blind insofar as--
13 they are not blind as to what you put into them initially.
14 They are only blind really if you put in cash or after a
15 period of time if the assets have been sold down to a
16 particular level, you are notified that you do not have
17 those anymore. But they are really not blind as to what you
18 put into them.

19 And as to limiting investment opportunities for members
20 and staff, I would be concerned that you would be perhaps
21 making it harder to attract the best and the brightest or
22 really even the pretty good and the fairly smart into
23 Government service.

24 [Laughter.]

25 Senator Collins. Well, I will try not to be offended

PAGE 59

1 by that as a person with no assets and who could never
2 qualify for a blind trust.

3 Mr. Walker. I do not mean the blind trust aspect. I
4 mean limiting--

5 Senator Collins. No. I understand.

6 Professor Nagy, you testified that you feel confident
7 that congressional insider trading is already illegal under
8 existing law. Even if you are correct, is there an
9 advantage to Congress making it crystal clear by passing
10 such a law? I mean, I realize we have to be careful how we
11 draft it, et cetera, but--

12 Ms. Nagy. Sure. Well, one potential disadvantage,
13 though I concede this could be cured by careful drafting,
14 one risk I would fear is by legislating directly, that would
15 be taken then as an indication that the STOCK Act is the
16 only insider trading law that would apply to Members of
17 Congress. And as Professor Langevoort testified, that can
18 be cured by a statement that says the STOCK Act builds on
19 top of existing law such that Rule 10b-5 and the Federal
20 mail and wire fraud would be there as the floor and the
21 STOCK Act would come on top. And so I think that potential
22 risk could be solved, and solved easily, and I would be
23 happy to help in that effort.

24 There is, though, another risk that I think we should
25 think through, and that comes from public perception as

PAGE 60

1 well. As I mentioned, the controversy surrounding the
2 application of the Federal securities laws to Members of
3 Congress stems from the fact that Congress has never enacted
4 an express statutory prohibition of insider trading for
5 anybody. And so everybody else has to navigate through what
6 has often been described as "the maze" of decisions.

7 The boyfriend has to decide can he trade on information
8 based on whether he owes a duty of trust and confidence.
9 Sometimes that might be hopelessly confusing. And what I
10 could see potentially happening with an express statutory
11 prohibition applying to Congress and Federal employees is,
12 when all the dust settles from all of this, everyday,
13 ordinary people saying, "Why do they get the express
14 prohibition and we have to suffer through the maze of what
15 it means to defraud in connection with the purchase or sale
16 of securities?" And I think that is a risk that might not
17 be on the table now but potentially could be.

18 Senator Collins. A valid point, and in the next round
19 or for the record, a question that I want you to be thinking
20 of is whether we should have a law, if we are going to
21 venture into this area, that applies to the executive branch
22 officials as well explicitly since, frankly, I think a
23 Treasury Secretary has access to far more confidential
24 nonpublic information than any Member of Congress.

25 Chairman Lieberman. Thanks, Senator Collins.

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 16 PAGE 61

1 In order of appearance, we will go to Senator Brown,
2 Senator Begich, and then Senator Tester. Senator Brown?
3 Senator Brown. Thank you, Mr. Chairman.
4 I appreciate all the examples about boyfriends and
5 girlfriends and relationships. We are not talking about
6 that. We are talking very specifically about Members of
7 Congress. If I am in a top-secret meeting and I find that
8 we are going to drop a weapons system and by doing that that
9 company stock is going to go down dramatically, and I walk
10 outside and I pick up the phone and I say, "Hey, sell XYZ
11 Company's stock," that is what we are talking about. We are
12 not talking about all the kind of classroom examples that
13 you are using. We are talking very specifically about real-
14 time, real-world situations that have been brought to our
15 attention.
16 So while I appreciate--listen, I went to law school,
17 too, and it reminds me of a law school class. And, quite
18 frankly, I want to start to do something, because you
19 indicated that the courts, you know, still have not decided
20 what to do. Well, you know, if not now, when? I mean, that
21 is why we are here. That is why the Chairman and the
22 Ranking Member asked for this very important hearing.
23 I was wondering--and I want to go to Ms. Sloan, since
24 you have been kind of left out of all the fun. If you are
25 looking at this type of situation, would you think it would

PAGE 62

1 be a good idea in our ethics disclosures to just be more
2 specific as to maybe a more periodic update as to the stocks
3 we own, the stocks we trade, when we bought them, when we
4 sold them, and the exact amount of monies we purchased and
5 sold them for? That way, anybody who is in the media or the
6 Government agencies looking at it will say, oh, well, you
7 know, Senator So-and-so is on the Armed Services, and he or
8 she bought X amount of military arms stock, and when he or
9 she found out that that company was going to be--the
10 contract was going to be terminated, that is, I think,
11 certainly the initial information that would be used to
12 establish that prima facie case potentially on saying, hey,
13 there is an issue we need to look into. Do you think that
14 is a good suggestion?
15 Ms. Sloan. I do think that disclosure is a great way
16 to go because I think there would be a lot of repercussions
17 if you have quick disclosure. Again, I think 90 days is far
18 too long, but I think there are people who will be looking
19 at these kinds of trades very frequently, especially if they
20 are searchable on an electronic database.
21 I do want to point out that in the scenario, the
22 example that you gave, you gave where you learned something
23 in a committee and you immediately went out and made a call,
24 that is exactly the kind of conduct that the Speech or
25 Debate Clause would make very difficult to prosecute because

PAGE 63

1 it is something that you learned in a legislative committee.
2 So no grand jury and no prosecutor would be able to use that
3 information that you had obtained this in a committee either
4 to obtain an indictment or at trial. So it is a tricky
5 situation.
6 Senator Brown. That is why we are here. I mean, the
7 bottom line is I think the fiduciary responsibility is to
8 the American people. I mean, that is the relationship that
9 we have.
10 Professor Langevoort, the Supreme Court has articulated
11 a severely restrained approach to applying the insider
12 trading laws, saying it is within Congress' power, not the
13 courts, to expand Rule 10b-5, as I think you have kind of
14 touched upon. If we choose to do nothing today or in the
15 very near future, wouldn't Congress be sending a pretty
16 strong message to the Supreme Court that we do not want to
17 clearly articulate the rule to hold Members of Congress
18 liable for trading on this material nonpublic information?
19 Mr. Langevoort. You are absolutely right, Senator.
20 The Supreme Court in a number of cases, admittedly largely
21 involving private securities litigation, has said repeatedly
22 it is Congress' job to push on the statute, to expand it,
23 not the Court's job, in the absence of clarity. That is the
24 language that worries me the most in terms of a court coming
25 out the other way.

PAGE 64

1 I think you can accomplish a lot by that explicit
2 statement.
3 Senator Brown. Thank you.
4 Ms. Sloan, back to you. In order to rebuild America's
5 trust in Congress, in your opinion, as you are aware, no
6 Members of Congress have been successfully prosecuted for
7 insider trading. Would strengthening the Senate ethics
8 rules be a sufficient deterrent? And would this reform help
9 rebuild the confidence that members are, in fact, held to
10 the same standard and face the same consequences as everyone
11 else?
12 Ms. Sloan. No. I think people have very little
13 confidence in the Ethics Committees in the House and Senate.
14 They have done a pretty lousy job over the past years. They
15 very rarely hold members' feet to the fire except in
16 particularly egregious cases that have received a lot of
17 press attention. CREW has filed many complaints that we do
18 not even get responses for 3 years later. So I would say
19 that that is not a solution. I think you need a dual
20 solution: going to the Ethics Committee if the Speech or
21 Debate Clause is going to kill your prosecution, but also
22 having a very clear prohibition and ability of prosecutors
23 to go after you.
24 Senator Brown. And, Professor Coffee, in its written
25 testimony the SEC indicates that it has all the tools it

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 17 PAGE 65

1 needs, but yet we have never seen any prosecution, as we
2 referenced, of any Members of Congress or staff for insider
3 trading. And given that the SEC recently lost a string of
4 insider trading cases, as you state in your written
5 testimony, why wouldn't the SEC want a legal standard that
6 without a doubt creates a crystal clear framework for the
7 SEC to prosecute members and staff who trade on material
8 nonpublic information?

9 Mr. Coffee. They should want that, and I think both
10 Professor Langevoort and I are clearly saying, we agree with
11 you, that Congress should legislate. We are just talking
12 about little tweaks in what the language should be.

13 Senator Brown. And, Mr. Walker, if the existing Senate
14 ethics rules provide a framework, as I think maybe you have
15 indicated, for prosecuting members who trade on material
16 nonpublic information, why haven't we actually seen any
17 prosecutions then?

18 Mr. Walker. Well, first of all, I do want to say that,
19 you know, there is the Ziobrowski study that suggests that
20 this practice of insider trading is somehow endemic in
21 Congress. There is the Eggers and Hainmueller study that I
22 think says otherwise and says that, in fact, members'
23 portfolios perform below the market, and particularly when
24 you look at the average member's portfolio, they do not
25 exceed the market, and they do not meet market performance.

PAGE 66

1 And so I think the question of why haven't there been
2 prosecutions is based on the premise that somehow this is
3 happening everywhere.

4 Another aspect of the answer is the Ethics Committees
5 do not have an audit function. They do not go from office
6 to office to investigate what people are doing that has not
7 otherwise been reported either to them either through a
8 complaint or through the media. And so it is not a matter
9 of complaints and allegations coming before the committees
10 that they are not paying attention to. It just is not that.

11 Senator Brown. Thank you. I have one more question
12 for Professor Langevoort and Professor Coffee. Some
13 scholars have suggested that clearly defining a duty for
14 Members of Congress would be an easy solution that could be
15 done through a Senate resolution. Do you agree with that,
16 both of you?

17 Mr. Coffee. I think that passing a statute along the
18 lines you have suggested, with possible tweaks in the
19 language, would be an effective solution.

20 Senator Brown. A Senate resolution, though? Or are
21 you looking--

22 Mr. Coffee. Oh, no, no. I thought you meant--I meant
23 legislation. I misunderstood you.

24 Senator Brown. No. Just a Senate resolution. I
25 appreciate--

PAGE 67

1 Mr. Coffee. That is like a motherhood salute. I do
2 not think it accomplishes that much.

3 Senator Brown. I agree. Thank you.

4 Mr. Langevoort. It takes you one step forward, but
5 only one small step.

6 Senator Brown. Well, listen, I appreciate all of your
7 testimony.

8 Mr. Chairman, I appreciate you and the Ranking Member
9 for bringing this forward, and I and my staff will make
10 ourselves available to meet that deadline of the 14th or
11 15th. But I have to get down on the floor for the Armed
12 Services that we are working on.

13 Chairman Lieberman. Thanks, Senator Brown. Thanks
14 very much for your work, and we look forward to working with
15 you to move this quickly.

16 Senator Begich?

17 Senator Begich. Thank you very much, Mr. Chairman and
18 Ranking Member, for having this hearing.

19 Let me first say my view on--I remember when I was on
20 the Anchorage Assembly, we had to write the ethics code, and
21 at the end of the day, I really came to the conclusion, you
22 know, you are ethical or you are not. You can provide all
23 the rules you want, but if you are going to cheat, you are
24 going to cheat. And so keeping that in mind, one of the
25 views I have is disclosure, disclosure, disclosure.

PAGE 68

1 For example, you can go on my website and find every
2 single disclosure form I have ever filled out since 1988 in
3 any office, any public facility that I have participated in.

4 The challenge we have here--and this is the question I
5 have for you, and, Mr. Coffee, I am going to go to your--you
6 know, I know it is hard for us to do simple things around
7 here, but actually sometimes simpler is better. And I like
8 your approach, and so I am going to ask some questions and
9 comments from people. But first I want to--you know, in the
10 Senate, if I ask a constituent of mine in Alaska to get a
11 copy of my disclosure form, thank God I have it online,
12 because they would have to come to Washington, D.C., or have
13 someone here come down to the clerk's office and get a copy
14 of it, copy it, and then get it to me--or get it to them in
15 Alaska.

16 Neither one of these bills requires an electronic
17 searchable database. I agree with you that you can file
18 these things very quickly, and I have done trades, and, you
19 know, that is all public disclosure, and that is why I
20 disclose it. So I want your comment on either both of these
21 bills or any legislation. Should it be required that any
22 trade, any action should be electronically available to
23 anyone at any time via the Internet and searchable? I will
24 just go down the list here. Then I have a different
25 question for you, Mr. Coffee and Mr. Walker.

Committee on Homeland Security and Governmental Affairs

Insider Trading and Congressional Accountability

Thursday, December 1, 2011

SHEET 18 PAGE 69

1 Mr. Walker. Well, in this day and age, other than
2 perhaps a shortage of resources in the Office of Public
3 Records that would be needed to manage it, it is not clear
4 to me why there would not be and should not be online--
5 Senator Begich. It actually costs us more to do what
6 is going on now by hand processing when people send in their
7 forms. Some of these people around here that are very
8 wealthy--I am not one of them--have big, thick disclosure
9 forms.
10 Mr. Walker. The fact of the matter is that there are
11 nonprofit and outside groups that put--they are online
12 already, so the question is: Why shouldn't the Senate put
13 them online?
14 Senator Begich. Correct. So you are a yes?
15 Mr. Walker. Yes.
16 Mr. Coffee. I am definitely a yes, and what you have
17 just proposed is on page 14 of my testimony.
18 Senator Begich. That is right.
19 Mr. Coffee. That it should go on a website so a
20 journalist could immediately find this--
21 Senator Begich. Or a constituent.
22 Mr. Coffee. Constituents, too, but journalists would
23 be--
24 Senator Begich. Because they are the best enforcers.
25 Mr. Coffee. Well, I think journalists are effective,

PAGE 71

1 putting that on the record here that, you know, if we do not
2 do that, we are passing another law that will go off
3 somewhere, and we will fill out forms that will be
4 handwritten and sent in, and somebody, the good-government
5 groups will be out there, a constituent who is mad at you,
6 and your opposition will be the searchable database people.
7 So I appreciate that.
8 Second, to Mr. Coffee, your comment, your idea about
9 one line, I am going to turn to the rest of the four to ask
10 them to comment on your idea. I know it is hard for us--and
11 I am not an attorney. I did not go to law school. So no
12 disrespect to all the folks here, but simple is better. The
13 more detail, the more out clauses people have, in my view.
14 I will not say what my brother says about the bigger the
15 bill, the more times you will get--I will fill in the blank
16 later. That is a little concern.
17 So let me ask, and go down, what people think of Mr.
18 Coffee's comment here, or his idea.
19 Mr. Walker. Well, if the idea you are talking about is
20 a one-liner that says Members of Congress have a fiduciary--
21 are fiduciaries with respect to information they learn in
22 committees.
23 Mr. Coffee. Not committees. Anyplace.
24 Senator Begich. Anyplace.
25 Mr. Walker. Anyplace. I think you need to be careful

PAGE 70

1 too.
2 Senator Begich. I have seen a lot of people lose
3 offices because of ethical issues, but you are right,
4 journalists add to it.
5 Mr. Langevoort. Agreed, and if you are a high-ranking
6 executive of a public corporation, today you have 48 hours
7 electronically to file your trades.
8 Senator Begich. That is right, which we require them
9 to do.
10 Mr. Langevoort. Exactly. That is right. And that
11 immediately becomes accessible.
12 Senator Begich. You are making my point.
13 Ms. Nagy. I am a yes as well.
14 Ms. Sloan. Yes, I agree.
15 Senator Begich. That was a soft ball, but the reason I
16 asked this is because we--when I say "we," collectively--are
17 so resistant to this for some reason. So I am looking to
18 the two members here that are going to do the markup with
19 members sitting here, this is going to be insistent on my
20 part, and I will actually ask for an expansion not only of
21 these forms but our disclosure forms, because they have the
22 annual reports of stock trades. And if someone wanted to
23 search through that now, you cannot. It is the most
24 ridiculous system I have ever seen.
25 So, Mr. Chairman and Ranking Member, I am just kind of

PAGE 72

1 and you need to think about the potential consequences to
2 what you do as Senators beyond financial transactions.
3 For example, the Privacy Act does not apply to the
4 Congress, and you are, therefore, able to do certain things
5 with information that you receive from constituents and
6 others that may not be consonant with the Privacy Act at any
7 rate. So you have more freedom to use information than the
8 executive branch. If you create a blanket fiduciary
9 obligation with respect to congressional information, I
10 think you do want to be concerned about how it could affect
11 your representative functions and your oversight function
12 and your function of communicating with others beyond the
13 financial transaction area.
14 Mr. Langevoort. I have not seen Professor Coffee's
15 precise language. I think I could do it in two sentences.
16 But apropos of what was just said, I think it has to relate
17 specifically to what insider trading is, which is profiting
18 from--
19 Senator Begich. Information.
20 Mr. Langevoort. --the existence of that information
21 without talking about all the other fiduciary possibilities
22 that could be associated with that information.
23 Senator Begich. That is good. I see Mr. Walker kind
24 of nodding but not yet acknowledged, but good.
25 Ms. Nagy. I would support one sentence.

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 19 PAGE 73

1 [Laughter.]
2 Senator Begich. It is amazing how lawyers get down to
3 one and two sentences. I am very excited right now.
4 Ms. Nagy. I wholeheartedly agree that simple is
5 better, and I would encourage avoiding the concept of
6 fiduciary altogether such that the sentence would be: "For
7 purposes of the misappropriation theory, a duty of trust and
8 confidence exists whenever a person is a Member of Congress
9 or a Federal employee and has learned that information
10 through Government service."
11 One possibility would be Congress could authorize the
12 Securities and Exchange Commission to add that subsection to
13 existing Rule 10b5-2.
14 Senator Begich. To existing rules, that is right.
15 Ms. Nagy. Rule 10b5-2 now sets out three nonexclusive
16 situations in which an insider is presumed to be in a
17 relationship of trust and confidence with the source of the
18 information. That is the family prong working backwards,
19 the history, pattern, or practice prong, and the "has
20 promised to maintain information in confidence." If
21 Congress were to authorize the Securities and Exchange
22 Commission to add a fourth section there, I think that would
23 improve the clarity, but going back to my point to Senator
24 Collins before, it would apply the same law to everybody
25 else, and I think that is a very important principle that

PAGE 74

1 should come out of any legislative action Congress takes in
2 this matter.
3 Ms. Sloan. I have to defer to the law professors on
4 the material about insider trading, but I would caution you
5 that that would not really solve your problem of the Speech
6 or Debate Clause, which would not allow prosecution in an
7 awful lot of these cases, so I still would go back to--as
8 much as I do not love the Ethics Committees, sometimes they
9 are really the only option left.
10 Senator Begich. Very good. Thank you, Mr. Chairman
11 and Ranking Member, for having this hearing. I am a big
12 supporter of the concepts of this legislation. Again,
13 disclosure to me is really critical, but also how easy it
14 should be, and accessible, is how we create more
15 enforcement, because the public and media become the
16 enforcers in a lot of ways, so thank you very much.
17 Chairman Lieberman. Thank you, Senator Begich.
18 Senator Tester?
19 Senator Tester. Yes, thank you, Mr. Chairman. And I
20 assume, Senator Begich, you are on my bill to make sure that
21 campaign disclosures are filed electronically?
22 Senator Begich. I believe I am, and if I am not, I
23 will be, I will tell you that.
24 Senator Tester. That sounds good.
25 Senator Begich. I like it.

PAGE 75

1 Senator Tester. That is good.
2 I, first of all, want to welcome all the panel members.
3 I appreciate your perceptions and your comments. I can tell
4 you that I am not as good as the Chairman. I did not
5 understand everything you said. But that is okay.
6 Chairman Lieberman. I was not under oath.
7 [Laughter.]
8 Senator Tester. That is good. And it is ironic
9 because about 3 or 4 hours ago, Mr. Coffee was in front of
10 the Banking Committee, and it was not you, it was your
11 brother, because you look a lot alike. And so this is a day
12 of your testimony, and we appreciate all your testimony
13 today.
14 You know, what I did hear, as people talked about the
15 STOCK Act, is that we need to be careful because there are
16 potentially some unintended consequences whatever we do.
17 And those unintended consequences may be something that
18 really limits our ability to legislate and create policy and
19 do the things that we need to do as Senators or House
20 Members.
21 So I want to approach it from a similar way than what
22 was talked about earlier here today, and that is, from a
23 transparency standpoint, if we did things like make
24 financial disclosures transparent, if we did things like
25 make our schedules transparent and online in searchable

PAGE 76

1 databases--all this stuff has to be done that way--if we
2 required ethics audits of Senate and House offices. And
3 then I got to thinking maybe there are some unintended
4 consequences there.
5 Can you guys think of anything that we do where it
6 should not be transparent? I actually come from--I believe
7 in transparency. I believe in sunlight. I think that we
8 should do the maximum to let everybody know what we are
9 doing, and that way that cleanses all the problems. I
10 believe the forefathers were right when they said we need to
11 have a citizen legislature, all that stuff.
12 Is there any area that you guys can think of where
13 transparency might be inappropriate? We will start with
14 you, Melanie.
15 Ms. Sloan. No, I cannot see anywhere where
16 transparency would be inappropriate. I think more
17 transparency is required, and I also think the Ethics
18 Committee needs to have the ability to audit members
19 routinely. They get all these financial disclosure forms,
20 but all they do is make sure that they are filled out.
21 There is no auditing to say compare them with perhaps a tax
22 return to see if they are, in fact, jibing together. And if
23 we saw more of that, I think we might find some problems.
24 I know that there was a situation in the House Ethics
25 Committee, for example, where a member had filled out a

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 20 PAGE 77

1 financial disclosure form in one way and a tax return
2 indicated a far different scenario, and that member resigned
3 rather than face the consequences of that situation.

4 Senator Tester. Okay. Donna?

5 Ms. Nagy. I cannot think of a downside to transparency
6 that would be specific enough to articulate at this time, so
7 I would say be in favor of transparency.

8 Senator Tester. Donald?

9 Mr. Langevoort. I agree also. You know, if somebody
10 is bent on acting unethically, they are going to violate the
11 disclosure rules as well as the substantive rules.

12 Senator Tester. Fair point.

13 Mr. Langevoort. Insider trading often takes the form
14 not of transacting securities in your own account because it
15 really is so transparent already, but establishing a
16 friendship in a foreign country with a foreign bank account,
17 laundering money, laundering ideas--

18 Senator Tester. But if that was ever found out about
19 one of us, we would be noodled. I mean, really, don't you
20 think? I agree with--

21 Mr. Langevoort. I have seen clever enough insider
22 trading schemes that very successfully avoid detection for a
23 long period of time. All I am saying--I am trying to be
24 responsive to your question--is if you try to expand
25 transparency not simply to trades but to the communication

PAGE 79

1 there has been in the past that would be perhaps even less
2 so if everything were transparent and, you know, if
3 everything were televised.

4 As far as an audit function for the Ethics Committee, I
5 do not think there is anything--I think it is a good idea in
6 principle, but obviously it would require a vast increase in
7 resources for the Ethics Committee, and whether or not in
8 these days of tight budgets that would be possible is a real
9 question.

10 And, also, I would be concerned if all communications,
11 congressional communications, with whomever were to be
12 transparent. I do think there would be some serious
13 chilling effects.

14 Senator Tester. I got you. Fair point by all.

15 I do not think either one of these bills deal with
16 personal real estate that you brought up, Melanie, where a
17 person would increase the value of their own personal real
18 estate by advocating for policies that would help them in
19 that, regardless of what that would be.

20 It seems to me that that is much more easy to track
21 down than insider trading. Is that a fair statement? Go
22 ahead. I mean, I do not deal with insider trading so I have
23 very little knowledge of it. I wish I had enough money to
24 even buy stock, but go ahead.

25 Ms. Nagy. Well, your example, Senator, essentially--or

PAGE 78

1 of information to others, which is the route by which profit
2 often comes, you will run into difficulties with respect to
3 the work you do on the Hill.

4 Senator Tester. Fair point. Thanks.

5 Mr. Coffee. I think that some law professors smarter
6 than me probably can think of some problem with
7 transparency. The way to deal with that is to give the SEC
8 exemptive authority. You could say, "We have this
9 obligation, and if we find out there are problems, the SEC
10 is given exemptive rulemaking authority to carve out safe
11 harbors and exemptions."

12 Senator Tester. Super. Robert?

13 Mr. Walker. Well, I want to put it on record that I am
14 not smarter than Professor Coffee, but I do see some
15 concerns with across-the-board transparency in everything
16 that the Senate and Congress does, if that is what you are
17 asking.

18 Senator Tester. That is what I am asking.

19 Mr. Walker. I mean, certainly there would be many
20 sessions in executive closed sessions that could not be
21 transparent. There would be many deliberations of you as
22 Committee members behind the scenes that probably ought not
23 to be transparent.

24 I think there is even less room today for negotiation
25 and for tradeoffs between members of different parties than

PAGE 80

1 one possible scenario from that example would be essentially
2 insider trading in real estate, which is taking material
3 nonpublic information and using it in a real property
4 purchase as opposed to a securities purchase.

5 Senator Tester. Or purchasing property and enhancing
6 it with policies that you pass, whether it is--

7 Ms. Nagy. That is also a different--that could be
8 another problem as well. That is not the same problem as
9 using material nonpublic information that one learns in
10 Government service to actually purchase physical real
11 estate. That could be prosecuted under the Federal mail and
12 wire fraud statutes for much the same reason that insider
13 trading can. And there is precedent where a Government
14 official, actually a Chicago politician, used information
15 that he came upon in connection with his alderman service,
16 and he was prosecuted under the Federal mail and wire fraud
17 statutes by the Department of Justice.

18 Senator Tester. And he used that information to buy
19 land?

20 Ms. Nagy. To buy, I believe, an interest in an
21 apartment building that was going to receive a tax
22 abatement.

23 Senator Tester. What about if you own land and you
24 advocated for an appropriation to build a highway over it or
25 something along those lines that would add value to that

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 21 PAGE 81

1 property?
2 Ms. Nagy. Well, and one could imagine a similar
3 situation on the securities side where one takes a favorable
4 legislative action to a company whose stock you own. And
5 so, again, that could be a problem. But--
6 Senator Tester. But this bill would not cover that.
7 Ms. Nagy. Not that I see.
8 Senator Tester. Okay. Very good.
9 Thank you, Mr. Chairman.
10 Chairman Lieberman. Do you have more questions?
11 Senator Tester. Well, I have got some more questions,
12 but I think I got hammered out what I needed to have
13 hammered out.
14 Chairman Lieberman. Okay.
15 Senator Tester. I appreciate the panelists'
16 perspective and thoughtfulness, and as we look forward--I
17 think if I might just say something, Mr. Chairman.
18 Chairman Lieberman. Please.
19 Senator Tester. I think that it is very difficult to
20 take a look at ourselves and say, "You know what? People
21 think we are crooked," when you do not think you are doing
22 anything wrong and there is no intent, whether that is
23 dealing with a policy with the farm program and talking to
24 one of your neighbors about what you are talking on, which
25 may actually impact the price of wheat or, God knows,

PAGE 82

1 futures or something like that.
2 On the other side of the coin, I think that it is
3 critically important that we operate in a way that is
4 totally clean--totally clean--and if there is any way we can
5 do that, we should make those policies, quite honestly,
6 mandatory. And transparency is important, and I get your
7 point, Robert. I mean, I do get your point. I think there
8 are certain--but as far as the forms we fill out, they ought
9 to all be online, they ought to be in searchable databases.
10 Our schedules ought to be online. We should be letting
11 people know everything that they should reasonably know
12 online in a way that they can access it, not just online but
13 all searchable.
14 So I just think that we need to be aware of this. I
15 think that, you know, we have--what have we got, an 8-, 9-
16 percent rating? That is probably due to much more than
17 this. But I do not think this helps a lick. And, by the
18 way, if somebody in the Senate or somebody in the House does
19 something crooked, it reflects on everybody, whether they
20 are honest or not. And that is just the way it is.
21 So I think we need to address it, but we need to
22 address it in a common-sense way that really gets to the
23 problem and does not create more problems than it fixes.
24 Thank you, Mr. Chairman.
25 Chairman Lieberman. Thank you very much, Senator

PAGE 83

1 Tester.
2 Senator McCaskill, welcome.
3 Senator McCaskill. Thank you. I apologize. I have
4 been presiding over the Senate, so I have not been able to
5 be here.
6 I think it is pretty important we clarify that this law
7 applies to Congress. I know that there is one of those good
8 old-fashioned legal arguments that is great for
9 hypotheticals in a law school classroom. But for purposes
10 of clarifying to the public, regardless of what the SEC
11 says, I think it would be very helpful for us to pass this
12 legislation and make it crystal clear that the rules that
13 apply in companies and to CEOs apply just as much to Members
14 of Congress in terms of their ability to have and use
15 information not available to the public. And you all may
16 have covered this, and if you have, do not answer the
17 question because I can move on to another one.
18 Have you all characterized why you think it might be a
19 challenge to prosecute these cases in Congress? Has that
20 been covered?
21 Ms. Sloan. Senator, I think I talked a fair amount
22 about the problems with the Speech or Debate Clause that
23 will lead to some prosecutions being difficult, which is why
24 I think in addition to Federal law you also need to make it
25 clear that the Ethics Committee has enforcement over that,

PAGE 84

1 too.
2 Mr. Walker. And I think we addressed certain other
3 practical problems as well in enforcement in the
4 congressional context.
5 Senator McCaskill. Well, the interesting thing is
6 that, as a former prosecutor, it seems to me that one of the
7 things that makes it easier to prosecute these cases in
8 Congress is that it is much clearer what is a public record
9 and what is not. I think it is more murky in private
10 companies what is in the public domain and what is not.
11 Here we have hearings and the record is available to the
12 public. We pass laws and the dates they are passed are
13 available to the public, and then it is publicly adviser.
14 There is a great deal of information that prosecutors could
15 easily see whether or not this is something that someone who
16 looked into it could find with some great deal of ease, or
17 whether it would be more difficult.
18 So in some ways, I--would anybody disagree that these
19 cases might be easier to prosecute because of--it is very
20 hard to have inside information in Congress. I mean, this
21 place is pretty open in terms of what gets out to the
22 public. But even in a formal context, a great deal of our
23 work is publicly done.
24 Mr. Walker. I would not disagree, Senator McCaskill,
25 but I do think because so much is open in Congress that it

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 22 PAGE 85

1 does become difficult--the issue of something being
2 nonpublic material, nonpublic information, that would be an
3 obstacle to overcome. And if that were alleged in any given
4 case, I think you would find some pretty rigorous defenses
5 and attempts to proof and probably successful proof that
6 ultimately the information in question was public.

7 Senator McCaskill. Right. I have five things that I
8 have been told we need to do better in the legislation, and
9 probably some of them have been mentioned, but I want to
10 make sure that if there are disagreements on any of them
11 that we need to expand the covered information because we
12 need to also talk about regulatory action, grants--

13 Mr. Coffee. Contracts.

14 Senator McCaskill. Earmarks, contracts obviously,
15 shorten the time frame of disclosure, clearly that is
16 important. I think 90 days is obviously way too long, and
17 we do have a measure of transparency now that allowed some
18 of the things to be written even though a lot of the things
19 that were written were inaccurate, just flat wrong.
20 Certainly the fact that purchases were made and so forth was
21 available to the public because of the rules we currently
22 have. Expanding the types of securities that are covered,
23 explicitly state that the members owe a duty, and, finally,
24 specifically laying out in the legislation that members
25 cannot give insider tips.

PAGE 86

1 Well, those are the five things that I think we need to
2 put in the legislation, and I think we have got a
3 significant amount of problems out there with the public
4 right now. I think, Mr. Chairman, the more quickly we can
5 pass this legislation and demonstrate to the public that
6 none of us--frankly, you know, I am not sure I have met
7 anyone that has gone into this line of work because they
8 thought they were going to receive a great deal of money for
9 it. I am not arguing that there may have been some people
10 that have used their positions inappropriately. Certainly
11 there have been people who have gone to jail in Congress,
12 but I think all of us want to make sure that the public
13 knows that we are not using this position in any way to gain
14 personally from it. And the more we can do to reassure them
15 in that regard, the better. And I think we need to write
16 this legislation in a way that does that.

17 The last thing I would ask about is about earmarks.
18 You know, earmarks are a tricky area. We have a current
19 moratorium on earmarks, and I am cosponsoring legislation
20 for a permanent moratorium on earmarks. But I think that
21 knowing that a member would have the ability singlehandedly
22 to put public money in a project certainly could lead to the
23 kind of information that would allow someone to benefit from
24 that knowledge since there is absolutely--in a pure earmark,
25 there is nobody that has any way as to whether it is good,

PAGE 87

1 bad, or indifferent, other than that individual member.
2 Have any of you discussed how earmarks might also lend
3 themselves to this kind of activity that the public would
4 obviously disapprove of?

5 Mr. Coffee. I do not think we have discussed it, but I
6 think as I understand what you are saying, it would be a
7 kind of material nonpublic information. If you know that
8 you are going to earmark resources for a particular project
9 and it is going to benefit particular companies and you buy
10 that stock, that falls easily within the category of
11 misusing material nonpublic information.

12 Senator McCaskill. There have been thousands of
13 earmarks done for research and development into certain
14 types of technology, and a great deal of that technology has
15 worked itself into the marketplace. So I think that that is
16 one area that we need to make sure that we cover because
17 that is the essence of an insider information, since
18 somebody singlehandedly can provide the resources to a
19 company to make that research and development a reality.
20 Yes?

21 Ms. Nagy. I would certainly agree with respect to
22 earmarks. As you listed off your five fixes, I would
23 encourage you to think of a sixth or to list a sixth, which
24 would be a clear statement in any legislation that it builds
25 on the floor of existing law, and so that it should not in

PAGE 88

1 any case be read to displace Rule 10b-5 of the Federal
2 securities laws and the mail and wire fraud statutes in
3 connection with Government employee, congressional official
4 Member of Congress securities trading.

5 Senator McCaskill. Because at the root of all this,
6 these are good old-fashioned fraud cases, right?

7 Ms. Nagy. Exactly.

8 Senator McCaskill. Right. I think that would be
9 important because we do not want to start a whole new book
10 of precedent. Not that we do not want all the lawyers to
11 stay busy, but--

12 Mr. Coffee. In that light, it is rather important that
13 you not try to redefine established terms like "material" or
14 "nonpublic."

15 Senator McCaskill. Right.

16 Mr. Coffee. They are redefined in this legislation,
17 and that would raise questions about whether for Congress is
18 it a different kind of information than it is in ordinary
19 cases. So if you say you are adopting the existing case law
20 with respect to all of the terms that go into the
21 prosecution and you have done that before, I think that
22 gives greater certainty to the courts.

23 Senator McCaskill. I think that is a great idea, and I
24 will share that with other cosponsors of the legislation
25 because I think there are three or four of us that are

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 23 PAGE 89

1 working on this, and hopefully--and we will look for your
2 input as we further get it drafted and try to improve it and
3 make it as strong as possible. We appreciate all of you
4 being here today and helping us with this. We want to do
5 this right.

6 Thank you, Mr. Chairman.

7 Chairman Lieberman. Thank you, Senator McCaskill. I
8 mentioned before you could be here that ideally we will get
9 something drafted that we can get a majority of the
10 Committee for before we depart in December from here.

11 I have a couple more questions. I think we have gone
12 over pretty well, and very helpfully to the Committee, what
13 we should do in response to this problem in making clear in
14 law unambiguously, if I may say so, that Members of Congress
15 and our staffs are covered by insider trading laws.

16 There are two other responses that are possible here.
17 One deals with Senate ethics. I want to come back to that
18 in a minute. But the first I want to talk about is
19 disclosure, which we have also talked about, and this is
20 more in the way of prevention, or, of course, it may
21 accelerate discovery of a problem.

22 So I wanted to start with you, Ms. Sloan, and talk
23 about ideally how would you alter the requirements in the
24 Ethics in Government Act for disclosure. We have talked
25 some about--obviously Senator Begich focused on electronic

PAGE 91

1 example, who wanted to see if members had any specific
2 asset, and you cannot search them for that kind of thing.
3 And in this day and age, with the technology that is
4 available, there is really no reason that these forms are
5 not put on the Web quickly and in searchable form so that
6 the information is easily accessible, so that if there is
7 wrongdoing, it can be ferreted out quickly, and often just
8 the court of public opinion will be helpful here.

9 Chairman Lieberman. I agree. So one alternative here,
10 I presume--and let me ask you to respond to it--is either
11 instead of or in addition to having us file the whole form
12 more than once a year, that there could be some requirement
13 to file amendments after stock trades of a certain amount.
14 Is that a possibility?

15 Ms. Sloan. I think you should probably have something
16 separate for stocks rather than--so that you do that form
17 once a year, but file something about the stocks. And I
18 would say rather than this 90-day period that is included
19 right now, I would get it down to something like 10 days
20 because, again, I do not think it needs to be so burdensome.
21 Since this information comes in an electronic form as it is,
22 there could easily be set up a database so that somebody
23 only had to hit a button to transfer it into this bigger
24 database that the Senate, for example, could maintain of all
25 such information. So it does not really need to be

PAGE 90

1 filing of our filings, and I think that is a very good idea.
2 You talked a little bit about requiring that we file more
3 than once a year, presumably after transactions, so I wanted
4 to invite you to spend a little more time about how you
5 would ideally have us change the Ethics in Government Act
6 with regard to filing.

7 Ms. Sloan. Well, the personal financial disclosure
8 forms have very broad ranges of assets.

9 Chairman Lieberman. Right.

10 Ms. Sloan. And I think that they could be narrowed
11 substantially. You would not actually have to, if you did
12 not want to, change the Ethics in Government Act, which
13 would, therefore, change the form for everybody. You could
14 do that by House and Senate rules if you chose to, so you
15 would not have to go through that.

16 Chairman Lieberman. Right.

17 Ms. Sloan. But the ranges are so wide that it is often
18 impossible to tell what a person's assets really are and how
19 much income they have had from those assets. In addition to
20 that, the forms are filed--I mean, I understand that they
21 are burdensome, but they are filed once a year, and they are
22 filed even then 6 months after the previous year ended. So
23 they are pretty far down the line.

24 Those forms, too, are not in a form that they are
25 searchable, so if somebody is--I spoke with a reporter, for

PAGE 92

1 burdensome once it is set up. And then also, as I said, I
2 would make clear that lying on those kinds of forms,
3 willfully failing to disclose that information, that could
4 be a false statement to Congress--or that would be a false
5 statement, and those kinds of false statements are, by the
6 way, very much more easily prosecuted than sort of anything
7 else we have been talking about.

8 Chairman Lieberman. Before I move on to the ethics,
9 the rules of the Senate, which would have to be changed by
10 the Senate in this regard, I want to come back to that in a
11 minute. Do any of you have any other ideas on the panel
12 about how we might alter the existing Senate and House
13 disclosure rules to prevent insider trading or at least to
14 make it more discoverable more quickly if it occurs?

15 Mr. Walker. Well, I do agree that the provisions in
16 the STOCK Act that would call for public disclosure of stock
17 transactions within a specific period of time would go a
18 long way to deterring insider trading where it may be
19 occurring. I am not sure I agree with the 10-day period for
20 doing that, simply for the reason Ms. Sloan mentioned.
21 Failure to provide full information could be prosecuted
22 under the False Statements Act. I think 10 days is a very
23 short window. Maybe 90 days is too long, but I do think
24 that that kind of more frequent periodic disclosure does
25 make sense.

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 24 PAGE 93

1 Chairman Lieberman. Okay. Let us just spend a moment-
2 -and it will be my last series of questions--about our
3 ethics rules of the Senate, your concern, Ms. Sloan, about
4 the impact of the Speech or Debate Clause of the
5 Constitution on prosecution of Members of Congress for
6 insider trading or using insider information. How would you
7 change our rules to deal with this problem?

8 Mr. Sloan. So the Speech or Debate Clause only applies
9 if a member is being prosecuted, so it does not have any
10 implications at all for the Ethics Committee, which is why
11 that works better in some ways.

12 Chairman Lieberman. Right, for the Ethics Committee
13 and for Congress itself, pursuant to the Constitution, in
14 fact.

15 Ms. Sloan. Right, so any information. So the Ethics
16 Committee, while a prosecutor would not easily be able to
17 obtain and sift through, for example, committee files to see
18 if somebody really had inside information, the Ethics
19 Committee absolutely could review that material.

20 Chairman Lieberman. Right.

21 Ms. Sloan. And so that is why that would be so
22 significant to make sure that the Ethics Committee does have
23 jurisdiction. But I think that the ethics rules are not
24 clear enough, and the House Ethics Committee just 2 days ago
25 issued guidance, but, again, I think it is imperative to

PAGE 95

1 Service is that there just is not across the board from
2 committee to committee and office to office specific
3 obligations and rules and policies regarding what
4 information is confidential. And I think getting at it at
5 that level is important. I think there are rules in place.
6 I think if there were a rule crafted that mentioned insider
7 trading specifically as part of Rule 37 on conflicts of
8 interest, that would not be harmful, provided it were
9 crafted in a way, as you are very carefully considering,
10 that would not have other chilling effects.

11 Let me just say that as to the notion of the Ethics
12 Committees' actions perhaps not having sufficient force, I
13 would perhaps want to ask certain members whose careers were
14 ended by receiving letters of admonition whether they think
15 that is a soft action. The Ethics Committees do pursue
16 allegations that come before them. They are not criminal
17 enforcement agencies, but I do think if you chose to
18 strengthen the rules regarding insider trading within the
19 Congress, that would be a reasonable approach.

20 Chairman Lieberman. Good. A final question, bringing
21 two parts of this together, if I may. Ms. Sloan just
22 mentioned this fact. Two days ago, as you may know, the
23 House Ethics Committee released a memo to all House members
24 and staff, stating in part, and I will quote here: "House
25 rules prohibit members and employees from entering into

PAGE 94

1 make it crystal clear and lay it out.

2 And the other problem that we have seen is the Ethics
3 Committees are very soft, frankly, on Members of Congress.
4 If somebody is only going to get a mild reprimand or a
5 letter of admonition for having done something like this,
6 really that does not hurt very much, and there is not a lot
7 of disincentive. But if you included something specific,
8 which you could, including some kind of penalty, a financial
9 penalty, that money would have to be turned over to the
10 treasury at some significant amount--like I gave you 3
11 times, but it would be open--above the profit or loss, that,
12 too, would be a disincentive.

13 Chairman Lieberman. So what you would do here is make
14 clear in our rules that insider trading is a violation of
15 the rules? Is it as simple as that?

16 Ms. Sloan. Yes, and that there are certain penalties
17 that will attach.

18 Chairman Lieberman. Yes, understood.

19 Ms. Sloan. Right.

20 Chairman Lieberman. Okay. Mr. Walker, based on your
21 experience, what do you think of this idea?

22 Mr. Walker. Well, as I said in my statement, I do
23 think there are rules that address this. I think a big
24 problem here in the Senate and in the House with respect to
25 use of paragraph 8 of the Code of Ethics of Government

PAGE 96

1 personal financial transactions to take advantage of any
2 confidential information obtained through performing their
3 official Government duties."

4 So I wonder to what extent, if any extent, that kind of
5 statement by the House Ethics Committee establishes the
6 necessary fiduciary duty that we have talked about as a
7 condition of a successful insider trading case against a
8 Member of Congress.

9 Mr. Coffee. I think you are going to get different
10 responses from the three of us here because a fiduciary duty
11 is a kind of property right. It is a relationship between
12 the director and the company or the employee, master,
13 principal, et cetera. An ethical duty is far more general
14 reaching, ineffable. Look at it this way: The Boy Scout
15 oath is an ethical duty. I do not think it gives rise to
16 the kind of relationship that can support a criminal
17 prosecution. There will be different views.

18 Chairman Lieberman. Okay.

19 Mr. Langevoort. I share much of that view. I think to
20 a judge predisposed to find a fiduciary duty on Capitol
21 Hill, that simply adds to the case.

22 Chairman Lieberman. Yes.

23 Mr. Langevoort. To a judge not inclined, there are all
24 the ways in the world to do it.

25 Chairman Lieberman. Not enough, so that disinclined

Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

SHEET 25 PAGE 97

1 judge would want to see the concept of fiduciary duty
2 spelled out in law.
3 Mr. Langevoort. A clear statement, yes.
4 Chairman Lieberman. Yes. Professor Nagy?
5 Ms. Nagy. Again, I would encourage the use of the term
6 "trust and confidence" rather than "fiduciary duty" because
7 the Supreme Court has made clear that you do not have to
8 stand in an explicit fiduciary relationship in order to fall
9 under the classical or misappropriation theory.
10 I think that Professor Langevoort's response is largely
11 correct. I think that it would put one more brick on the
12 scale in terms of is there indicia of a duty of trust and
13 confidence.
14 I should say, though, that many Securities and Exchange
15 Commission prosecutions as well as Justice Department
16 prosecutions are based on such indicia where everyday,
17 ordinary individuals will be prosecuted, they are not in an
18 explicit fiduciary relationship, and what is included in the
19 SEC's complaint or the Justice Department's indictment is
20 very ethical language sounding codes like the Boy Scout
21 code. And that is put in as a paragraph in the indictment
22 or in the complaint.
23 So to answer your question, this would be another
24 paragraph in a complaint if it came to that.
25 Chairman Lieberman. Right. Thank you. You have been

PAGE 98

1 very helpful.
2 Senator McCaskill, do you have other questions?
3 Senator McCaskill. I just have one question. How do
4 we address in terms of disclosure purchases and sales within
5 a managed fund? In other words, if a Member of Congress has
6 a fund that they buy which is a large--you know, whether it
7 is an index fund or whether it is some other kind of fund,
8 do you believe that the duty to report--would we be creating
9 a new duty for the manager of that fund to have to let this
10 particular member know when they are buying and selling
11 stocks within the fund? Or would there only be a duty in
12 your mind to report the purchase and sale of the overall
13 fund? Do you understand the question I am asking?
14 Mr. Coffee. The fund manager has the discretion--
15 Senator McCaskill. Correct.
16 Mr. Coffee. Not the decision made by someone who owns
17 shares in--
18 Senator McCaskill. Correct.
19 Mr. Coffee. No control or no ability to influence the
20 decision of the fund manager. It would be different if he
21 tipped the fund manager.
22 Senator McCaskill. Right. So, obviously, there could
23 be no information going from the Member of Congress to the
24 manager, but whatever decisions the manager had the legal
25 authority to make internally that the member had no control

PAGE 99

1 over, that would not have to be something that would be
2 reportable every 10 days or every 90 days. Okay. I was
3 just curious about that.
4 Thank you.
5 Chairman Lieberman. Thanks, Senator McCaskill. Thanks
6 very much to the five of you. You have been an
7 extraordinarily helpful panel. In some sense, this is like
8 we have been sitting around the table and saying we have got
9 a problem, which I think all of us acknowledge; now how can
10 we est solve this problem legislatively? And I think you
11 have helped the Committee very substantially in doing that,
12 and you have also made the mistake of offering to continue
13 to be available to review the work that we do, so we will
14 take advantage of that.
15 I said earlier that I hoped we could do something on
16 this before we leave. December 15th is 2 weeks from today.
17 But we can do that, and I think we have to find a balance
18 here to make sure--because this is important and
19 complicated--that we do as much as we are confident that we
20 have got right on December 15th, and if we hold parts of
21 this over until January when we come back, that is not
22 terrible either.
23 We will leave the record of this hearing open for 10
24 days for any additional questions and statements. I thank
25 the witnesses again very much, and with that the hearing is

PAGE 100

1 adjourned.
2 [Whereupon, at 4:36 p.m., the Committee was adjourned.]

Committee on Homeland Security and Governmental Affairs
 Insider Trading and Congressional Accountability
 Thursday, December 1, 2011

<p style="text-align: center;">"</p> <hr/> <p>"and [1] 3:4</p> <hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$1,000 [1] 13:5 \$5 [1] 40:10</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 [2] 1:2 27:22 10 [5] 42:5 91:19 92:22 99:2,23 10(b) [4] 2:25 3:9 31:8 35:19 10-day [1] 92:19 109th [1] 20:11 10b [1] 31:8 10b-5 [10] 31:12 33:8 35:19 56:12,15,22 57:2 59:19 63:13 88:1 10b5-1 [4] 42:22,24 57:9,16 10b5-2 [2] 73:13,15 12 [1] 9:1 14 [1] 69:17 14th [2] 22:15 67:10 15 [2] 12:5 42:6 15th [4] 22:15 67:11 99:16,20 17 [1] 30:8 1734 [1] 3:4 19 [1] 25:22 1934 [2] 2:24 3:3 1970s [1] 42:1 1976 [1] 26:18 1980s [1] 42:1 1985 [1] 9:11 1988 [1] 68:2</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 [3] 40:8 93:24 99:16 2:34 [1] 1:6 2001 [1] 9:12 2004 [1] 25:22 2008 [1] 55:15 2009 [1] 25:22 2011 [2] 1:2 17:3 24-hour [1] 26:11 28 [1] 25:22</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 [4] 27:7 64:18 75:9 94:10 30 [1] 42:1 37 [1] 95:7</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 [1] 75:9 41 [1] 25:5 46 [1] 24:9 48 [1] 70:6</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 [1] 31:9 50/50 [2] 39:19 45:12 51 [1] 20:25</p>	<p style="text-align: center;">6</p> <hr/> <p>6 [1] 90:22 60 [5] 1:21 7:21 16:5,9 24:11 67-vote [1] 20:25 69 [1] 8:8</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7-minute [1] 49:3</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 [5] 46:9 47:3,13 82:15 94:25</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9 [1] 82:15 90 [7] 13:5 27:10 48:12 62:17 85:16 92:23 99:2 90-day [1] 91:18 99 [1] 27:24</p> <hr/> <p style="text-align: center;">A</p> <hr/> <p>abatement [1] 80:22 ability [7] 51:9 64:22 75:18 76:18 83:14 86:21 98:19 able [8] 11:25 17:1 22:6 51:7 63:2 72:4 83:4 93:16 above [3] 8:22 12:3 94:11 absence [3] 31:6 33:12 63:23 absolute [1] 18:5 absolutely [5] 19:9,25 63:19 86:24 93:19 abuse [1] 18:7 abusing [2] 24:17 25:9 abusive [1] 35:16 academics [1] 18:11 accelerate [1] 89:21 accept [2] 25:11 38:2 access [6] 12:1 18:22 19:3,8 60:23 82:12 accessible [4] 48:15 70:11 74:14 91:6 accomplish [1] 64:1 accomplishes [1] 67:2 accordingly [1] 19:2 account [3] 17:18 77:14,16 ACCOUNTABILITY [3] 1:1 13:6 45:6 accurate [1] 25:7 accused [1] 2:3 accustomed [1] 44:2 acknowledge [2] 30:23 99:9 acknowledged [1] 72:24 acquired [2] 9:7 36:4 acquires [1] 41:15 acronyms [1] 23:13 across [2] 11:13 95:1 across-the-board [1] 78:15 Act [35] 2:24 5:14 7:16 12:9 14:5 17:3 19:5 26:20 27:2,19,24 31:4,8,14 33:11,13 35:8 36:6,24 39:9,</p>	<p>22 45:8 55:10,18 59:15,18,21 72:3,6 75:15 89:24 90:5,12 92:16,22 acting [2] 20:21 77:10 action [10] 27:6 36:19 39:14 43:5 51:8 68:22 74:1 81:4 85:12 95:15 actions [6] 7:23 24:20 26:3 45:23,24 95:12 activities [4] 3:8,10 35:24 45:23 activity [4] 9:5 13:2 54:24 87:3 acts [2] 13:1 48:10 actually [14] 18:20 20:12 47:1 55:3,23 65:16 68:7 69:5 70:20 76:6 80:10,14 81:25 90:11 add [7] 51:14 57:6,8 70:4 73:12,22 80:25 addition [4] 43:4 83:24 90:19 91:11 additional [3] 12:25 13:12 99:24 address [10] 7:15 8:20 17:6 31:4 37:2 45:5 82:21,22 94:23 98:4 addressed [2] 47:14 84:2 addressing [2] 27:3 47:4 adds [1] 96:21 adequate [1] 7:11 adequately [2] 35:13,16 adhere [1] 16:20 adjourned [1] 100:1 administrative [1] 58:12 admittedly [1] 63:20 admonition [2] 94:5 95:14 ADOLF [1] 39:1 adopt [4] 42:4,9,23 56:4 adopted [1] 42:18 Adopting [2] 6:25 88:19 advancing [1] 26:4 advantage [8] 2:10 9:2 16:11 18:15 52:14 59:9 96:1 99:14 advice [3] 43:6 55:12,16 advise [1] 42:19 advised [1] 56:22 adviser [1] 84:13 advising [1] 43:1 advocacy [1] 12:13 advocate [2] 23:16 45:7 advocated [1] 80:24 advocates [1] 55:11 advocating [1] 79:18 Affairs [1] 1:4 affect [1] 72:10 affections [1] 6:23 affects [2] 17:6,7 affirm [1] 16:23 affirmative [1] 18:2 affirmatively [1] 22:4 afraid [2] 20:21 42:10 afternoon [4] 1:19 2:4 5:1 11:7 age [2] 69:1 91:3</p>	<p>agencies [5] 19:22,24 24:20 62:6 95:17 aggressive [1] 26:4 ago [7] 6:18 8:23 24:11 42:1 75:9 93:24 95:22 agree [13] 39:5 65:10 66:15 67:3 68:17 70:14 73:4 77:9,20 87:21 91:9 92:15,19 Agreed [1] 70:5 ahead [4] 10:18 36:3 79:22,24 aimed [1] 18:10 Alan [1] 8:23 Alaska [2] 68:10,15 albeit [1] 9:10 alderman [1] 80:15 alike [1] 75:11 allegations [10] 2:3 8:6 47:4,6,14,18,22,22 66:9 95:16 alleged [3] 16:10 30:23 85:3 allow [4] 2:9 56:5 74:6 86:23 allowed [2] 16:7 85:17 allows [1] 26:5 alluded [2] 39:24 45:22 almost [3] 33:17 39:5,12 already [13] 2:12 8:7 13:16 17:20 24:12 26:15 30:17 39:23 42:21 45:21 59:7 69:12 77:15 alter [2] 89:23 92:12 alternative [1] 91:9 although [1] 10:12 altogether [2] 52:21 73:6 amazing [1] 73:2 ambiguities [1] 39:13 ambiguity [6] 36:14 39:22 49:12,19 52:6,7 ambiguous [1] 50:11 ambitious [1] 41:23 amend [2] 20:24 27:4 amendments [1] 91:13 America [2] 24:9 26:21 America's [2] 14:7 64:4 American [14] 2:11 6:9 8:8,16,21 11:19 12:1 13:14 18:3,8 20:18 21:6 54:15 63:8 American's [1] 11:11 Americans [6] 8:10 9:24 11:13 24:10 25:13 27:20 among [2] 18:8 32:17 amount [8] 10:12 27:7 62:4,8 83:21 86:3 91:13 94:10 analysis [2] 47:7 53:22 analyze [1] 9:15 Anchorage [1] 67:20 announced [1] 40:10 annual [2] 13:7 70:22 another [7] 56:8 59:24 66:4 71:2 80:8 83:17 97:23 answer [5] 50:24 58:3 66:4 83:16 97:23</p>
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 301-384-2005

Committee on Homeland Security and Governmental Affairs
 Insider Trading and Congressional Accountability
 Thursday, December 1, 2011

<p>anti-fraud [3] 2:23 3:9 33:8 anticipate [1] 54:16 anybody [3] 60:5 62:5 84:18 Anyplace [3] 71:23,24,25 Apart [1] 47:13 apartment [1] 80:21 apologize [1] 83:3 apparent [1] 24:22 apparently [1] 16:14 appearance [1] 61:1 appearances [1] 38:7 appears [1] 55:18 applaud [1] 33:11 applicable [1] 48:1 application [3] 7:22 31:1 60:2 applied [4] 25:16 35:24 52:5,5 applies [6] 17:20 33:14 51:10 60:21 83:7 93:8 apply [9] 9:23 26:15 36:7 45:9 59:16 72:3 73:24 83:13,13 applying [3] 53:21 60:11 63:11 appointees [1] 25:17 appreciate [13] 7:13 11:5 17:4 61:4,16 66:25 67:6,8 71:7 75:3,12 81:15 89:3 approach [6] 48:8,13 63:11 68:8 75:21 95:19 appropriate [1] 3:5 appropriateness [1] 48:18 appropriation [1] 80:24 approved [1] 56:4 approving [1] 18:19 apropos [1] 72:16 AQUINAS [1] 35:1 area [6] 54:24 60:21 72:13 76:12 86:18 87:16 Arguing [2] 17:20 86:9 argument [1] 51:9 arguments [1] 83:8 arise [1] 36:13 Armed [3] 25:23 62:7 67:11 arms [1] 62:8 around [6] 6:10 19:21 45:18 68:6 69:7 99:8 arrived [1] 1:13 article [1] 30:16 articles [2] 30:10,12 articulate [2] 63:17 77:6 articulated [1] 63:10 asks [1] 23:3 aspect [3] 53:13 59:3 66:4 Assembly [1] 67:20 asset [1] 91:2 assets [9] 25:7,23 56:9 58:11,15 59:1 90:8,18,19 assignments [1] 48:5 assistance [1] 38:2 associated [1] 72:22 assume [1] 74:20</p>	<p>assure [2] 8:21 37:1 attach [1] 94:17 attempt [1] 41:23 attempting [1] 41:9 attempts [1] 85:5 attended [1] 14:6 attention [5] 16:12 20:17 61:15 64:17 66:10 attorney [2] 54:5 71:11 Attorneys [1] 39:17 attract [1] 58:21 attributes [1] 6:23 audit [3] 66:5 76:18 79:4 auditing [1] 76:21 audits [1] 76:2 author [1] 18:16 authored [1] 30:9 authority [9] 3:20 5:15 35:13 49:8 51:22 52:3 78:8,10 98:25 authorize [2] 73:11,21 available [8] 67:10 68:22 83:15 84:11,13 85:21 91:4 99:13 average [1] 65:24 avoid [2] 19:22 77:22 avoided [2] 27:8 52:20 avoiding [2] 17:15 73:5 awaits [1] 32:4 aware [3] 57:15 64:5 82:14 away [4] 17:17 51:6 57:10,25 awful [1] 74:7</p> <hr/> <p style="text-align: center;">B</p> <p>Back [10] 20:11 26:18 27:11 34:2 64:4 73:23 74:7 89:17 92:10 99:21 backed [1] 42:2 backwards [1] 73:18 bad [1] 87:1 Bainbridge [1] 18:12 Baird [1] 20:12 balance [1] 99:17 ball [1] 70:15 ban [1] 55:24 banc [3] 51:15,15 53:9 bank [3] 43:1,1 77:16 Banking [1] 75:10 barred [1] 12:21 based [18] 1:21 3:13 5:3 17:2 30:19,21 32:24 46:7,14 47:19 48:15 49:4,10 56:24 60:8 66:2 94:20 97:16 basic [2] 12:18 19:18 basically [2] 46:23 58:10 basis [5] 9:6 12:22 46:5 50:1 52:22 Baucus [1] 12:7 became [1] 10:4 become [3] 24:11 74:15 85:1 becomes [2] 26:10 70:11</p>	<p>becoming [2] 27:20 30:13 Begich [24] 1:10 61:2 67:16,17 69:5,14,18,21,24 70:2,8,12,15 71:24 72:19,23 73:2,14 74:10,17,20,22,25 89:25 begin [3] 7:8 14:7 23:12 behavior [3] 5:17 13:19 56:1 behind [3] 33:11 36:24 78:22 believe [17] 8:17 12:2 19:11,20 20:1 24:10,12 30:25 37:7 39:9 43:9 74:22 76:6,7,10 80:20 98:8 believes [1] 5:14 belonging [2] 32:20 51:2 belongs [1] 32:9 below [1] 65:23 BEN [2] 30:1,7 benefit [3] 24:21 86:23 87:9 benefits [1] 25:11 benefitted [2] 5:13 18:14 bent [1] 77:10 BERLE [1] 39:1 besides [1] 57:8 best [7] 11:22,23 20:2 21:3 23:13 58:21 69:24 betray [1] 19:9 better [8] 26:1 41:11 68:7 71:12 73:5 85:8 86:15 93:11 between [9] 2:11 7:4 9:11 20:23 22:5 25:22 41:5 78:25 96:11 Beyond [3] 30:16 72:2,12 bicameral [1] 21:5 big [4] 24:11 69:8 74:11 94:23 bigger [2] 71:14 91:23 bill [14] 7:16,18 12:4,7,8,17 13:15,21 14:1 22:8 40:8 71:15 74:20 81:6 billion [1] 40:11 bills [13] 7:14 10:5 20:23 21:4 22:5 27:10 35:8 36:25 40:2,23 68:16,21 79:15 bipartisan [3] 12:4 20:10 21:5 bit [4] 39:25 41:3 56:18 90:2 blank [2] 54:24 71:15 blanket [3] 18:2 46:22 72:8 blind [13] 25:7 42:24 56:8,9,14 58:5,10,12,13,14,17 59:2,3 Blumenthal [1] 12:6 board [1] 95:1 body [2] 3:8 17:6 book [4] 1:20,20 18:16 88:9 books [1] 26:15 boss [1] 51:7 both [13] 6:3 17:5 21:4 22:18 23:7 36:7 40:2 44:7 53:2 57:4 65:9 66:16 68:20 bottom [3] 8:10 27:20 63:7 bought [3] 3:12 62:3,8 Boy [2] 96:14 97:20 boyfriend [2] 54:4 60:7</p>	<p>boyfriends [1] 61:4 branch [5] 17:8 25:20 48:9 60:21 72:8 breach [3] 7:3 51:4,8 breached [1] 32:7 breaching [1] 50:3 break [1] 22:14 breakdown [2] 16:16 18:8 breaks [1] 17:16 bribery [1] 26:6 brick [1] 97:11 brief [1] 44:3 briefings [1] 18:24 briefly [1] 58:9 brightest [1] 58:21 bring [7] 5:22 22:13 23:10 36:12,12,19 53:23 bringing [2] 67:9 95:20 broad [4] 2:23 3:9 33:8 90:8 broader [2] 6:8 50:19 broken [1] 14:7 broker [2] 43:1,1 brother [2] 71:14 75:11 brought [5] 20:17 36:10 45:25 61:14 79:16 Brown [27] 1:10 6:2 7:13 10:2,13 12:7,14 15:2,5 16:1,4 21:10 22:1 39:15 61:1,2,3 63:6 64:3,24 65:13 66:11,20,24 67:3,6,13 Brown's [1] 7:16 budgets [1] 79:8 Buffalo [1] 14:4 build [1] 80:24 Building [2] 1:7 80:21 buildings [1] 18:20 builds [2] 59:18 87:24 built [1] 6:11 burden [1] 48:13 burdensome [3] 90:21 91:20 92:1 business [4] 6:15,15 14:6 25:24 busy [1] 88:11 button [1] 91:23 buy [7] 17:15 24:19 79:24 80:18,20 87:9 98:6 buying [3] 12:21 40:21 98:10 buys [1] 5:3</p> <hr/> <p style="text-align: center;">C</p> <p>call [5] 5:25 10:10 22:20 62:23 92:16 called [4] 19:13 31:23 42:22,23 calling [1] 40:7 came [6] 16:6 49:4 57:21 67:21 80:15 97:24 campaign [4] 24:23 25:25 26:2 74:21 cannot [10] 40:16 45:24 46:17 56:2,18 70:23 76:15 77:5 85:25 91:</p>
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 301-384-2005

Committee on Homeland Security and Governmental Affairs
 Insider Trading and Congressional Accountability
 Thursday, December 1, 2011

<p>2 canvas [2] 54:24,25 Capitol [5] 35:17,25 36:15 45:18 96:20 capture [1] 46:5 Cardin [1] 12:7 care [2] 25:12 51:5 careers [1] 95:13 careful [5] 9:3 59:10,13 71:25 75:15 carefully [2] 36:25 95:9 Carper [1] 1:9 carried [1] 2:22 carries [1] 36:21 carve [1] 78:10 case [18] 6:17 36:8,11 39:19 40:5 45:14 51:1 52:18 53:7,12 54:8,12 62:12 85:4 88:1,19 96:7,21 case-by-case [1] 47:7 cases [24] 2:5 12:25 26:23 31:19,23 32:1,5,6 35:20 36:12 39:20 45:20,21 54:1 56:16 63:20 64:16 65:4 74:7 83:19 84:7,19 88:6,19 cash [1] 58:14 category [1] 87:10 caution [1] 74:4 Center [3] 22:25 34:4 35:3 CEOs [1] 83:13 certain [9] 9:22 45:23 72:4 82:8 84:2 87:13 91:13 94:16 95:13 certainly [8] 33:17 54:6 62:11 78:19 85:20 86:10,22 87:21 certainty [1] 88:22 cetera [2] 59:11 96:13 CFTC [1] 12:24 chain [1] 41:4 chair [1] 21:8 Chairman [76] 1:8,11,12,17 5:1 7:7 9:25 10:1,17 11:3,12 15:1 16:4,16 19:16 20:12 22:1,19,20 23:5 24:4 29:1 30:4 34:1 35:4 38:1 39:3 44:1 45:3 49:1 51:13 52:9,19 53:4 54:21 55:7,8 60:25 61:3,21 67:8,13,17 70:25 74:10,17,19 75:4,6 81:9,10,14,17,18 82:24,25 86:4 89:6,7 90:9,16 91:9 92:8 93:1,12,20 94:13,18,20 95:20 96:18,22,25 97:4,25 99:5 challenge [2] 68:4 83:19 challenges [1] 8:16 change [4] 90:5,12,13 93:7 changed [2] 42:3 92:9 changes [1] 14:1 changing [1] 27:25 character [1] 51:24 characterized [1] 83:18 cheat [2] 67:23,24 chemist [1] 32:3 Chestman [4] 53:7,12,21 54:6</p>	<p>Chiarella [1] 53:10 Chicago [1] 80:14 chief [2] 23:7 44:7 chilling [3] 55:19 79:13 95:10 choose [1] 63:14 chose [2] 90:14 95:17 circuit [5] 42:7 51:15,16,20 53:9 cited [1] 45:24 citizen [1] 76:11 citizens [4] 6:23 22:21 23:13 24:2 clarify [2] 18:2 83:6 clarifying [1] 83:10 clarity [3] 9:16 63:23 73:23 class [1] 61:17 classical [1] 97:9 classified [1] 18:23 classroom [2] 61:12 83:9 Clause [9] 26:5,24 45:22 62:25 64:21 74:6 83:22 93:4,8 clauses [1] 71:13 clean [2] 82:4,4 cleanses [1] 76:9 clear [24] 3:20 5:8,11 10:12 13:2,21 18:6 27:5 46:15 49:13 59:9 64:22 65:6 69:3 83:12,25 87:24 89:13 92:2 93:24 94:1,14 97:3,7 clearer [1] 84:8 clearly [14] 3:11 11:17 13:23 16:15 21:5 36:6 39:13 46:18 51:10 54:3 63:17 65:10 66:13 85:15 clerk's [1] 68:13 clever [1] 77:21 client [1] 51:2 close [4] 7:24 9:19 12:8 19:25 closed [2] 18:24 78:20 closing [1] 22:2 co [1] 30:8 Coburn [1] 1:10 code [8] 41:9 46:9,20 47:3,13 67:20 94:25 97:21 codes [1] 97:20 codify [1] 41:10 Coffee [41] 22:25 38:9 39:1,3 43:12 49:21 50:16 51:13,14 52:12,25 53:7,13 55:9,24 56:12 64:24 65:9 66:12,17,22 67:1 68:5,25 69:16,19,22,25 71:8,23 75:9 78:5,14 85:13 87:5 88:12,16 96:9 98:14,16,19 Coffee's [2] 71:18 72:14 coin [1] 82:2 colleague [2] 12:14 15:2 colleagues [4] 7:13 9:19 12:5 24:13 collectively [1] 70:16 Collins [29] 1:10,14,16 7:5,6,7 10:1,15 11:4 14:9 16:5 22:7 24:5 30:4 35:5 39:4 45:4 55:2,7,8 57:</p>	<p>5 58:1,8,10,25 59:5 60:18,25 73:24 Collins' [1] 10:7 Columbia [3] 23:1 38:10 39:2 come [16] 1:19 8:6 22:7 34:2 47:19 49:11 56:21 59:21 68:12,13 74:1 76:6 89:17 92:10 95:16 99:21 comes [5] 8:11 44:5 59:25 78:2 91:21 coming [3] 46:11 63:24 66:9 command [1] 6:24 comment [5] 58:2 68:20 71:8,10,18 comments [3] 22:2 68:9 75:3 Commission [12] 2:22 3:4,19,20 53:8,12,23,25 54:9 73:12,22 97:15 commitment [1] 12:12 committed [1] 50:1 Committee [51] 1:4,6,8 3:18 6:3,5 7:22 10:15 19:12 21:8 22:13 24:5 25:23 27:1 30:5 35:5 37:6 38:4 39:4 45:4 46:24 47:20,20,23 48:5 49:7 62:23 63:1,3 64:20 75:10 76:18,25 78:22 79:4,7 83:25 89:10,12 93:10,12,16,17,19,22,24 95:2,2,23 96:5 99:11 Committees [12] 23:8 44:8 46:25 47:10 64:13 66:4,9 71:22,23 74:8 94:3 95:15 Committees' [1] 95:12 common [1] 40:5 common-sense [2] 13:14 82:22 communicating [1] 72:12 communication [1] 77:25 communications [2] 79:10,11 companies [8] 24:19 25:19,23 40:21 48:3 83:13 84:10 87:9 company [5] 61:9 62:9 81:4 87:19 96:12 Company's [1] 61:11 compare [1] 76:21 comparing [1] 26:2 complained [1] 24:17 complaint [4] 66:8 97:19,22,24 complaints [2] 64:17 66:9 completely [2] 39:5 55:22 compliance [1] 48:13 complicated [2] 55:17 99:19 complicating [1] 45:19 complications [1] 38:5 component [1] 27:9 comprehensive [1] 42:9 concede [1] 59:13 conceivable [1] 46:1 concept [3] 35:25 73:5 97:1 concepts [2] 40:2 74:12 concern [3] 7:15 71:16 93:3</p>	<p>concerned [5] 27:22 33:12 58:20 72:10 79:10 concerns [4] 8:20 26:21 42:14 78:15 conclude [2] 32:18 54:13 concluded [1] 9:1 concludes [1] 30:16 conclusion [4] 49:5,11 55:2 67:21 conclusions [1] 9:13 conclusive [2] 5:11 48:17 condition [1] 96:7 conduct [11] 3:21 26:9,19 27:4,5 46:4 47:15,16,24 48:19 62:24 conference [1] 18:24 confidence [18] 7:25 8:9 32:8 50:19 53:11,16,19 54:8,14,19 60:8 64:9,13 73:8,17,20 97:6,13 confidences [2] 36:22 53:18 confident [4] 6:14 51:12 59:6 99:19 confidential [9] 18:4 26:25 46:14,19,25 47:12 60:23 95:4 96:2 confidentiality [2] 46:22 47:2 confidentially [1] 46:11 confined [1] 8:13 confirm [1] 24:12 confirmation [1] 25:18 confirmations [1] 27:12 conflicts [4] 42:7 48:7,8 95:7 confusing [1] 60:9 confusion [1] 42:8 Congress [139] 1:22 2:1,2,9,15,18 3:15 5:2,8,12,15,17,22 7:1,12,19,23 8:7,9,10,14 9:23 11:15,18,24 12:20 13:3,9,24 14:8 16:10,20,23 17:8,12,21 18:3,18,22 19:23 20:2,11 24:10,16 25:1,3,9,13 26:3,8,16,19,20 27:15,21 30:13,15,20 31:2,2 32:23 33:15 35:7 36:2,5,21,23 37:2 39:9 41:13,17,24 42:2,15,17,23 45:10,25 46:4,19 47:6,8,14 48:3,6 49:9,14 50:9,12 52:14,22,24 53:3 54:13 55:10,20 56:2 57:10,17 59:9,17 60:3,3,11,24 61:7 63:15,17 64:5,6 65:2,11,21 66:14 71:20 72:4 73:8,11,21 74:1 78:16 83:7,14,19 84:8,20,25 86:11 88:4,17 89:14 92:4 93:5,13 94:3 95:19 96:8 98:5,23 Congress' [5] 13:1 18:14 37:4 63:12,22 CONGRESSIONAL [32] 1:1 2:7 3:22 5:2,5,9 11:16 12:23 13:23 30:17,22 32:15,19,25 33:2,4,7 45:6,14,21,23 46:1,6,14,16 47:5,21 59:7 72:9 79:11 84:4 88:3 Congressman [7] 12:11 17:17 20:13 40:7,25 41:5 56:19</p>
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 Insider Trading and Congressional Accountability
 Thursday, December 1, 2011

<p>Congressmen [2] 40:13 56:13 Congresswoman [3] 12:11 20:12,13 connection [6] 2:25 16:17 31:9 60:15 80:15 88:3 consequence [1] 33:10 consequences [7] 19:7 64:10 72:1 75:16,17 76:4 77:3 Consider [1] 17:12 considerable [1] 52:8 considered [1] 46:18 considering [1] 95:9 consistent [1] 48:12 consonant [1] 72:6 constituent [3] 68:10 69:21 71:5 constituents [6] 48:16 50:10 55:11,20 69:22 72:5 constituents' [1] 20:2 constitutes [2] 32:15 33:6 Constitution [5] 26:24 32:11 45:23 93:5,13 constitutional [1] 46:2 constructive [1] 44:3 contact [1] 56:21 contacting [1] 13:9 context [5] 45:14,21 50:25 84:4,22 continual [1] 45:17 continue [1] 99:12 continued [1] 20:14 contract [3] 40:9,10 62:10 contractor [1] 40:9 contracts [3] 55:12 85:13,14 contravention [1] 3:2 contributes [1] 18:7 contributions [2] 24:23 26:2 contrivance [1] 3:2 control [3] 19:24 98:19,25 controversy [2] 31:1 60:1 convening [1] 6:6 conversations [1] 18:25 convinced [1] 49:19 copy [3] 68:11,13,14 cornerstone [1] 6:10 corporate [1] 3:12 corporation [1] 70:6 correct [5] 59:8 69:14 97:11 98:15,18 correcting [1] 18:10 corrupt [1] 24:10 cosponsor [1] 7:15 cosponsoring [1] 86:19 cosponsors [1] 88:24 cost [1] 42:19 costs [2] 58:12 69:5 counsel [7] 23:6,7 43:6 44:7 45:1 52:17 57:2 counsel's [1] 26:4 country [7] 8:16 11:13,22 16:24</p>	<p>19:7 25:2 77:16 couple [1] 89:11 courageously [1] 36:17 course [5] 9:7 48:13 50:9 52:13 89:20 court [19] 3:10 30:19,25 31:18 32:18 33:5 49:24 50:24 51:11 53:9 54:12,13 55:1 63:10,16,20,24 91:8 97:7 Court's [1] 63:23 courts [13] 31:19,19,22 35:15,18 41:20 42:5 50:7,23 53:20 61:19 63:13 88:22 cover [5] 41:6 53:1,2 81:6 87:16 coverage [2] 25:12 26:11 covered [7] 13:16 40:25 83:16,20 85:11,22 89:15 covers [1] 12:18 crafted [3] 36:25 95:6,9 create [10] 19:3,8 37:1 38:6,7 53:18 72:8 74:14 75:18 82:23 creates [2] 53:14 65:6 creating [1] 98:8 credible [1] 47:17 CREW [3] 23:13 24:15 64:17 crimes [1] 26:6 criminal [5] 31:11 40:12 56:23 95:16 96:16 criminally [1] 39:17 crisis [1] 55:14 critical [2] 8:15 74:13 critically [2] 20:22 82:3 critics [1] 13:15 crooked [2] 81:21 82:19 crystal [4] 59:9 65:6 83:12 94:1 cue [1] 1:16 cured [2] 59:13,18 curious [1] 99:3 current [11] 7:11 9:5 13:7,16 17:16,20 35:10,15 45:8 47:8 86:18 currently [2] 5:11 85:21 cut [2] 17:13 27:11</p>	<p>dealers [1] 40:20 dealing [1] 81:23 deals [1] 89:17 dealt [1] 52:10 debate [11] 18:1 26:5,24 45:22 46:3 62:25 64:21 74:6 83:22 93:4,8 debunk [1] 30:12 DECEMBER [6] 1:2 22:13,15 89:10 99:16,20 deceptive [1] 3:2 deceptively [1] 35:23 decide [1] 60:7 decided [1] 61:19 decidedly [1] 31:20 decision [3] 51:15 98:16,20 decisions [7] 3:10 8:17 13:11 55:13 56:24 60:6 98:24 declared [1] 52:21 declaring [1] 3:21 deemed [1] 31:14 defaulted [1] 31:18 defense [6] 36:20 40:6,9,10 43:10 52:16 defense-of-counsel [1] 43:10 defenses [1] 85:4 defer [1] 74:3 define [3] 18:2 41:19 50:19 defined [3] 2:19 31:16 49:17 defining [3] 18:5 52:15 66:13 definite [1] 9:2 definitely [1] 69:16 definition [2] 47:11 52:1 defraud [2] 32:16 60:15 defrauding [1] 33:2 defy [1] 5:22 delays [1] 27:13 deliberations [1] 78:21 delighted [1] 39:5 democracy [1] 32:22 democratic [1] 6:11 demonstrate [3] 7:22 26:20 86:5 demonstrated [1] 8:2 denied [1] 2:3 depart [1] 89:10 Department [8] 2:22 27:3 31:10 40:6 53:23,25 80:17 97:15 Department's [1] 97:19 dependency [2] 51:22 52:3 describe [1] 7:14 described [1] 60:6 deserve [3] 11:21 21:6 36:16 detail [1] 71:13 detailed [3] 41:9 42:25 56:6 detection [1] 77:22 determine [4] 2:4,5 5:19 46:24 determining [1] 31:17 deterrent [1] 64:8</p>	<p>deterring [1] 92:18 deters [1] 5:16 development [2] 87:13,19 device [1] 3:2 dictated [1] 33:5 difference [2] 16:8 40:23 differences [2] 20:23 22:5 different [17] 19:7 42:24 43:2 49:11 50:13 52:17 54:24 55:22 58:2 68:24 77:2 78:25 80:7 88:18 96:9,17 98:20 difficult [8] 10:9 19:23 57:12 62:25 81:19 83:23 84:17 85:1 difficulties [1] 78:2 difficulty [1] 58:6 diminishing [1] 19:12 direct [1] 53:11 directly [4] 18:10 41:3 46:8 59:14 Director [6] 3:18 22:21 23:7 24:1 44:7 96:12 Dirks [1] 53:10 Dirksen [1] 1:7 disadvantage [1] 59:12 disagree [8] 13:18 17:22 19:16 39:11,12 57:5 84:18,24 disagreements [1] 85:10 disapprove [1] 87:4 disaster [1] 41:25 discharge [1] 32:13 disciplinary [1] 27:6 disciplined [1] 26:18 disclose [4] 13:4 27:18 68:20 92:3 disclosure [25] 27:17 48:10,11 62:15,17 67:25,25,25 68:2,11,19 69:8 70:21 74:13 76:19 77:1,11 85:15 89:19,24 90:7 92:13,16,24 98:4 Disclosures [4] 27:9 62:1 74:21 75:24 discoverable [1] 92:14 discovered [1] 57:12 discovery [1] 89:21 discredit [2] 47:17,24 discretion [1] 98:14 discretionary [2] 51:22 52:2 discuss [1] 26:14 discussed [2] 87:2,5 disfavored [1] 48:6 disincentive [2] 94:7,12 disinclined [1] 96:25 dismal [1] 25:1 displace [1] 88:1 disrespect [2] 24:8 71:12 distance [1] 41:5 distinguished [3] 24:6 30:24 38:10 district [4] 40:9 54:12,13,17</p>
D			
<p>D.C. [2] 1:5 68:12 data [2] 9:1,13 database [6] 27:16 62:20 68:17 71:6 91:22,24 databases [2] 76:1 82:9 dates [1] 84:12 day [5] 6:18 67:21 69:1 75:11 91:3 days [15] 13:5 23:2 27:10 48:12 62:17 79:8 85:16 91:19 92:22,23 93:24 95:22 99:2,2,24 deadline [1] 67:10 deal [12] 6:4 23:16 42:14 78:7 79:15,22 84:14,16,22 86:8 87:14 93:7</p>			

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 301-384-2005

Committee on Homeland Security and Governmental Affairs
 Insider Trading and Congressional Accountability
 Thursday, December 1, 2011

<p>disturbing [2] 16:21 36:5 divest [1] 25:19 divestment [1] 48:5 doing [8] 13:8 41:8 61:8 66:6 76:9 81:21 92:20 99:11 DOJ [2] 30:22 32:25 domain [1] 84:10 Donald [4] 22:24 34:3 35:1 77:8 done [14] 17:23 19:18 20:8 21:6 43:2 54:23 64:14 66:15 68:18 76:1 84:23 87:13 88:21 94:5 Donna [4] 22:22 30:1,6 77:4 doubt [4] 32:14 35:18 36:6 65:6 down [10] 58:15 61:9 67:11 68:13,24 71:17 73:2 79:21 90:23 91:19 downside [2] 52:7 77:5 draft [1] 59:11 drafted [2] 89:2,9 drafters [1] 37:8 drafting [2] 44:2 59:13 dramatic [2] 9:10 17:7 dramatically [4] 13:6 17:14 27:12 61:9 dream [1] 25:13 drop [1] 61:8 dual [1] 64:19 due [1] 82:16 Durbin [1] 12:6 during [2] 17:12 55:14 dust [1] 60:12 duties [9] 32:13 41:16 46:12 47:2,11 51:4,5 53:15 96:3 DUTTON [2] 30:1,7 duty [34] 3:14 18:2,5 32:7 36:21 46:22 49:22 50:3,10,17,18,19 51:8 52:20 53:19 54:10,14,18 60:8 66:13 73:7 85:23 96:6,10,13,15,20 97:1,6,12 98:8,9,11</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [5] 46:24 47:10 49:3 51:17 53:16 eager [1] 9:17 earlier [5] 1:13 39:15 49:16 75:22 99:15 earmark [3] 24:18 86:24 87:8 Earmarks [8] 85:14 86:17,18,19,20 87:2,13,22 ease [1] 84:16 easier [3] 21:1 84:7,19 easily [7] 59:22 84:15 87:10 91:6,22 92:6 93:16 easy [3] 66:14 74:13 79:20 ebbs [1] 6:11 economic [1] 25:3 economist [1] 8:23 edit [1] 39:7 effect [1] 17:22</p>	<p>effective [3] 58:6 66:19 69:25 effects [2] 79:13 95:10 effort [2] 20:14 59:23 efforts [5] 6:12 7:19 20:16 35:6 52:16 Eggers [1] 65:21 egregious [2] 26:10 64:16 either [12] 8:4 17:14 31:12 35:11 56:3 63:3 66:7,7 68:20 79:15 91:10 99:22 elected [3] 6:9 8:1 11:19 electronic [6] 27:12,16 62:20 68:16 89:25 91:21 electronically [4] 26:1 68:22 70:7 74:21 eliminate [1] 36:6 eloquent [1] 7:8 else's [1] 35:25 elsewhere [1] 7:21 emphasis [1] 54:9 employ [1] 2:25 employee [4] 47:18 73:9 88:3 96:12 employees [5] 17:7,8 45:10 60:11 95:25 employer [1] 51:7 empowered [1] 12:24 en [3] 51:15,15 53:9 enable [1] 1:23 enacted [2] 31:3 60:3 encompass [1] 3:11 encourage [3] 73:5 87:23 97:5 encouragement [1] 36:16 end [1] 67:21 ended [2] 90:22 95:14 endemic [1] 65:20 endorse [2] 33:11 55:11 enforce [1] 26:8 Enforcement [10] 3:19 9:20 19:22 39:16 46:16,19 74:15 83:25 84:3 95:17 enforcer [1] 43:9 enforcers [3] 5:21 69:24 74:16 engage [1] 47:16 engaged [2] 26:6 43:8 engaging [1] 7:12 enhance [2] 18:20 25:9 enhancing [1] 80:5 enjoins [1] 47:15 enough [9] 18:1 39:13 52:19 56:9 77:6,21 79:23 93:24 96:25 ensure [5] 5:20 6:13 7:19 14:1,5 entering [1] 95:25 entire [2] 8:14 13:24 entrusted [2] 31:24 35:24 equal [1] 51:23 eroded [1] 2:12 erosion [1] 8:13 especially [4] 19:23 20:19 35:18</p>	<p>62:19 essence [1] 87:17 essentially [3] 32:18 79:25 80:1 est [1] 99:10 establish [1] 62:12 established [3] 50:18,25 88:13 establishes [1] 96:5 establishing [1] 77:15 estate [6] 18:18 24:19 79:16,18 80:2,11 esteemed [1] 26:13 et [2] 59:11 96:13 ethical [6] 8:11 67:22 70:3 96:13,15 97:20 ethics [50] 5:5 20:24 22:22 23:8,14 24:2 26:9,21 44:8 46:9,17 47:3,13,20,20,21,23 62:1 64:7,13,20 65:14 66:4 67:20 74:8 76:2,17,24 79:4,7 83:25 89:17,24 90:5,12 92:8 93:3,10,12,15,18,22,23,24 94:2,25 95:11,15,23 96:5 even [19] 16:7,13 24:23 26:8,18 36:8 39:16 43:4 45:25 56:15 58:22 59:8 64:18 78:24 79:1,24 84:22 85:18 90:22 everybody [7] 19:11 25:16 60:5 73:24 76:8 82:19 90:13 everyday [3] 12:1 60:12 97:16 everyone [4] 16:24 17:18 20:6 64:10 everything [6] 19:10 75:5 78:15 79:2,3 82:11 everywhere [1] 66:3 evidence [1] 5:12 evident [1] 10:4 exact [2] 11:20 62:4 exactly [5] 43:1 46:18 62:24 70:10 88:7 examine [1] 7:10 examined [1] 9:13 example [14] 11:8 25:21 31:22 41:12 46:23 62:22 68:1 72:3 76:25 79:25 80:1 91:1,24 93:17 examples [2] 61:4,12 exceed [1] 65:25 except [2] 26:10 64:15 Exchange [13] 2:21,24 3:19 24:22 31:8 53:8,12,23,25 54:9 73:12,21 97:14 exchanging [1] 53:18 excited [1] 73:3 exclusive [1] 37:3 exclusively [1] 52:10 excuse [1] 19:21 execute [1] 57:19 executed [1] 57:21 executive [8] 17:8 22:21 24:1 25:20 60:21 70:6 72:8 78:20 exemplified [1] 6:22</p>	<p>exempt [3] 3:22 8:4 30:16 exempted [3] 3:16 30:13 37:2 exemption [1] 35:10 exemptions [1] 78:11 exemptive [2] 78:8,10 exempts [1] 25:14 exercising [1] 40:13 exist [1] 2:11 existence [2] 18:1 72:20 existing [25] 2:6 5:15 7:23 9:21 19:14 30:14,18 31:1 33:18 35:13 40:12 41:21 46:4 49:7,15 54:19,25 59:8,19 65:13 73:13,14 87:25 88:19 92:12 exists [4] 7:4 19:21 52:2 73:8 expand [4] 63:13,22 77:24 85:11 Expanding [1] 85:22 expansion [1] 70:20 expand [2] 13:14 30:19 experience [4] 23:10 43:7 44:6 94:21 expert [2] 26:12 55:12 experts [3] 9:12 13:17 55:15 explicit [4] 2:17 64:1 97:8,18 explicitly [7] 5:16 6:25 20:4 31:3 35:6 60:22 85:23 explore [2] 7:22 9:19 express [4] 31:6 60:4,10,13 expressly [1] 11:17 extend [1] 48:12 extent [5] 26:14 36:11,15 96:4,4 external [1] 36:12 extraordinarily [1] 99:7 extraordinary [1] 48:6 extremely [3] 8:7 11:6 36:18 eye [1] 20:17</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face [5] 8:20 42:17 57:17 64:10 77:3 faced [1] 54:12 facie [1] 62:12 facility [1] 68:3 facing [1] 8:16 fact [15] 3:17 6:8,18 15:2 24:9 31:2 57:20 60:3 64:9 65:22 69:10 76:22 85:20 93:14 95:22 factor [1] 45:19 facts [2] 5:19 30:23 factually [1] 36:11 fail-safe [1] 47:15 failing [2] 26:9 92:3 fails [1] 33:16 failure [2] 27:18 92:21 Fair [5] 77:12 78:4 79:14,21 83:21 fairly [1] 58:22 fairness [1] 11:9 faith [4] 6:9,11 8:7 11:11</p>
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 301-384-2005

Committee on Homeland Security and Governmental Affairs
 Insider Trading and Congressional Accountability
 Thursday, December 1, 2011

<p>faithfully [1] 32:13 fall [6] 33:17 40:14 43:2 48:4 55:15 97:8 falls [1] 87:10 False [5] 27:19 92:4,4,5,22 families [5] 11:15,24 12:2,21 13:24 family [4] 24:21 31:23 53:15 73:18 far [10] 27:11 53:24,25 60:23 62:17 77:2 79:4 82:8 90:23 96:13 farm [1] 81:23 fatter [1] 17:17 favor [1] 77:7 favorable [1] 81:3 FDA [1] 32:3 fear [1] 59:14 feather [1] 24:14 featured [1] 16:9 Federal [20] 3:23 8:14 18:19 31:12,18 32:1,25 41:21 42:5 45:9,11 46:10 59:19 60:2,11 73:9 80:11,16 83:24 88:1 feel [2] 50:11 59:6 feeling [1] 49:13 feet [1] 64:15 fellow [1] 18:17 felt [1] 53:8 ferreted [1] 91:7 few [2] 24:11 46:25 fewer [2] 53:24 54:1 fiduciaries [3] 51:17,20 71:21 fiduciary [27] 41:14 42:25 49:22 50:3,9,18 51:3,4,8,21,24 52:1,12,20 54:7 63:7 71:20 72:8,21 73:6 96:6,10,20 97:1,6,8,18 fiduciary-like [3] 32:7 35:22 36:21 field [5] 26:14 38:3,4 39:13 42:1 file [7] 25:25 68:17 70:7 90:2 91:11,13,17 filed [8] 20:13 49:6,6 64:17 74:21 90:20,21,22 files [1] 93:17 filling [2] 90:1,6 filings [1] 90:1 fill [3] 71:3,15 82:8 filled [3] 68:2 76:20,25 final [3] 14:2 33:10 95:20 finally [5] 23:6 24:23 43:5 48:2 85:23 finance [1] 25:25 financial [20] 11:23 17:11 19:6 27:7,17 40:20 48:9,18 55:14,15 57:11,14 72:2,13 75:24 76:19 77:1 90:7 94:8 96:1 financially [2] 5:13 24:21 find [14] 19:1 42:12 54:18 56:13,17 61:7 68:1 69:20 76:23 78:9</p>	<p>84:16 85:4 96:20 99:17 fire [1] 64:15 firm [3] 51:1,2,3 firm's [1] 51:2 first [14] 1:12 5:25 6:18 10:10 12:10,20 27:25 50:22 55:18 65:18 67:19 68:9 75:2 89:18 fit [2] 36:1 56:25 five [5] 41:4 85:7 86:1 87:22 99:6 fix [1] 38:6 fixes [2] 82:23 87:22 flashbacks [1] 23:1 flat [1] 85:19 flaw [2] 40:15,16 floor [3] 59:20 67:11 87:25 focus [1] 47:8 focused [3] 6:7 24:15 89:25 fodder [1] 26:10 folks [1] 71:12 follows [8] 4:1 14:11 21:10 28:2 33:21 37:10 43:12 48:21 force [1] 95:12 forefathers [1] 76:10 foreign [2] 77:16,16 form [12] 48:16 57:13 68:2,11 77:1,13 90:13,24 91:5,11,16,21 formal [1] 84:22 former [3] 23:7 45:11 84:6 formidable [1] 31:17 forms [14] 35:12 57:11 69:7,9 70:21,21 71:3 76:19 82:8 90:8,20,24 91:4 92:2 forth [1] 85:20 forward [11] 7:17 11:10 13:25 21:8 38:8 39:21 49:2 67:4,9,14 81:16 found [6] 3:8 18:13 25:22 49:25 62:9 77:18 foundations [2] 6:20 7:2 four [4] 39:8 41:4 71:9 88:25 fourth [1] 73:22 frame [1] 85:15 framework [3] 19:21 65:6,14 frankly [7] 16:25 40:13,17 60:22 61:18 86:6 94:3 fraud [11] 9:21 31:9,12,15,16 33:1 59:20 80:12,16 88:2,6 free [1] 6:22 freedom [1] 72:7 freely [1] 36:3 frequent [1] 92:24 frequently [3] 19:6 26:8 62:19 friendship [1] 77:16 front [1] 75:9 frustrated [1] 27:21 full [2] 24:9 92:21 fully [3] 36:24 39:25 45:9 fun [1] 61:24 function [5] 40:14 66:5 72:11,12</p>	<p>79:4 functions [2] 9:8 72:11 fund [10] 98:5,6,7,7,9,11,13,14,20,21 fundamental [1] 11:9 funding [1] 55:11 funds [4] 18:19 33:4 56:4 57:14 further [4] 2:12 27:16 41:7 89:2 future [1] 63:15 futures [2] 40:19 82:1</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gain [9] 2:10 5:24 8:2 11:25 13:10 17:11 19:10 20:5 86:13 gained [3] 11:16 12:22 46:7 Gallup [1] 8:7 gap [2] 18:5,6 garnered [1] 16:11 gather [1] 3:15 gave [4] 56:6 62:22,22 94:10 general [4] 17:1 18:15 32:16 96:13 generous [1] 25:12 genuine [1] 49:12 George [1] 6:16 Georgetown [3] 22:24 34:4 35:2 gets [2] 82:22 84:21 getting [3] 20:15 21:8 95:4 Gillibrand [12] 6:1 7:14 10:2,11,17 11:1,3 14:11 15:1 19:15 22:3,19 Gillibrand's [1] 7:17 girlfriend [1] 54:5 girlfriends [1] 61:5 give [6] 19:1 40:8 42:25 43:4 78:7 85:25 given [6] 26:15 45:17 49:10 65:3 78:10 85:3 gives [2] 88:22 96:15 giving [1] 33:19 goal [3] 5:19 14:2 22:16 God [2] 68:11 81:25 good-government [2] 12:18 71:4 got [9] 56:9 76:3 79:14 81:11,12 82:15 86:2 99:8,20 governing [2] 2:14 25:14 Government [21] 2:12 6:18,22 7:4 11:11 18:25 32:3 36:22 46:9,10 58:23 62:6 73:10 80:10,13 88:3 89:24 90:5,12 94:25 96:3 Governmental [2] 1:4 46:12 grand [1] 63:2 grants [2] 55:12 85:12 grateful [2] 11:4 14:10 gray [1] 30:24 great [12] 22:12 36:9,13 42:20 62:15 83:8 84:14,16,22 86:8 87:14 88:23</p>	<p>greater [2] 9:16 88:22 greatly [1] 17:4 group [1] 42:10 groups [4] 12:18 23:16 69:11 71:5 grows [1] 51:10 guidance [1] 93:25 guilt [1] 2:4 guilty [1] 32:3 guys [2] 76:5,12</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>Hainmueller [1] 65:21 hammered [2] 81:12,13 hand [2] 5:7 69:6 hands [1] 39:20 handwritten [1] 71:4 happen [3] 16:14 17:14 43:3 happening [2] 60:10 66:3 happens [1] 5:18 happy [2] 37:6 59:23 harbor [2] 42:11 57:2 harbors [3] 42:13 57:1 78:11 hard [6] 22:11 47:10 57:25 68:6 71:10 84:20 harder [1] 58:21 hardly [1] 36:16 hardship [1] 25:3 harmful [1] 95:8 head [1] 22:4 headline [1] 36:23 headlines [1] 54:16 health [1] 25:12 hear [6] 5:2,7 9:17 16:14 19:13 75:14 hearing [21] 1:19 3:18 6:6,19 7:9,10,18 9:15 11:6 12:15 14:10 15:3 19:13 30:11 49:5,20 61:22 67:18 74:11 99:23,25 hearings [1] 84:11 hears [1] 17:12 held [6] 8:24 9:11 14:10 16:24 25:23 64:9 help [5] 7:3 13:10 59:23 64:8 79:18 helped [1] 99:11 helpful [7] 34:2 44:2,6 83:11 91:8 98:1 99:7 helpfully [1] 89:12 helping [1] 89:4 helps [1] 82:17 high [3] 25:2 52:4 54:6 high-ranking [1] 70:5 higher [1] 16:25 highway [1] 80:24 Hill [5] 35:17,25 36:15 78:3 96:21 historic [1] 6:12 histories [1] 53:17 history [2] 24:25 73:19</p>
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 Insider Trading and Congressional Accountability
 Thursday, December 1, 2011

<p>hit ^[1] 91:23 hold ^[6] 1:17 30:19 48:3 63:17 64:15 99:20 holding ^[2] 7:10 11:5 holdings ^[1] 24:19 holidays ^[1] 22:14 home ^[1] 14:4 Homeland ^[1] 1:4 Hon ^[1] 1:7 honest ^[1] 82:20 honestly ^[1] 82:5 honesty ^[1] 8:11 honor ^[1] 6:13 HONORABLE ^[2] 11:1 16:1 honored ^[1] 30:5 Hoover ^[1] 18:17 hope ^[4] 7:3 22:6 35:17 51:11 hoped ^[1] 99:15 hopefully ^[1] 89:1 hopelessly ^[1] 60:9 host ^[1] 33:16 hours ^[2] 70:6 75:9 House ^[29] 9:11 12:10 20:10 23:8 25:5 26:3,17 27:4 35:9 44:8 46:21 47:1,9,17,20,21 64:13 75:19 76:2,24 82:18 90:14 92:12 93:24 94:24 95:23,23,24 96:5 however ^[5] 8:3 9:12 30:23 45:8,14 hundreds ^[1] 31:19 hurt ^[1] 94:6 husband ^[1] 51:19 husbands ^[2] 51:17 52:1 hypothetical ^[1] 54:12 hypotheticals ^[1] 83:9</p>	<p>85:16 88:9,12 95:5 99:18 impose ^[1] 31:22 imposed ^[1] 31:20 imposing ^[1] 47:2 imposition ^[1] 56:14 impossible ^[2] 8:19 90:18 improper ^[1] 55:25 improve ^[4] 14:1 27:23 73:23 89:2 improved ^[1] 13:6 inaccurate ^[1] 85:19 inappropriate ^[3] 13:3 76:13,16 inappropriately ^[1] 86:10 inclined ^[1] 96:23 include ^[1] 32:1 included ^[4] 49:14 91:18 94:7 97:18 including ^[8] 2:18 3:23 27:7 30:10 32:3 42:23 57:14 94:8 income ^[1] 90:19 inconsistent ^[1] 32:21 increase ^[6] 6:12 20:6 24:18 48:15 79:6,17 increasingly ^[1] 27:21 Indeed ^[1] 35:14 index ^[2] 40:19 98:7 Indiana ^[4] 22:23 29:2 30:2,7 indicated ^[3] 61:19 65:15 77:2 indicates ^[1] 64:25 indication ^[1] 59:15 indicia ^[2] 97:12,16 indict ^[2] 39:17,18 indictment ^[3] 63:4 97:19,21 indifferent ^[1] 87:1 indirectly ^[1] 41:3 individual ^[5] 2:5 32:20 46:6 56:2 87:1 individuals ^[3] 13:8,10 97:17 industries ^[2] 19:7 48:4 industry ^[1] 13:12 ineffable ^[1] 96:14 inevitably ^[1] 36:13 infer ^[1] 9:4 influence ^[2] 19:4 98:19 information ^[100] 1:23 3:13 5:3,13,23 7:20 9:6 11:16,25 13:10 17:2,9 18:4,23 19:1,3,8 20:5 23:11 24:24 27:1,15,18 30:21 31:24 32:2,9 33:5 35:23,23 36:4 40:3,25 41:14 43:8 45:15,17 46:7,11,15,18,24 47:12,19 48:15 50:2,5,14 51:2 52:13,23 54:2 56:15,21 57:20,22 60:7,24 62:11 63:3,18 65:8,16 71:21 72:5,7,9,19,20,22 73:9,18,20 78:1 80:3,9,14,18 83:15 84:14,20 85:2,6,11 86:23 87:7,11,17 88:18 91:6,21,25 92:3,21 93:6,15,18 95:4 96:2 98:23 informational ^[2] 9:2 18:15</p>	<p>informed ^[2] 22:16 49:5 initial ^[2] 17:21 62:11 initially ^[1] 58:13 innocence ^[1] 2:4 input ^[1] 89:2 inquiry ^[1] 27:1 inside ^[4] 5:3 24:23 84:20 93:18 INSIDER ^[94] 1:1,23 2:7,14,17,19,20 3:7,11,16,23 5:9,13,15,23 6:25 7:12,20 8:5 9:16 11:14 13:22 16:11 23:16 25:15 26:14,17 30:9,15,17 31:4,7,11,13,17 32:6,24 33:7,14,16 35:7,11,15,20 36:8,15 37:3,4 42:3 45:6,9,14,20,20 46:2,14 47:5,6,8,14 49:9,14,16 50:1 53:22 57:12 59:7,16 60:4 63:11 64:7 65:2,4,20 72:17 73:16 74:4 77:13,21 79:21,22 80:2,12 85:25 87:17 89:15 92:13,18 93:6,6 94:14 95:6,18 96:7 insiders ^[2] 3:12 31:21 insinuation ^[1] 47:22 insistent ^[1] 70:19 insofar ^[2] 31:14 58:12 instance ^[1] 52:20 instances ^[1] 31:13 instantaneous ^[1] 27:13 instead ^[3] 55:24 56:1 91:11 Institute ^[1] 18:17 institution ^[2] 7:25 47:24 instruct ^[1] 43:4 instructions ^[3] 42:25 56:6 57:19 instrument ^[1] 57:14 instruments ^[1] 57:11 insufficient ^[1] 9:20 intangible ^[1] 33:6 intelligence ^[1] 13:8 intended ^[2] 24:8 35:8 intensely ^[1] 22:12 intent ^[4] 10:7 36:24 37:8 81:22 intentional ^[1] 18:7 interest ^[8] 3:5 11:22 20:21 23:15 42:10 48:7 80:20 95:8 interesting ^[3] 16:13 54:21 84:5 interests ^[6] 8:18,18,22 11:23 20:3 25:19 internally ^[1] 98:25 Internet ^[1] 68:23 interpretation ^[2] 26:5 49:25 interpretations ^[1] 9:14 interpreting ^[2] 3:10 41:20 introduced ^[8] 10:5 12:4,10 17:3 20:9,10,22 35:9 introducing ^[1] 6:4 investigate ^[2] 12:25 66:6 investigated ^[2] 36:17 47:25 investigations ^[2] 2:20 13:17 investing ^[1] 17:10</p>	<p>investment ^[4] 9:10 13:10 17:17 58:19 investments ^[4] 1:23 18:14 56:3,7 investors ^[3] 3:6 9:3 36:3 invitation ^[1] 30:6 invite ^[1] 90:4 invites ^[1] 18:6 inviting ^[3] 7:13 11:6 24:6 involving ^[4] 31:23 51:1 54:1 63:21 ironic ^[1] 75:8 issue ^[13] 11:9 12:13,15 45:5 48:2 52:20 55:17,22 57:6 58:2,4 62:13 85:1 issued ^[2] 40:20 93:25 issuer ^[3] 31:21 40:17,20 issues ^[2] 57:25 70:3 itself ^[8] 3:16 25:14 30:13,16 37:3 46:4 87:15 93:13</p>
J			
<p>idea ^[10] 36:2 62:1 71:8,10,18,19 79:5 88:23 90:1 94:21 ideally ^[3] 89:8,23 90:5 ideas ^[2] 77:17 92:11 identified ^[1] 18:12 identify ^[1] 7:23 illegal ^[11] 3:7 5:17 7:1 9:4 13:2,19,23 30:17 31:14,17 59:7 illiquidity ^[2] 42:18,20 image ^[1] 27:25 imagine ^[3] 40:6 54:11 81:2 immediately ^[4] 38:2 62:23 69:20 70:11 immune ^[1] 30:14 immunize ^[1] 30:15 immutable ^[1] 6:21 impact ^[3] 55:19 81:25 93:4 imperative ^[2] 26:19 93:25 implications ^[1] 93:10 important ^[22] 2:8 7:18 11:6,8,9,10 12:18 16:22 45:5 54:22 55:9 57:16 61:22 73:25 82:3,6 83:6</p>	<p>idea ^[10] 36:2 62:1 71:8,10,18,19 79:5 88:23 90:1 94:21 ideally ^[3] 89:8,23 90:5 ideas ^[2] 77:17 92:11 identified ^[1] 18:12 identify ^[1] 7:23 illegal ^[11] 3:7 5:17 7:1 9:4 13:2,19,23 30:17 31:14,17 59:7 illiquidity ^[2] 42:18,20 image ^[1] 27:25 imagine ^[3] 40:6 54:11 81:2 immediately ^[4] 38:2 62:23 69:20 70:11 immune ^[1] 30:14 immunize ^[1] 30:15 immutable ^[1] 6:21 impact ^[3] 55:19 81:25 93:4 imperative ^[2] 26:19 93:25 implications ^[1] 93:10 important ^[22] 2:8 7:18 11:6,8,9,10 12:18 16:22 45:5 54:22 55:9 57:16 61:22 73:25 82:3,6 83:6</p>	<p>idea ^[10] 36:2 62:1 71:8,10,18,19 79:5 88:23 90:1 94:21 ideally ^[3] 89:8,23 90:5 ideas ^[2] 77:17 92:11 identified ^[1] 18:12 identify ^[1] 7:23 illegal ^[11] 3:7 5:17 7:1 9:4 13:2,19,23 30:17 31:14,17 59:7 illiquidity ^[2] 42:18,20 image ^[1] 27:25 imagine ^[3] 40:6 54:11 81:2 immediately ^[4] 38:2 62:23 69:20 70:11 immune ^[1] 30:14 immunize ^[1] 30:15 immutable ^[1] 6:21 impact ^[3] 55:19 81:25 93:4 imperative ^[2] 26:19 93:25 implications ^[1] 93:10 important ^[22] 2:8 7:18 11:6,8,9,10 12:18 16:22 45:5 54:22 55:9 57:16 61:22 73:25 82:3,6 83:6</p>	<p>idea ^[10] 36:2 62:1 71:8,10,18,19 79:5 88:23 90:1 94:21 ideally ^[3] 89:8,23 90:5 ideas ^[2] 77:17 92:11 identified ^[1] 18:12 identify ^[1] 7:23 illegal ^[11] 3:7 5:17 7:1 9:4 13:2,19,23 30:17 31:14,17 59:7 illiquidity ^[2] 42:18,20 image ^[1] 27:25 imagine ^[3] 40:6 54:11 81:2 immediately ^[4] 38:2 62:23 69:20 70:11 immune ^[1] 30:14 immunize ^[1] 30:15 immutable ^[1] 6:21 impact ^[3] 55:19 81:25 93:4 imperative ^[2] 26:19 93:25 implications ^[1] 93:10 important ^[22] 2:8 7:18 11:6,8,9,10 12:18 16:22 45:5 54:22 55:9 57:16 61:22 73:25 82:3,6 83:6</p>
K			
<p>keep ^[1] 42:15 keeping ^[1] 67:24 Kerry ^[1] 12:7 key ^[2] 27:9 40:2 Khuzami ^[1] 3:25 kill ^[1] 64:21 killing ^[1] 18:18 kind ^[23] 13:19 20:7 49:11 50:20 51:9 56:12 61:12,24 62:24 63:13 70:25 72:23 86:23 87:3,7 88:18 91:2 92:24 94:8 96:4,11,16 98:7</p>	<p>keep ^[1] 42:15 keeping ^[1] 67:24 Kerry ^[1] 12:7 key ^[2] 27:9 40:2 Khuzami ^[1] 3:25 kill ^[1] 64:21 killing ^[1] 18:18 kind ^[23] 13:19 20:7 49:11 50:20 51:9 56:12 61:12,24 62:24 63:13 70:25 72:23 86:23 87:3,7 88:18 91:2 92:24 94:8 96:4,11,16 98:7</p>	<p>keep ^[1] 42:15 keeping ^[1] 67:24 Kerry ^[1] 12:7 key ^[2] 27:9 40:2 Khuzami ^[1] 3:25 kill ^[1] 64:21 killing ^[1] 18:18 kind ^[23] 13:19 20:7 49:11 50:20 51:9 56:12 61:12,24 62:24 63:13 70:25 72:23 86:23 87:3,7 88:18 91:2 92:24 94:8 96:4,11,16 98:7</p>	<p>keep ^[1] 42:15 keeping ^[1] 67:24 Kerry ^[1] 12:7 key ^[2] 27:9 40:2 Khuzami ^[1] 3:25 kill ^[1] 64:21 killing ^[1] 18:18 kind ^[23] 13:19 20:7 49:11 50:20 51:9 56:12 61:12,24 62:24 63:13 70:25 72:23 86:23 87:3,7 88:18 91:2 92:24 94:8 96:4,11,16 98:7</p>

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 301-384-2005

Committee on Homeland Security and Governmental Affairs
 Insider Trading and Congressional Accountability
 Thursday, December 1, 2011

<p>kinds [3] 62:19 92:2,5 Kirsten [2] 6:1 11:1 Klobuchar [1] 12:6 knowing [1] 86:21 knowledge [8] 12:22,23 16:6 32:15,19,25 79:23 86:24 known [1] 7:16 knows [2] 81:25 86:13</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>laid [1] 6:20 land [2] 80:19,23 lands [1] 18:20 Langevoort [30] 22:24 34:3 35:1,4 37:10 39:6,23 49:21 50:16,21,23 52:4 57:7,8 59:17 63:10,19 65:10 66:12 67:4 70:5,10 72:14,20 77:9,13,21 96:19,23 97:3 Langevoort's [1] 97:10 language [12] 14:1 19:6 36:25 39:25 40:12,22 50:20 63:24 65:12 66:19 72:15 97:20 large [2] 3:8 98:6 largely [2] 63:20 97:10 larger [1] 31:5 last [6] 30:10 32:4 36:23 42:17 86:17 93:2 Lastly [1] 13:8 lately [1] 6:17 later [2] 64:18 71:16 Laughter [8] 1:15 10:14,16 23:4 55:6 58:24 73:1 75:7 laundering [2] 77:17,17 law [9] 2:6,9,14 5:8,16,21 6:25 9:5 11:17 17:16,20 22:23,23,24,25,25 23:1,2,5 26:12 29:2 30:2,3,7,8,14,18,24 31:2 33:14,18 34:3,4 35:2,3,11,15 37:3 38:5,9,10 39:2,2,18,19 45:12 48:1 49:7,12,15,17,24 50:8,10 51:1,2 52:21 54:19,25 55:3,5,24 59:8,10,16,19 60:20 61:16,17 71:2,11 73:24 74:3 78:5 83:6,9,24 87:25 88:19 89:14 97:2 lawmakers [1] 8:3 lawmakers' [1] 11:21 laws [23] 2:17 3:23 5:5 7:11,23 8:5 9:17,21,23 16:18,19,23 19:14 25:14 26:15 41:22 43:7 49:14 60:2 63:12 84:12 88:2 89:15 lawyer [1] 43:7 lawyers [2] 73:2 88:10 lay [1] 94:1 laying [1] 85:24 lead [3] 6:3 83:23 86:22 leaders [2] 11:20 26:13 leadership [5] 10:3,4 11:4,5,7 leads [1] 50:11 leap [1] 51:12</p>	<p>learn [3] 2:16 11:14 71:21 learned [3] 62:22 63:1 73:9 learning [1] 7:17 learns [1] 80:9 least [4] 12:17 36:5 45:20 92:13 leave [6] 18:5 26:12 46:23 58:7 99:16,23 Leaving [1] 36:14 left [4] 7:9 18:6 61:24 74:9 legal [8] 5:20 9:14 19:21 35:13 45:24 65:5 83:8 98:24 legally [2] 8:4 36:11 legislate [4] 49:13 55:10 65:11 75:18 legislating [1] 59:14 legislation [42] 6:4,5 9:18 12:9,10 13:14,20 18:10 19:5,6 20:9,10,22 23:16 24:22 27:10 33:12,16 37:1 39:25 40:4,11,15 42:5,9 44:2 46:1 52:8,15 66:23 68:21 74:12 83:12 85:8,24 86:2,5,16,19 87:24 88:16,24 legislative [14] 10:6 19:5 22:10 26:3 35:6,24 36:4,25 39:14 41:24 48:9 63:1 74:1 81:4 legislatively [1] 99:10 legislators [1] 24:17 legislature [1] 76:11 lend [1] 87:2 less [5] 9:10 14:2 41:8 78:24 79:1 letter [1] 94:5 letters [2] 43:5 95:14 letting [1] 82:10 level [2] 58:16 95:5 liability [4] 31:20,22 32:6 40:4 liable [3] 30:20 57:22 63:18 lick [1] 82:17 Lieberman [55] 1:8,9,11,12,17 5:1 10:1,17 14:9 15:1 22:1,20 23:5 24:4 29:1 30:4 34:1 35:4 38:1 39:3 44:1 45:3 49:1 51:13 52:9,19 53:4 54:21 55:7 60:25 67:13 74:17 75:6 81:10,14,18 82:25 89:7 90:9,16 91:9 92:8 93:1,12,20 94:13,18,20 95:20 96:18,22,25 97:4,25 99:5 light [3] 11:8 35:18 88:12 likely [7] 17:17 30:25 32:4 36:10 40:6,17 54:18 limit [1] 56:3 limited [1] 26:9 limiting [2] 58:19 59:4 limits [1] 75:18 linchpin [1] 32:6 line [7] 20:4 27:20 51:14 63:7 71:9 86:7 90:23 lines [2] 66:18 80:25 list [3] 8:11 68:24 87:23</p>	<p>listed [1] 87:22 listen [2] 61:16 67:6 literally [1] 31:19 litigation [1] 63:21 little [10] 8:8 32:14 39:25 41:3 64:12 65:12 71:16 79:23 90:2,4 live [1] 16:23 living [1] 27:23 LLP [1] 45:2 lobbyists [1] 13:11 long [8] 6:17 27:11 57:18 62:18 77:23 85:16 92:18,23 longstanding [1] 12:12 look [12] 7:17 21:8 38:8 47:10 62:13 65:24 67:14 75:11 81:16,20 89:1 96:14 looked [1] 84:16 looking [7] 55:22 57:23 61:25 62:6,18 66:21 70:17 loophole [2] 12:8 19:25 loopholes [2] 7:24 9:19 lose [1] 70:2 loss [2] 27:8 94:11 losses [1] 17:16 lost [1] 65:3 lot [14] 6:16 20:25 38:5,5 54:25 62:16 64:1,16 70:2 74:7,16 75:11 85:18 94:6 Louise [1] 12:11 lousy [1] 64:14 love [1] 74:8 low [2] 8:7 16:21 lower [1] 31:18 lows [1] 6:12 loyalty [1] 51:5 lying [1] 92:2</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>mad [1] 71:5 made [7] 1:24 55:9 62:23 85:20 97:7 98:16 99:12 mail [7] 31:12 33:1,8 59:20 80:11,16 88:2 main [1] 35:10 maintain [3] 25:6 73:20 91:24 major [1] 13:4 majority [3] 20:1 31:13 89:9 malady [1] 31:5 manage [1] 69:3 managed [1] 98:5 manager [6] 98:9,14,20,21,24,24 mandatory [1] 82:6 manifestation [1] 31:5 manipulative [1] 3:1 manner [1] 21:5 many [19] 8:15 19:7,24 20:11 22:5 24:12,13,16 30:10,23 35:12 55:14 56:13 57:3,24 64:17 78:19,21 97:14</p>	<p>market [5] 8:25 40:21 65:23,25,25 marketplace [1] 87:15 markup [4] 10:8 22:13,15 70:18 Massachusetts [2] 6:2 16:3 master [1] 96:12 material [28] 3:13 20:5 30:21 32:9 33:5 41:11,14,19 43:8 46:7 47:19 50:2,13 52:15,23 56:21 57:20 63:18 65:7,15 74:4 80:2,9 85:2 87:7,11 88:13 93:19 matter [8] 8:15 9:20 10:11 36:9 56:16 66:8 69:10 74:2 matters [1] 36:16 Maurer [3] 22:23 30:2,7 maximum [1] 76:8 maze [2] 60:6,14 McCaskill [20] 1:9 12:6 83:2,3 84:5,24 85:7,14 87:12 88:5,8,15,23 89:7 98:2,3,15,18,22 99:5 mean [13] 17:18 59:3,4,10 61:20 63:6,8 77:19 78:19 79:22 82:7 84:20 90:20 meaning [1] 41:21 meanings [1] 41:10 means [7] 2:9 42:6 46:12 51:16 52:16 56:13 60:15 meant [2] 66:22,22 measure [1] 85:17 mechanism [3] 46:16 56:4 58:10 media [6] 20:17,19 26:1 62:5 66:8 74:15 meet [3] 22:12 65:25 67:10 meeting [2] 17:13 61:7 meets [1] 14:2 Melanie [4] 22:21 24:1 76:14 79:16 Member [43] 5:2 6:2 10:15 11:4 16:5 17:12 24:5 26:16,17,25 30:4,20 32:20,23 35:5 36:8,19 39:4 41:13,17 45:4 47:18 53:2 54:13 56:7 60:24 61:22 67:8,18 70:25 73:8 74:11 76:25 77:2 86:21 87:1 88:4 93:9 96:8 98:5,10,23,25 member's [4] 48:16,18,19 65:24 Members [108] 1:22 2:1,2,9,15,18 3:22 5:12,12,14,17,22 7:1,11,19 8:10 9:11 11:14,24 12:20 13:3,4,9,24 16:10,22 17:1,7,20 18:3,13,15,18,22 19:20 20:1 24:5,16,21 25:3,5,8,11 26:6,10,20 27:15 30:5 31:23 32:12 35:5,7,11 36:2,7 39:4 42:15,17,23 45:4,10,25 46:22 47:2,16 48:2,14 49:8,14 50:9,12 52:22,24 53:15 55:10,20 56:2 57:10 58:19 59:16 60:2 61:6 63:17 64:6,9 65:2,7,15 66:14 70:18,19 71:20 75:2,20 76:18</p>
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 301-384-2005

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 Insider Trading and Congressional Accountability
 Thursday, December 1, 2011

<p>78:22,25 83:13 85:23,24 89:14 91:1 93:5 94:3 95:13,23,25 members' [3] 32:14 64:15 65:22 memo [1] 95:23 memory [1] 1:13 mentioned [13] 2:19 44:5 49:16, 23 53:7,13 57:9 60:1 85:9 89:8 92:20 95:6,22 mere [2] 18:1 47:22 message [1] 63:16 met [2] 1:6 86:6 metaphor [1] 54:23 mid-1990s [1] 8:25 middle-class [1] 12:1 might [15] 26:24 41:11 42:20 56: 16,23 58:5 60:9,16 76:13,23 81: 17 83:18 84:19 87:2 92:12 mild [1] 94:4 military [1] 62:8 millionaires [1] 25:5 millions [1] 11:13 mind [3] 55:21 67:24 98:12 mine [3] 10:7 20:24 68:10 minute [2] 89:18 92:11 Minutes [5] 1:21 7:21 16:5,9 24: 11 misappropriated [3] 51:1 54:2, 5 misappropriation [9] 32:5,15 33:3 35:21 45:10 50:25 51:10 73: 7 97:9 misconduct [1] 24:15 mission [1] 13:21 mistake [1] 99:12 misunderstood [1] 66:23 misusing [1] 87:11 modification [1] 33:13 moment [2] 10:3 93:1 money [6] 1:24 77:17 79:23 86:8, 22 94:9 monies [1] 62:4 monitoring [1] 48:8 month [1] 32:4 months [1] 90:22 morality [1] 6:21 moratorium [2] 86:19,20 morning [1] 54:16 most [11] 2:16 25:12 38:4 40:5, 17 42:22 43:3 45:25 46:8 63:24 70:23 motherhood [1] 67:1 motivation [1] 33:11 move [7] 10:7 13:25 17:5 51:6 67: 15 83:17 92:8 moves [1] 57:22 moving [1] 57:10 Ms [42] 23:12 24:4 28:2 29:1 30:4 33:21 53:6 58:5 59:12 61:23 62: 15 64:4,12 70:13,14 72:25 73:4,</p>	<p>15 74:3 76:15 77:5 79:25 80:7, 20 81:2,7 83:21 87:21 88:7 89: 22 90:7,10,17 91:15 92:20 93:3, 15,21 94:16,19 95:21 97:5 much [32] 6:8 7:12 10:1,13 22:1, 18 31:5 33:19 34:1,4 39:7 40:13 58:6 67:2,14,17 74:8,16 79:20 80:12 82:16,25 83:13 84:8,25 90: 19 92:6 94:6 96:19 99:6,19,25 murky [1] 84:9 must [13] 6:12 7:22 8:20 12:24 13:18 14:6 18:2 19:9,25 27:9 36: 25 50:17 56:3 mutual [2] 56:3 57:14 myth [1] 30:13</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>Nagy [29] 22:22 29:2 30:1,4,6 33: 21 35:14 49:23 50:16 53:4,6 58: 1,5 59:6,12 70:13 72:25 73:4,15 77:5 79:25 80:7,20 81:2,7 87:21 88:7 97:4,5 name [2] 30:6 56:24 narrow [2] 6:7 37:5 narrowed [2] 53:9 90:10 narrowly [2] 39:9,10 national [2] 6:20 7:2 nature [2] 13:18 50:17 navigate [1] 60:5 near [2] 8:10 63:15 nearly [2] 8:25 57:13 neatly [1] 36:1 necessarily [2] 50:6,7 necessary [3] 3:5 42:19 96:6 need [31] 5:21 7:24 8:21 9:16 11: 19 16:17 17:22 20:24 26:20 39: 14 41:2 42:13 57:4 62:13 64:19 71:25 72:1 75:15,19 76:10 82:14, 21,21 83:24 85:8,11,12 86:1,15 87:16 91:25 needed [4] 5:20 20:23 69:3 81: 12 needs [7] 2:11 5:8 20:25 42:7 65: 1 76:18 91:20 negotiate [1] 19:5 negotiation [1] 78:24 neighbors [1] 81:24 neither [2] 52:4 68:16 Nelson [1] 12:7 nests [1] 24:14 never [8] 25:4 31:2 32:23 46:11 47:16 59:1 60:3 65:1 New [10] 6:1,18,25 11:2 16:5 20: 19 42:5,6 88:9 98:9 News [4] 14:4 17:16 24:11 26:11 newspaper [1] 14:4 next [5] 8:18 34:3 38:9 54:16 60: 18 Nobody [2] 12:3 86:25</p>	<p>nodding [2] 22:3 72:24 non-public [1] 11:15 None [2] 42:7 86:6 nonexclusive [1] 73:15 nonprofit [1] 69:11 nonpublic [35] 3:13 17:2,9 18:4 19:1 20:5 30:21 32:9,19,24 33:5 41:11,14,19 43:8 45:16 46:7 47: 19 50:2,4,13 52:16,23 57:20 60: 24 63:18 65:8,16 80:3,9 85:2,2 87:7,11 88:14 nodded [1] 77:19 nor [1] 52:4 normal [3] 9:7 50:6,7 normally [2] 50:4,20 Notably [2] 25:17 42:22 note [1] 22:3 noted [1] 14:5 nothing [2] 40:11 63:14 notice [1] 6:23 10 notified [1] 58:16 notion [1] 95:11 now-discredited [1] 53:21 number [2] 23:15 63:20 numerous [1] 24:17</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O'Hagan [1] 53:10 oath [3] 32:12 75:6 96:15 obligation [2] 72:9 78:9 obligations [1] 95:3 obstacle [3] 45:16,17 85:3 obtain [3] 5:4 63:4 93:17 obtained [9] 3:14 17:9 27:8 30: 21 32:2 52:23 57:3 63:3 96:2 obviously [13] 16:9 17:4,7 20:17 38:3 49:15 54:22 79:6 85:14,16 87:4 89:25 98:22 occurring [1] 92:19 occurs [1] 92:14 offended [1] 58:25 offense [1] 31:7 offer [2] 11:6 38:2 offered [1] 12:8 offering [1] 99:12 Office [14] 1:7 8:1 26:4 32:12,20 46:24 47:21 66:5,6 68:3,13 69:2 95:2,2 offices [3] 32:11 70:3 76:2 official [5] 40:7 46:8 80:14 88:3 96:3 officials [5] 18:25 19:22 32:2 33: 2 60:22 often [9] 6:17 25:18 27:13 57:3 60:6 77:13 78:2 90:17 91:7 Okay [10] 42:17 54:21 75:5 77:4 81:8,14 93:1 94:20 96:18 99:2 old-fashioned [2] 83:8 88:6 older [1] 10:13</p>	<p>once [6] 19:17 90:3,21 91:12,17 92:1 one [49] 9:22 17:24 23:3,13 24:11 26:17 30:10 31:5 33:10 39:9,21 40:2,15 41:18 51:22 52:3,5,9 53: 13,17 54:2 59:12,14 66:11 67:4, 5,24 68:16 69:8 71:9 72:25 73:3, 11 77:1,19 79:15 80:1,9 81:2,3, 24 83:7,17 84:6 87:16 89:17 91: 9 97:11 98:3 one-liner [1] 71:20 one-sentence [2] 41:12,13 online [9] 68:11 69:4,11,13 75:25 82:9,10,12,12 only [28] 5:4 6:14 11:22 13:2 19: 2 25:6,13 26:17 27:2 31:4,14 33: 14 36:10 50:2 52:2,14,23 58:10, 12,14 59:16 67:5 70:20 74:9 91: 23 93:8 94:4 98:11 open [4] 84:21,25 94:11 99:23 OPENING [3] 1:11 7:6 17:21 operate [1] 82:3 opinion [7] 5:10 43:6 49:6 56:10 57:2 64:5 91:8 opportunities [2] 20:20 58:19 opportunity [4] 33:19 45:5 47:9 56:8 opposed [2] 40:24 80:4 opposition [1] 71:6 option [1] 74:9 options [1] 40:18 order [5] 1:19 55:13 61:1 64:4 97: 8 ordinary [4] 36:3 60:13 88:18 97: 17 organization [2] 23:12 24:15 original [1] 49:12 other [38] 5:7 8:9 9:3,24 13:9 23: 15 24:5 26:13 30:25 32:1 38:7,7 39:4 48:1 50:8 51:17,23 52:3 53: 16,17,20 54:3 55:2 57:11 63:25 69:1 72:21 82:2 84:2 87:1 88:24 89:16 92:11 94:2 95:10 98:2,5,7 others [7] 3:12 13:20 24:25 32: 17 72:6,12 78:1 otherwise [5] 17:10 18:7 32:18 65:22 66:7 ought [5] 5:16 78:22 82:8,9,10 ourselves [2] 67:10 81:20 out [37] 2:23 5:19 9:3 10:11 16:6 18:16 20:20 39:7 45:13 50:24 53: 10 55:15 61:24 62:9,21,23 63:25 68:2 71:3,5,13 73:15 74:1 76:20, 25 77:18 78:9,10 81:12,13 82:8 84:21 85:24 86:3 91:7 94:1 97:2 outperformed [1] 8:25 outset [2] 44:5 57:9 outside [3] 45:25 61:10 69:11 outsider [2] 31:23 32:1</p>
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Committee on Homeland Security and Governmental Affairs

Insider Trading and Congressional Accountability

Thursday, December 1, 2011

<p>over ^[1] 2:21 9:2 18:15 64:14 80:24 83:4,25 89:12 94:9 99:1,21 overall ^[2] 48:19 98:12 overbroad ^[2] 37:5 56:18 overcome ^[1] 85:3 overruled ^[1] 51:25 oversee ^[1] 25:20 overseeing ^[1] 56:6 oversight ^[5] 13:6,12 40:14,14 72:11 owe ^[3] 53:15 54:14 85:23 owes ^[1] 60:8 own ^[15] 8:22 11:23 13:1 18:21 19:10 24:14 26:8 48:16 56:24,24 62:3 77:14 79:17 80:23 81:4 owner ^[1] 35:23 owns ^[1] 98:16</p>	<p>6 68:9 69:6,7 70:2 71:6,13,17 75:14 81:20 82:11 86:9,11 people's ^[2] 6:9 14:5 per ^[1] 9:1 perceived ^[1] 8:11 percent ^[8] 8:8 9:1 24:9 25:4,5 27:22,24 82:16 perception ^[3] 25:8 37:2 59:25 Perceptions ^[2] 2:8 75:3 perform ^[1] 65:23 performance ^[3] 41:15 46:12 65:25 performing ^[2] 9:7 96:2 perhaps ^[8] 25:15 27:6 58:20 69:2 76:21 79:1 95:12,13 period ^[6] 38:8 58:15 77:23 91:18 92:17,19 periodic ^[2] 62:2 92:24 perk ^[1] 32:19 permanent ^[1] 86:20 permits ^[1] 42:22 permitted ^[1] 27:10 person ^[14] 36:9,20 41:15,16 46:10 49:25 50:1,2 51:8 56:6 57:23 59:1 73:8 79:17 person's ^[2] 41:16 90:18 personal ^[15] 2:10 5:23 11:25 17:11 18:24 19:10 20:5 24:18 25:10 27:17 55:3 79:16,17 90:7 96:1 personally ^[2] 24:8 86:14 persons ^[1] 35:12 perspective ^[2] 56:10 81:16 pertaining ^[1] 18:4 Peter ^[2] 1:20 18:16 phone ^[1] 61:10 physical ^[1] 80:10 pick ^[1] 61:10 piece ^[3] 16:6,9 19:18 place ^[3] 8:1 84:21 95:5 places ^[1] 41:2 plan ^[5] 42:24 56:5,12,22 57:2 plans ^[1] 56:15 play ^[4] 11:20,20 21:7 40:22 Please ^[2] 23:17 81:18 pled ^[1] 32:3 pockets ^[1] 20:4 point ^[20] 6:7 9:3 33:10 39:9,15, 21,24 41:8 42:17 53:20 55:9 60:18 62:21 70:12 73:23 77:12 78:4 79:14 82:7,7 points ^[2] 39:8 41:7 police ^[1] 26:9 policies ^[4] 79:18 80:6 82:5 95:3 policing ^[2] 19:23 48:8 policy ^[6] 6:20 7:2 19:3 55:13 75:18 81:23 political ^[2] 13:8 36:10 politically ^[1] 19:22 politician ^[1] 80:14</p>	<p>politics ^[1] 21:7 poll ^[1] 8:8 polls ^[1] 8:9 pool ^[1] 48:15 portfolio ^[1] 65:24 portfolios ^[4] 8:24 9:11 25:6 65:23 position ^[3] 2:10 46:8 86:13 positions ^[4] 24:13,17 25:9 86:10 possess ^[1] 57:20 possession ^[1] 57:21 possibilities ^[1] 72:21 possibility ^[3] 57:10 73:11 91:14 possible ^[10] 7:24 33:10,16 35:14 57:13 66:18 79:8 80:1 89:3, 16 possibly ^[1] 52:25 Post ^[2] 25:22 27:15 potential ^[5] 48:7,8 59:12,21 72:1 potentially ^[5] 47:23 60:10,17 62:12 75:16 power ^[2] 17:25 63:12 powerful ^[1] 36:9 practical ^[1] 84:3 practically ^[1] 8:4 practice ^[2] 65:20 73:19 practices ^[1] 53:18 precaution ^[1] 56:17 precedent ^[3] 38:5 80:13 88:10 precise ^[2] 30:11 72:15 precisely ^[1] 5:20 predecessor ^[1] 39:6 predisposed ^[1] 96:20 preeminence ^[1] 6:22 preface ^[1] 55:21 preferred ^[1] 48:7 premise ^[1] 66:2 prepared ^[9] 3:25 14:11 21:10 28:2 33:21 37:10 43:12 48:21 55:5 prescribe ^[1] 3:4 Present ^[1] 1:9 presented ^[1] 9:18 preserving ^[1] 27:22 Presidential ^[1] 25:17 presiding ^[2] 1:8 83:4 press ^[3] 7:21 8:2 64:17 pressures ^[1] 36:12 presumably ^[1] 90:3 presume ^[1] 91:10 presumed ^[1] 73:16 presumption ^[1] 53:14 pretty ^[8] 58:22 63:15 64:14 83:6 84:21 85:4 89:12 90:23 prevail ^[1] 50:7 prevent ^[5] 2:6 7:11 26:24 55:25 92:13</p>	<p>prevention ^[1] 89:20 previous ^[1] 90:22 price ^[1] 81:25 prices ^[1] 43:2 prima ^[1] 62:12 primary ^[1] 35:20 principal ^[2] 51:7 96:13 principle ^[2] 73:25 79:6 principles ^[2] 6:21 12:19 prison ^[3] 32:4 54:4,7 Privacy ^[2] 72:3,6 private ^[5] 6:21 8:2 46:13 63:21 84:9 privilege ^[1] 46:3 probably ^[8] 22:9 45:16 78:6,22 82:16 85:5,9 91:15 problem ^[23] 6:4 9:22 10:4 18:11 23:17 37:1 38:6 42:14,20 53:1 74:5 78:6 80:8,8 81:5 82:23 89:13,21 93:7 94:2,24 99:9,10 problems ^[12] 8:19 37:7 38:7 43:3 45:13 76:9,23 78:9 82:23 83:22 84:3 86:3 proceed ^[2] 23:17 43:9 process ^[2] 22:2 46:17 processing ^[1] 69:6 product ^[1] 14:2 products ^[1] 40:19 professor ^[45] 9:9 18:13 22:23, 24,25 29:2 30:2,7,8 34:1,3,3 35:2,14 38:1,9 39:2,6,22 49:21,21, 23 50:16,21 51:13 52:4 53:4,7, 13 55:9,23 57:6,6 58:1 59:6,17 63:10 64:24 65:10 66:12,12 72:14 78:14 97:4,10 professor's ^[1] 9:13 Professors ^[7] 18:11 39:11,12 50:16 55:4 74:3 78:5 profit ^[7] 17:2,15 27:8 36:3 46:13 78:1 94:11 profiting ^[4] 7:19 32:8 46:6 72:17 profits ^[1] 11:25 program ^[2] 17:13 81:23 prohibit ^[3] 9:5 31:9 95:25 prohibited ^[2] 11:17 27:5 prohibiting ^[2] 8:5 20:4 prohibition ^[7] 2:17 31:6 57:1 60:4,11,14 64:22 prohibitions ^[2] 3:24 45:9 prohibits ^[2] 30:14 31:3 project ^[2] 86:22 87:8 projects ^[2] 18:19 24:18 promised ^[1] 73:20 promulgated ^[1] 53:13 prong ^[2] 73:18,19 proof ^[5] 45:13,15,24 85:5,5 property ^[6] 33:4,6 80:3,5 81:1 96:11</p>
P			
<p>p.m ^[1] 1:6 page ^[3] 42:12,13 69:17 painting ^[1] 54:24 panel ^[8] 22:16,20 24:7 38:10 56:11 75:2 92:11 99:7 panelists ^[1] 26:13 panelists' ^[1] 81:15 paragraph ^[6] 46:9 47:3,13 94:25 97:21,24 parents ^[1] 53:15 part ^[6] 25:20 27:21 46:22 70:20 95:7,24 partially ^[1] 51:25 participated ^[2] 51:16 68:3 particular ^[6] 40:21 45:15 58:16 87:8,9 98:10 particularly ^[6] 26:3 49:20,22 50:15 64:16 65:23 parties ^[1] 78:25 partner ^[3] 51:1,4 54:2 parts ^[2] 95:21 99:20 pass ^[9] 13:13,21 16:24 26:19 40:8 80:6 83:11 84:12 86:5 passed ^[1] 84:12 passing ^[6] 16:19 27:24 52:8 59:9 66:17 71:2 past ^[3] 13:17 64:14 79:1 path ^[1] 11:10 pattern ^[1] 73:19 patterns ^[1] 53:18 paying ^[1] 66:10 penalties ^[2] 42:3 94:16 penalty ^[3] 27:7 94:8,9 pending ^[2] 40:4,15 pensions ^[1] 25:12 Pentagon ^[1] 25:24 people ^[35] 2:11,16 6:13 7:4 8:21 11:19 13:14 16:17 18:3,8 20:3, 18 21:6 24:12 39:11 41:4 54:15 58:11 60:13 62:18 63:8 64:12 66:</p>			

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301-384-2005

Committee on Homeland Security and Governmental Affairs
 Insider Trading and Congressional Accountability
 Thursday, December 1, 2011

<p>proposal [2] 22:11 52:10 proposals [1] 10:6 proposed [10] 7:15 33:12,15 39:25 40:2,4,15 42:13 48:10 69:17 propriety [1] 48:19 proscribe [2] 5:9 35:7 proscribed [1] 35:13 proscribes [1] 35:16 prosecute [9] 3:20 33:1 39:17 49:8 62:25 65:7 83:19 84:7,19 prosecuted [9] 31:7 32:24 64:6 80:11,16 92:6,21 93:9 97:17 prosecutes [1] 31:11 prosecuting [2] 45:20 65:15 prosecution [9] 17:24 26:16,25 64:21 65:1 74:6 88:21 93:5 96:17 prosecutions [8] 2:20 19:19 53:22 65:17 66:2 83:23 97:15,16 prosecutor [4] 45:12 63:2 84:6 93:16 prosecutors [3] 36:19 64:22 84:14 protection [2] 3:6 56:13 protections [1] 25:15 proved [1] 30:22 proven [1] 41:25 provide [10] 12:25 13:11 27:2 46:5 47:4,9 65:14 67:22 87:18 92:21 provided [1] 95:8 provides [1] 19:21 providing [1] 13:5 provision [3] 46:15,20 47:5 provisions [6] 2:23 31:9 33:8 48:10 53:17 92:15 public [46] 2:8,10 3:5 5:23 8:1,8,13,16 16:11 17:1,9 18:15,23 19:12 23:15 24:14 25:8 32:11,16 33:3 48:9,11 55:11,13 59:25 68:3,19 69:2 70:6 74:15 83:10,15 84:8,10,12,13,22 85:6,21 86:3,5,12,22 87:3 91:8 92:16 public's [7] 7:25 8:6,14,21 19:9 20:21 25:1 publicly [2] 84:13,23 published [2] 8:23 30:10 punctuality [1] 1:18 punish [1] 2:6 punishable [1] 27:18 punishes [1] 5:18 purchase [7] 3:1 31:10 60:15 80:4,4,10 98:12 purchased [1] 62:4 purchases [2] 85:20 98:4 purchasing [1] 80:5 pure [3] 6:20 56:16 86:24 purpose [4] 2:3,5 9:15 38:3 purposes [4] 17:10 46:19 73:7</p>	<p>83:9 purse [1] 19:24 pursuant [6] 1:6 2:23 3:8 27:1 56:5 93:13 pursue [2] 49:8 95:15 pursued [3] 36:17 47:23,25 pursuing [1] 47:6 push [1] 63:22 pushing [2] 24:22 40:8 put [15] 21:4 22:17 54:9 55:24 58:13,14,18 69:11,12 78:13 86:2,22 91:5 97:11,21 putting [2] 8:22 71:1</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify [1] 59:2 question [22] 1:22 10:9 36:14 49:22 50:24 51:9 52:10 57:10 60:19 66:1,11 68:4,25 69:12 77:24 79:9 83:17 85:6 95:20 97:23 98:3,13 question-and-answer [1] 38:8 questioning [1] 49:2 questions [13] 8:3 19:19 21:9 23:3 34:2 68:8 81:10,11 88:17 89:11 93:2 98:2 99:24 quick [1] 62:17 quickly [9] 17:6 57:4 58:3 67:15 68:18 86:4 91:5,7 92:14 quintessential [1] 51:3 quite [7] 16:25 25:1 38:10 40:1 57:3 61:17 82:5 quote [5] 2:25 3:21 6:19 7:8 95:24</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raise [2] 36:20 88:17 raised [1] 1:21 ranges [2] 90:8,17 Ranking [12] 11:4 16:4 24:4 30:4 35:4 39:3 45:4 61:22 67:8,18 70:25 74:11 rarely [1] 64:15 rate [3] 8:10 25:2 72:7 rather [7] 8:18 41:9 77:3 88:12 91:16,18 97:6 rating [1] 82:16 re-establish [1] 16:17 reach [3] 8:4 33:16 55:13 reached [2] 49:5 55:15 reaching [1] 96:14 reaction [2] 50:6,7 read [3] 3:9 37:3 88:1 reading [2] 6:16 35:19 real [12] 10:4 18:18 19:6 24:19 42:14 61:13 79:8,16,17 80:2,3,10 real-world [1] 61:14 realities [1] 6:8</p>	<p>reality [1] 87:19 realize [1] 59:10 really [22] 10:3 19:17 49:24 51:18 56:23 58:10,14,17,22 67:21 74:5,9,13 75:18 77:15,19 82:22 90:18 91:4,25 93:18 94:6 reason [9] 1:12 39:19 52:21 56:22 70:15,17 80:12 91:4 92:20 reasonable [4] 39:11,11,12 95:19 reasonably [1] 82:11 reassure [1] 86:14 rebuild [2] 64:4,9 rebuttable [1] 53:14 receive [5] 40:3 52:13 72:5 80:21 86:8 received [3] 12:17 27:1 64:16 receives [1] 41:16 receiving [2] 40:24 95:14 recent [7] 1:20 7:21 8:2,6,7 9:9 18:16 recently [4] 14:4 35:8,18 65:3 recognize [3] 12:14 32:23 56:20 recommendation [1] 44:4 recommendations [1] 9:17 reconciled [1] 41:1 record [10] 1:17 3:18,25 22:3 60:19 71:1 78:13 84:8,11 99:23 Records [1] 69:3 recusal [1] 48:5 redefine [1] 88:13 redefined [1] 88:16 Reed [1] 12:7 reference [2] 40:16 57:9 referenced [6] 16:12,16 17:21 18:12 19:15 65:2 referred [1] 6:5 refers [1] 32:11 reflect [1] 47:17 reflecting [1] 47:24 reflects [2] 37:8 82:19 reform [1] 64:8 reforms [1] 5:20 refused [1] 25:24 refuses [1] 26:8 regard [5] 20:14 40:24 86:15 90:6 92:10 regarding [2] 95:3,18 regardless [3] 47:25 79:19 83:10 register [1] 13:11 regularly [1] 56:21 regulation [1] 56:18 regulations [1] 3:4 regulators [1] 5:21 regulatory [2] 3:8 85:12 Rein [2] 23:6 45:2 relate [2] 40:3 72:16 related [1] 26:19</p>	<p>relates [1] 33:10 relating [1] 47:11 relationship [16] 35:22 50:13 51:3,19,21,23 52:2 53:11 54:3,7 63:8 73:17 96:11,16 97:8,18 relationships [2] 54:2 61:5 relatively [2] 23:9 46:25 relatives [1] 31:25 released [1] 95:23 relevant [1] 6:19 reliable [1] 43:10 rely [1] 43:6 remaining [1] 27:24 remedies [1] 48:7 remember [3] 23:2 52:9 67:19 reminds [1] 61:17 remotely [1] 26:18 repair [1] 7:3 repeatedly [2] 32:11 63:21 repercussions [1] 62:16 report [2] 98:8,12 reportable [1] 99:2 reported [1] 66:7 reporter [1] 90:25 reporting [1] 13:7 reports [6] 7:21 18:17,24 25:25 27:17 70:22 represent [1] 6:14 representative [2] 32:22 72:11 representatives [1] 6:10 reprimand [1] 94:4 republic [1] 6:11 request [1] 21:3 requested [1] 15:3 requesting [1] 12:14 require [5] 25:25 41:18 48:11 70:8 79:6 required [6] 13:4 25:18 49:24 68:21 76:2,17 requirement [1] 91:12 requirements [2] 13:7 89:23 requires [3] 35:21 47:7 68:16 requiring [2] 25:17 90:2 requisite [2] 53:19 54:18 research [4] 30:19 49:4 87:13,19 researched [1] 10:10 resigned [1] 77:2 resistant [1] 70:17 resolution [5] 21:1 22:9 66:15,20,24 resolve [1] 37:7 resolved [1] 49:20 resolving [1] 42:6 resources [4] 69:2 79:7 87:8,18 respect [13] 6:24 36:22 41:14 47:11 51:25 57:13,16 71:21 72:9 78:2 87:21 88:20 94:24 respectfully [2] 19:16 40:1 respond [1] 91:10</p>
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 Insider Trading and Congressional Accountability
 Thursday, December 1, 2011

<p>response ^[3] 53:11 89:13 97:10 responses ^[3] 64:18 89:16 96:10 responsibilities ^[1] 55:19 Responsibility ^[4] 22:22 23:14 24:2 63:7 responsible ^[1] 39:16 responsive ^[1] 77:24 rest ^[1] 71:9 restore ^[1] 14:7 restoring ^[1] 11:10 restrained ^[2] 39:20 63:11 restrictions ^[2] 25:21 37:4 result ^[5] 5:4 16:7 27:2 36:4 54:4 results ^[1] 9:4 return ^[2] 76:22 77:1 returns ^[1] 9:10 review ^[2] 93:19 99:13 REYNOLDS ^[1] 35:2 richer ^[1] 25:4 ridiculous ^[1] 70:24 rightfully ^[1] 32:9 rigorous ^[1] 85:4 rise ^[1] 96:15 risk ^[5] 33:15 59:14,22,24 60:16 Robert ^[5] 23:6 44:5 45:1 78:12 82:7 role ^[2] 21:7 27:2 roles ^[1] 36:4 Room ^[2] 1:7 78:24 root ^[1] 88:5 round ^[1] 60:18 rounds ^[1] 49:3 route ^[2] 57:18 78:1 routinely ^[3] 31:22 53:21 76:19 Rubio ^[1] 12:5 rule ^[20] 30:25 31:8,12 33:8 35:15,19 42:22 48:1 53:13,14,16 57:17 59:19 63:13,17 73:13,15 88:1 95:6,7 ruled ^[2] 51:16,20 rulemaking ^[1] 78:10 rules ^[4] 3:7,11,16 5:5 11:17,20 12:3 13:1,23 16:18 19:14 20:24 22:10 26:9 27:5 42:21 46:21,23 47:1,10 64:8 65:14 67:23 73:14 77:11,11 83:12 85:21 90:14 92:9,13 93:3,7,23 94:14,15,23 95:3,5,18,25 rules" ^[1] 3:3 ruling ^[1] 54:17 rulings ^[1] 55:1 run ^[2] 19:18 78:2</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>safe ^[5] 42:11,13 57:1,1 78:10 safety ^[1] 25:15 sale ^[4] 3:1 31:10 60:15 98:12 sales ^[1] 98:4</p>	<p>salute ^[1] 67:1 same ^[12] 9:12 11:20 16:18,23,25 25:13 51:14 64:10,10 73:24 80:8,12 sanctioning ^[1] 46:5 sanctions ^[1] 42:4 satisfied ^[1] 52:17 saw ^[1] 76:23 saying ^[9] 39:8 40:7 60:13 62:12 63:12 65:10 77:23 87:6 99:8 says ^[9] 12:20 55:4 57:18 59:18 65:22,22 71:14,20 83:11 scale ^[1] 97:12 scenario ^[3] 62:21 77:2 80:1 scenarios ^[1] 33:17 scenes ^[1] 78:22 scheduled ^[1] 22:15 schedules ^[2] 75:25 82:10 schemes ^[1] 77:22 scholars ^[2] 30:24 66:13 school ^[15] 5:10 22:23 23:1,2,5 29:2 30:2,8 38:10 39:2 55:5 61:16,17 71:11 83:9 Schweizer ^[2] 1:20 18:17 scope ^[2] 9:16 47:11 score ^[1] 17:15 Scott ^[3] 6:2 12:14 16:1 Scout ^[2] 96:14 97:20 SD-342 ^[1] 1:7 search ^[2] 70:23 91:2 searchable ^[10] 27:16 62:20 68:17,23 71:6 75:25 82:9,13 90:25 91:5 SEC ^[20] 3:8 5:14 12:24 17:24 27:3 30:22 36:18 42:21 43:4 49:6,7 51:25 56:5 64:25 65:3,5,7 78:7,9 83:10 SEC's ^[1] 97:19 second ^[8] 5:10 22:16,20 51:15,20 53:8 58:4 71:8 Secretary ^[1] 60:23 secretly ^[1] 32:8 secrets ^[1] 35:25 section ^[5] 2:25 3:9 31:8 35:19 73:22 Securities ^[39] 2:21,24 3:13,19,23 5:5 12:22 26:12 30:20,24 31:3,21 32:7 35:16 40:17,19 41:21 43:7 46:6 47:18 48:3,11 53:8,12,22,24 54:9 60:2,16 63:21 73:12,21 77:14 80:4 81:3 85:22 88:2,4 97:14 Security ^[3] 1:4 3:1 31:10 see ^[19] 21:6 22:16 30:24 36:23 40:6,18 52:5,5 53:24 60:10 72:23 76:15,22 78:14 81:7 84:15 91:1 93:17 97:1 seek ^[1] 55:12 seeks ^[1] 37:2</p>	<p>seems ^[4] 2:9 6:19 79:20 84:6 seen ^[9] 24:16 27:11 65:1,16 70:2,24 72:14 77:21 94:2 segment ^[1] 16:10 seized ^[1] 10:3 self-serving ^[1] 32:14 sell ^[2] 17:15 61:10 selling ^[2] 12:22 98:10 sells ^[1] 5:3 Senate ^[39] 1:3,7 6:4 12:4 21:1 22:9 23:8 25:17,18,24 27:4 35:9 44:7 46:21,23 47:1,9,17,20 64:7,13 65:13 66:15,20,24 68:10 69:12 76:2 78:16 82:18 83:4 89:17 90:14 91:24 92:9,10,12 93:3 94:24 Senator ^[129] 1:13,16 6:2 7:5,6,7,13,14,16,17 10:1,2,2,7,11,13,15,17 11:2,3 12:14 14:11 15:1,2,5 16:2,4 19:15 21:10 22:1,3,7,19 39:15 49:3 53:6 55:2,7,8 57:5 58:1,8,9,25 59:5 60:18,25 61:1,2,2,2,3 62:7 63:6,19 64:3,24 65:13 66:11,20,24 67:3,6,13,16,17 69:5,14,18,21,24 70:2,8,12,15 71:24 72:19,23 73:2,14,23 74:10,17,18,19,20,22,24,25 75:1,8 77:4,8,12,18 78:4,12,18 79:14,25 80:5,18,23 81:6,8,11,15,19 82:25 83:2,3,21 84:5,24 85:7,14 87:12 88:5,8,15,23 89:7,25 98:2,3,15,18,22 99:5 senatorial ^[1] 9:7 Senators ^[14] 1:9 6:1 8:25 9:2,6 10:10 12:5 14:9 25:4,20,22,25 72:2 75:19 send ^[1] 69:6 sending ^[2] 6:13 63:15 seniority ^[1] 10:12 sensational ^[1] 26:11 sense ^[2] 92:25 99:7 sensitive ^[1] 51:18 sensitivity ^[1] 36:10 sent ^[1] 71:4 sentence ^[6] 32:4 41:18 52:10 54:8 72:25 73:6 sentences ^[2] 72:15 73:3 separate ^[5] 22:8,9,10 50:8 91:16 series ^[1] 93:2 serious ^[3] 1:21 26:6 79:12 seriously ^[2] 10:6 26:22 serve ^[1] 20:2 service ^[14] 2:8 8:1 12:23 17:10 30:22 32:3 36:21 46:9,10 58:23 73:10 80:10,15 95:1 Services ^[3] 25:23 62:7 67:12 sessions ^[2] 78:20,20 set ^[6] 22:11,15 49:24 53:10 91:22 92:1</p>	<p>sets ^[1] 73:15 settings ^[1] 51:6 settlements ^[1] 54:1 settles ^[1] 60:12 Seven ^[2] 8:23 12:18 several ^[1] 41:2 severe ^[1] 25:3 severely ^[1] 63:11 shades ^[1] 30:24 share ^[4] 9:13 33:20 88:24 96:19 shareholders ^[1] 50:4 shares ^[1] 98:17 Sherrod ^[1] 12:7 shielding ^[1] 9:23 shine ^[1] 11:8 shining ^[1] 11:8 shocked ^[1] 54:15 short ^[5] 6:1 23:9 42:12,15 92:23 shortage ^[1] 69:2 shorten ^[1] 85:15 should-be-illegal ^[1] 56:1 shouldn't ^[1] 69:12 show ^[2] 8:9 18:1 showed ^[2] 8:24 9:9 showing ^[1] 35:21 shows ^[1] 8:8 siblings ^[1] 53:15 side ^[6] 21:2,2 51:22 52:3 81:3 82:2 sift ^[1] 93:17 significant ^[7] 8:19 19:2 25:6 27:13 86:3 93:22 94:10 similar ^[5] 9:9 12:9 20:9 75:21 81:2 similarities ^[1] 22:6 simple ^[6] 41:12 42:16 68:6 71:12 73:4 94:15 simpler ^[1] 68:7 simply ^[9] 9:20 12:2 52:12,21 57:17,22 77:25 92:20 96:21 since ^[6] 60:22 61:23 68:2 86:24 87:17 91:21 single ^[2] 57:11 68:2 singlehandedly ^[2] 86:21 87:18 sitting ^[2] 70:19 99:8 situation ^[6] 54:11 61:25 63:5 76:24 77:3 81:3 situations ^[4] 41:6 57:3 61:14 73:16 sixth ^[2] 87:23,23 Sixty-six ^[1] 25:4 skepticism ^[1] 8:21 sky ^[1] 25:2 Slaughter ^[3] 12:11 20:12,13 Sloan ^[27] 22:21 23:12 24:1,4 28:2 29:1 61:23 62:15 64:4,12 70:14 74:3 76:15 83:21 89:22 90:7,10,17 91:15 92:20 93:3,8,15,21</p>
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Committee on Homeland Security and Governmental Affairs
 Insider Trading and Congressional Accountability
 Thursday, December 1, 2011

<p>94:16,19 95:21 small [4] 7:3 10:11 41:6 67:5 smart [1] 58:22 smarter [2] 78:5,14 Snowe [1] 12:5 So-and-so [1] 62:7 soft [3] 70:15 94:3 95:15 sold [4] 3:12 58:15 62:4,5 solution [5] 58:6 64:19,20 66:14,19 solve [3] 43:3 74:5 99:10 solved [2] 59:22,22 somebody [10] 32:10 71:4 77:9 82:18,18 87:18 90:25 91:22 93:18 94:4 somehow [3] 30:14 65:20 66:2 someone [6] 35:25 68:13 70:22 84:15 86:23 98:16 sometimes [4] 20:7 60:9 68:7 74:8 somewhere [1] 71:3 soon [5] 10:3,8 15:3 24:19 26:20 sort [2] 5:19 92:6 sorts [1] 17:23 sought [2] 30:12,15 sounding [1] 97:20 sounds [2] 3:3 74:24 source [2] 50:4 73:17 sources [1] 19:1 special [2] 42:10,21 specific [10] 3:7 27:6 47:1 48:1 62:2 77:6 91:1 92:17 94:7 95:2 specifically [7] 2:2 5:9 61:6,13 72:17 85:24 95:7 Speech [10] 26:5,23 45:22 46:2 62:24 64:20 74:5 83:22 93:4,8 spelled [1] 97:2 spend [4] 40:13 42:5 90:4 93:1 spoke [1] 90:25 spoken [1] 13:16 spousal [1] 54:3 spouses [2] 31:24 53:15 Stabenow [1] 12:6 staff [24] 5:12 11:15,24 12:21 13:25 19:20 20:1 23:7 33:11 35:11 36:7,9,19 37:7 44:7 46:23 47:16 48:14 49:9 58:20 65:2,7 67:9 95:24 staffer [1] 5:3 staffs [8] 3:22 5:22 13:9 35:8 36:2 47:3 50:12 89:15 stand [1] 97:8 standard [9] 16:25 22:11 27:23 47:15 52:4 54:6,6 64:10 65:5 standards [2] 8:12 46:4 standing [1] 27:5 standpoint [1] 75:23 start [5] 52:15 61:18 76:13 88:9 89:22</p>	<p>started [1] 55:23 state [9] 2:14 11:2 14:4 16:2 32:1 36:6 49:15 65:4 85:23 STATEMENT [21] 1:11 3:17,25 7:6 14:11 21:10 28:2 33:21 37:4,10 43:12 48:21 59:18 64:2 79:21 87:24 92:4,5 94:22 96:5 97:3 Statements [4] 27:19 92:5,22 99:24 States [8] 1:3 11:2 16:2 32:16 33:2 42:11 46:10 54:15 stating [1] 95:24 status [3] 27:22 41:17 52:14 statute [12] 2:20 3:9 31:3 41:12,13,20,24 42:2,12,18 63:22 66:17 statutes [8] 13:16 31:13,17 33:1,9 80:12,17 88:2 statutory [3] 31:6 60:4,10 stay [1] 88:11 stems [2] 31:2 60:3 step [7] 7:18 11:10 14:6 27:25 36:3 67:4,5 still [4] 1:17 50:23 61:19 74:7 stock [35] 5:3 7:16 8:24 9:6,10 12:9 14:5 17:3,15 25:6 26:19 27:2,24 31:4 33:13 35:8 36:24 40:19 43:2 45:8 48:10 59:15,18,21 61:9,11 62:8 70:22 75:15 79:24 81:4 87:10 91:13 92:16,16 stocks [7] 56:2 57:11 62:2,3 91:16,17 98:11 stole [1] 35:23 stop [1] 26:1 stories [2] 8:2 24:10 story [1] 1:20 strengthen [2] 7:1 95:18 strengthening [1] 64:7 strikingly [1] 32:21 string [1] 65:3 strings [1] 19:24 strong [6] 11:7 12:15 13:21 36:11 63:16 89:3 strongly [2] 13:18 35:6 study [4] 8:24 9:9 65:19,21 stuff [2] 76:1,11 subject [1] 27:6 subjected [1] 16:18 submitted [1] 3:17 subsection [1] 73:12 substantial [3] 45:13 48:14 58:11 substantially [2] 90:11 99:11 substantive [1] 77:11 succeed [1] 13:13 successful [3] 19:19 85:5 96:7 successfully [4] 30:22 33:1 64:6 77:22 sue [1] 51:4 suffer [1] 60:14</p>	<p>suffering [1] 25:3 sufficient [5] 2:6 19:15 35:17 64:8 95:12 suggest [4] 21:3 44:3 55:21 56:4 suggested [2] 66:13,18 suggestion [1] 62:14 suggests [1] 65:19 sum [1] 33:7 sunlight [1] 76:7 Super [1] 78:12 support [6] 12:17 20:15 36:24 39:7 72:25 96:16 supported [1] 54:7 supporter [1] 74:12 supports [1] 35:6 Supreme [10] 31:18 33:4 49:23 50:24 53:9 54:25 63:10,16,20 97:7 surely [1] 36:20 surely [1] 24:20 surprise [3] 2:16 17:5 51:18 surprised [1] 11:14 surrounding [2] 31:1 60:1 suspect [1] 19:13 suspicious [1] 36:13 swath [1] 25:2 sweeping [1] 46:1 swirl [1] 45:17 system [3] 8:15 61:8 70:24 systematic [1] 47:4</p> <p style="text-align: center;">T</p> <p>table [2] 60:17 99:8 tackle [1] 8:19 taints [1] 8:14 talked [7] 75:14,22 83:21 89:19,24 90:2 96:6 talks [2] 20:7 53:17 tangible [1] 33:4 task [2] 19:23 31:17 tasked [1] 13:17 tax [3] 76:21 77:1 80:21 technical [1] 13:25 technology [3] 87:14,14 91:3 teeth [2] 12:25 13:22 televised [1] 79:3 tenets [1] 32:22 tentative [1] 49:5 tentatively [1] 22:14 term [4] 2:19 31:16 54:4 97:5 terminated [1] 62:10 terms [13] 41:10,19,22 42:5,6 53:17 63:24 83:14 84:21 88:13,20 97:12 98:4 terrible [2] 23:2 99:22 Tester [25] 1:10 12:6 61:2 74:18,19,24 75:1,8 77:4,8,12,18 78:4,11,18 79:14 80:5,18,23 81:6,8,11,15,19 83:1</p>	<p>testified [3] 41:25 59:6,17 testify [1] 30:6 testimony [21] 5:2,7 11:1,7 16:1 24:1 30:1 35:1,5 39:1 45:1 49:6,10 50:11 55:23 64:25 65:5 67:7 69:17 75:12,12 Thanks [16] 10:1,2 15:1 22:1,2 23:9 34:1,4 44:8 45:5 60:25 67:13,13 78:4 99:5,5 theft [1] 35:25 themselves [4] 24:21 25:19 56:3 87:3 theory [6] 35:21 45:11 50:25 51:10 73:7 97:9 thereafter [1] 24:20 therefore [3] 36:6 72:4 90:13 thick [1] 69:8 thinking [3] 55:14 60:19 76:3 third [1] 41:8 THOMAS [1] 35:1 though [6] 9:3 59:13,24 66:20 85:18 97:14 thoughtfulness [1] 81:16 thoughts [1] 33:20 thousands [1] 87:12 three [4] 55:3 73:15 88:25 96:10 three-step [1] 49:17 threshold [1] 20:25 Throw [1] 18:16 thrust [1] 35:10 THURSDAY [1] 1:2 tight [1] 79:8 Tim [1] 12:11 tip [1] 12:24 tipped [1] 98:21 tippee [2] 41:5 53:2 tipper [1] 53:2 tippling [4] 35:12 36:7 40:24 53:1 tips [1] 85:25 today [25] 5:19,25 6:6,7,19 7:4,9,18 10:8 14:10 15:4 19:13,14 24:6 6 35:6 49:5,7 55:4 63:14 70:6 75:13,22 78:24 89:4 99:16 today's [3] 9:15 12:15 30:11 together [9] 11:7 21:4,4 22:17 23:15 56:25 57:4 76:22 95:21 tomorrow [1] 40:10 took [1] 10:4 tool [1] 47:4 tools [2] 5:21 64:25 top [2] 59:19,21 top-secret [1] 61:7 topic [1] 30:11 totally [2] 82:4,4 touch [1] 55:23 Touche [1] 10:17 touched [1] 63:14 touches [1] 6:8 toward [1] 27:25</p>
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 Thursday, December 1, 2011

<p>track ^[1] 79:20 trade ^[14] 19:2 31:24 32:2 40:16 48:3 52:22 56:2,18 57:21 60:7 62:3 65:7,15 68:22 traded ^[4] 26:25 31:21 45:15 56:24 tradeoffs ^[1] 78:25 trader ^[2] 32:7 35:22 traders ^[1] 31:20 trades ^[12] 27:9,12,16 46:7 50:1 56:7 62:19 68:18 70:7,22 77:25 91:13 TRADING ^[101] 1:1 2:7,15,17,19, 21 3:7,11,16,21,23 5:9,15 7:1,12, 20 8:5 9:6,16 11:14 13:22 16:11 23:17 24:23 25:15 26:15,17 30:9, 15,17,20 31:4,7,11,14,18,23 32: 6,24 33:7,14,17 35:7,11,12,15, 16,20 36:7,8,15 37:3,4 40:18 42: 3,24 45:6,9,14,20,21 46:2,14 47: 5,6,8,14,18 49:9,15,16 50:1 53: 22 56:5 57:13 59:7,16 60:4 63: 12,18 64:7 65:3,4,20 72:17 74:4 77:13,22 79:21,22 80:2,13 88:4 89:15 92:13,18 93:6 94:14 95:7, 18 96:7 transacting ^[1] 77:14 transaction ^[1] 72:13 transactions ^[7] 13:5 48:11,18 72:2 90:3 92:17 96:1 transfer ^[1] 91:23 transparency ^[13] 20:6 75:23 76: 7,13,16,17 77:5,7,25 78:7,15 82: 6 85:17 transparent ^[8] 75:24,25 76:6 77:15 78:21,23 79:2,12 Treasury ^[2] 60:23 94:10 treatise ^[1] 30:9 trial ^[1] 63:4 tricky ^[2] 63:4 86:18 tried ^[1] 41:24 troubling ^[1] 33:15 true ^[3] 3:17 35:22 37:8 truly ^[3] 8:19 38:3 45:15 trump ^[1] 46:2 trust ^[30] 2:11 3:14 5:23 8:13 14: 7 16:16,20 18:8 19:9,12 24:9 32: 8,12 42:24 50:19 53:11,16,19 54: 8,14,18 56:8 59:2,3 60:8 64:5 73: 7,17 97:6,12 trusts ^[5] 25:7 56:9,15 58:5,10 try ^[6] 16:8 42:9 58:25 77:24 88: 13 89:2 trying ^[3] 38:6 55:24 77:23 turn ^[2] 48:2 71:9 turned ^[1] 94:9 turns ^[1] 10:11 tweaks ^[2] 65:12 66:18 two ^[19] 7:13 10:9 19:11 20:23 22:</p>	<p>5,6 39:24 40:16,23 49:17 50:15 53:16 56:25 70:18 72:15 73:3 89: 16 95:21,22 type ^[1] 61:25 types ^[2] 85:22 87:14</p> <hr/> <p style="text-align: center;">U</p> <p>U.S ^[3] 8:24 35:11 39:16 ultimately ^[2] 48:17 85:6 unacceptable ^[1] 14:3 unambiguous ^[1] 13:19 unambiguously ^[1] 89:14 unappealable ^[1] 48:17 uncertainty ^[3] 18:6 19:20 39:18 under ^[23] 5:15 9:21 13:16 17:16 25:21 27:10,19 30:17 35:13 40: 12 41:21 45:10,22 46:21 47:15 49:7 54:19 59:7 75:6 80:11,16 92:22 97:9 underline ^[1] 39:10 undermine ^[1] 7:24 underpin ^[1] 8:20 understand ^[7] 49:23 50:3 59:5 75:5 87:6 90:20 98:13 understood ^[2] 55:3 94:18 undisclosed ^[2] 32:14 33:3 Undoubtedly ^[1] 26:23 unduly ^[1] 53:9 unethical ^[1] 5:17 unethically ^[1] 77:10 unfortunate ^[1] 36:18 Unfortunately ^[2] 7:8 40:5 unintended ^[3] 75:16,17 76:3 unique ^[1] 45:19 United ^[7] 1:3 11:2 16:2 32:16 33: 2 42:10 54:14 universal ^[2] 41:24 42:2 University ^[6] 22:23,25 30:2,7 34:4 35:2 unlawful ^[2] 2:24 36:15 unnecessary ^[3] 13:15 27:14 56: 17 unpunished ^[1] 26:7 until ^[2] 16:5 99:21 unusual ^[1] 44:6 up ^[9] 7:9 21:7 22:7 49:25 57:17 61:10 79:16 91:22 92:1 update ^[1] 62:2 upside ^[2] 52:7,8 urban ^[1] 30:13 urging ^[1] 24:20 using ^[12] 1:22 5:23 11:15 12:23 17:9 43:8 56:23 61:13 80:3,9 86: 13 93:6</p> <hr/> <p style="text-align: center;">V</p> <p>valid ^[1] 60:18 value ^[6] 18:20 19:2 24:18,20 79: 17 80:25</p>	<p>valued ^[1] 6:2 values ^[1] 6:8 various ^[2] 23:10 35:8 vast ^[3] 20:1 31:13 79:6 vastly ^[1] 20:6 venture ^[1] 60:21 version ^[1] 45:7 via ^[1] 68:23 victories ^[1] 53:24 view ^[9] 8:14 25:1 32:19,21 45:8, 11 67:19 71:13 96:19 viewed ^[3] 27:21 33:14 48:6 views ^[3] 9:17 67:25 96:17 violate ^[1] 77:10 violates ^[3] 5:4,5 33:7 violation ^[7] 3:14 13:1,23 31:8, 11 46:15 94:14 vocabulary ^[1] 50:8 votes ^[1] 20:25</p> <hr/> <p style="text-align: center;">W</p> <p>walk ^[2] 17:17 61:9 Walker ^[25] 23:6 44:5 45:1,3 48: 21 49:1 58:8,9 59:3 65:13,18 68: 25 69:1,10,15 71:19,25 72:23 78: 13,19 84:2,24 92:15 94:20,22 wall-to-wall ^[1] 26:11 Walz ^[2] 12:11 20:13 wanted ^[5] 16:7 70:22 89:22 90: 3 91:1 wants ^[1] 52:5 Washington ^[10] 1:5 6:14,16 16: 15 22:22 23:13,14 24:3 25:21 68: 12 Washington's ^[1] 7:2 watch ^[1] 20:19 watchdogs ^[1] 26:2 watching ^[1] 20:18 way ^[32] 7:3 17:7 19:4 23:5 26:17 30:15,25 52:25 55:22 62:5,15 63: 25 75:21 76:1,9 77:1 78:7 82:3,4, 12,18,20,22 85:16 86:13,16,25 89:20 92:6,18 95:9 96:14 ways ^[5] 23:10 74:16 84:18 93:11 96:24 weak ^[1] 13:20 weaker ^[1] 51:10 wealth ^[2] 23:10 25:10 wealthy ^[1] 69:8 weapon ^[1] 35:20 weapons ^[1] 61:8 Web ^[1] 91:5 website ^[2] 68:1 69:19 weeks ^[2] 24:11 99:16 weigh ^[1] 50:17 welcome ^[3] 10:8 75:2 83:2 well-recognized ^[1] 41:10 Whatever ^[4] 9:22 52:21 75:16 98:24</p>	<p>wheat ^[1] 81:25 whenever ^[1] 73:8 whether ^[26] 1:22 2:5 5:11,13 7: 11 8:3 9:20 25:7 26:14 36:14 40: 24 47:25 48:2 60:8,20 79:7 80:6 81:22 82:19 84:15,17 86:25 88: 17 95:14 98:6,7 whistleblower ^[1] 25:14 whole ^[3] 56:11 88:9 91:11 wholeheartedly ^[1] 73:4 whom ^[1] 6:3 whomever ^[1] 79:11 wide ^[2] 25:2 90:17 widespread ^[2] 16:11 25:8 wife ^[1] 51:19 Wiley ^[2] 23:6 45:1 will ^[77] 1:19 2:12,16 5:25 6:1,20, 22 7:3 8:18 13:15,22,25 17:13 18:5,19 19:13 20:3,6 21:6,7 22:3, 6,8,10,20 23:12 25:19 26:12 34: 2 36:9,13 40:10 41:7 42:5,7,11, 12,12,17 43:9 45:8,11 49:2,2 51: 18 58:6,25 61:1 62:6,18 67:9 68: 23 70:20 71:2,3,3,5,6,14,15,15 74:23,23 76:13 78:2 83:23 88:24 89:1,8 91:8 93:2 94:17 95:24 96: 17 97:17 99:13,23 willful ^[1] 27:17 willfully ^[1] 92:3 willing ^[1] 25:11 win ^[1] 6:23 window ^[1] 92:23 wire ^[7] 31:12 33:1,9 59:20 80:12, 16 88:2 wisely ^[1] 42:2 wiser ^[1] 42:4 wish ^[1] 79:23 wished ^[1] 32:21 within ^[16] 13:5 33:17 40:14 46:4, 19 47:6 48:4,12 49:14 54:1 63: 12 87:10 92:17 95:18 98:4,11 without ^[2] 65:6 72:21 witnesses ^[5] 5:25 9:18 19:14 49:10 99:25 wives ^[2] 51:17 52:1 wonder ^[1] 96:4 wondering ^[1] 61:23 word ^[1] 51:14 wording ^[1] 33:13 words ^[5] 7:2 9:5 39:10 50:8 98: 5 work ^[15] 11:16 12:15 13:8 18:13, 13 22:7,12 37:6 40:1 52:13 67: 14 78:3 84:23 86:7 99:13 worked ^[2] 23:15 87:15 working ^[6] 27:23 50:23 67:12, 14 73:18 89:1 workplace ^[1] 25:15 works ^[2] 55:25 93:11</p>
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Committee on Homeland Security and Governmental Affairs
Insider Trading and Congressional Accountability
Thursday, December 1, 2011

world [2] 6:24 96:24
worries [1] 63:24
write [4] 41:9,11 67:20 86:15
writing [1] 42:2
written [7] 3:3 30:9 56:5 64:24
65:4 85:18,19
wrongdoing [1] 91:7
wrongful [1] 3:21

X

XYZ [1] 61:10

Y

year [7] 9:1 20:11 90:3,21,22 91:
12,17
years [9] 2:21 8:23 24:16 30:8 40:
8 42:1,6 64:14,18
York [2] 6:1 11:2
yourself [1] 40:24

Z

Ziobrowski [4] 8:23 9:1 18:11
65:19
Ziobrowski's [1] 18:13

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