Good morning, and thank you Mr. Chairman and Members of the Committee.

My name is Jack Maskell. I am a legislative attorney in the American Law Division of CRS. I have been at CRS since 1973, and one of the areas of law that I cover is governmental ethics and conflicts of interest law.

When questions have come into CRS from time-to-time over the years regarding Members of Congress and the use of confidential or nonpublic information for their own personal financial benefit, we have approached that issue, generally, as a matter of congressional ethics. Our advice over the years has consistently been that such conduct may be a violation of specific House or Senate ethics rules, as well as contrary to recognized and accepted ethical guidelines and norms in Congress. A recent advisory opinion from the House Ethics Committee, released last week, has confirmed this approach.

Because of allegations over the last number of years with regard to trading in securities of publicly traded companies by Members of Congress, there have been questions raised also about possible violations of the insider trading rules.

I think it is now fairly clear to everyone following this issue that Congress did not "exempt itself" from the insider trading laws:

- the statutory provisions prohibiting fraud and market manipulation provide no exception for Members,
- the regulations of the SEC do not express any exemption for Members of Congress,
- and the case law has not recognized any specific congressional exemption.

When an individual is in a position or has a particular relationship to issuers, to those who are stockholders, or even to a provider of information, as described in the SEC regulations, and that person trades on material, nonpublic information, such person would likely violate the insider trading provisions whether or not he or she is a Member of Congress.

Because of the lack of case law specifically applying the insider trading laws to Members of Congress, -- there are certainly some areas for dispute concerning any particular hypotheticals, and how the law would or not apply, especially in relation to information that is not from a private company, insider, or trader, but rather is merely about a potential or proposed congressional action. However, one of the two main points I want to make this morning is that CRS considers that the characterization made by some critics of Congress that the position of a Member of Congress is one which does not involve a public trust, a duty of entrustment, is wrong as a matter of both law and ethics.

I am certainly not the first to say that the office of a Member of Congress involves a public trust. Even before the enactment of the Constitution, James Madison noted in the Federalist Papers the importance of measures to keep Members "virtuous whilst they

continue to hold their public trust." The phrase "public office is a public trust" is recognized explicitly in both the House and the Senate. That phrase is more than merely an aphorism, because it denotes that Members of Congress who wield public power have a fiduciary responsibility to use that power in the interests of the general public who are supposed to be the beneficiaries of that trust.

The Senate, in its Standing Orders, has stated it very nicely:

> "It is declared to be the policy of the Senate that ... The ideal concept of public office, expressed by the words, 'A public office is a public trust', signifies that the officer has been entrusted with public power by the people; that the officer holds this power in trust to be used only for their benefit and never for the benefit of himself or a few ...."

(Standing Orders of the Senate, *Senate Manual*, § 87, S. Doc. 107-1, at 118-119 (2002)).

This fiduciary duty of Members towards the public is one which has been expressly recognized by federal courts. In 1978, the United States Court of Appeals for the Second Circuit applied a fiduciary theory of public trust owed by a Member in a case in which the government moved to have the proceeds from an illegal transaction between a Member of the House and a private party recovered by the government under a theory of a "constructive trust." The court agreed with the lower court decision to "impose a constructive trust on monies [the Member of Congress] received in breach of his *fiduciary duty as a United States Congressman.*" (*United States v. Podell*, 572 F.2d 31, 32 (2d Cir. 1978)).

There are also specific House and Senate ethics rules relative to the use of one's office for one's own personal benefit. The Ethics Committee has noted that the language of the House Rules means that Members "may not use their official positions for personal gain." (*House Ethics Manual*, at 186 (2008)). Additionally, the House of Representatives has expressly recognized the continued application to the House of the ethical guidelines and standards adopted in the Code of Ethics for Government Service, which provides expressly that any federal official, including a Member of Congress, may

> "[n]ever use any information coming to him confidentially in the performance of governmental duties as a means for making private profit."

The ethics rules in the executive branch of government on using information for private gain are similar to these provisions, and, of course, you are probably familiar with the guilty plea this summer by a federal employee who worked for the FDA to insider trading charges. (*United States v. Cheng Yi Liang*, Crim. No. DKC-11-0530, plea agreement of August 18, 2011 (D.Md. 2011))

The second point I want to make today is about potential problems with enforcing certain measures proposed to address this issue. The express authorization and duty of each House to discipline its own Members for misconduct in Article I, Section 5 of the Constitution is there, in part, because of existence of the provisions of Article I, Section 6

of the Constitution, which help enforce separation of powers by providing that Members of Congress may not be "questioned" in other place regarding their speech or debate in either House. The courts have found that Members of Congress are immune from criminal or civil proceedings for their official legislative activities which are considered "an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings."[1] So, if Congress passes a law in which it delegates to an *outside* body, such as an independent regulatory agency in the executive branch of government, the responsibility to police congressional activity inside of Congress arising from, for example, hearings, depositions, or even legislative strategy sessions, any outside enforcement authority may encounter some significant evidentiary issues regarding the "Speech or Debate" privilege. Its not a bar to prosecution or to civil action, but it certainly would impact outside enforcement decisions.

I am available to answer questions you may have relative to my testimony.

Thank you.

[1] Gravel v. United States, 408 U.S. 606, 625 (1972).