

The STOCK Act's Attempt at Clarifying Legislative Ambiguities

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The laws that regulate insider trading have been largely shaped by the courts and the Securities and Exchange Commission (SEC). Laws regulating insider trading and securities may have created a situation of ambiguity as they have not previously expressly stated that members of Congress are also subject to the laws. Trading practices by members of Congress have come under suspicion as indicating the use of insider knowledge. The applicability of the laws to Congress is an issue that has never been explicitly raised and because of that, there were opportunities for clarification.

Ambiguities in the applicability of insider trading laws include the question of whether members of Congress have a fiduciary duty to the United States. This duty would exist if they were considered federal employees, but case law has been divided on that matter. The STOCK Act would directly address this issue by explicitly stating that members of Congress are subject to insider trading laws. Ambiguities also extend to whether insider trading laws are applicable to non-public pending Congressional action as that is not required to be confidential. Ideally the House and Senate would agree on provisions in the STOCK Act to address that as well.

In order to clarify the ambiguities and stop possible insider trading by members of Congress, both the House and the Senate have passed versions of the Stop Trading on Congressional Knowledge (STOCK) Act. The STOCK Act would prevent members of Congress and their staff from using non-public information derived from work within Congress for personal benefit. Both the House and Senate versions of the STOCK Act specifically say that members of Congress and their staff are not exempt from insider trading and securities laws. This clarifies any ambiguities that there may be under existing laws. The STOCK Act would also call on members of Congress to publicly disclose financial transactions in stocks, bonds, and commodities on their websites within thirty days of the transaction. If the House version passes, any lawmaker convicted of a crime would not be able to collect a pension.

The SEC and the Department of Justice (DoJ) may still run into difficulties in enforcement if the STOCK Act passes. In particular, the Speech or Debate Clause could prevent the SEC or the DoJ from questioning Congress about upcoming legislation. The Speech or Debate Clause prohibits questioning about legislative activity of members of Congress. The result could be an Act that seems

to put Congress on an even playing field with the public, but actually does not allow for adequate policing and enforcement because the SEC and DoJ would not be able to enforce those laws on the members of Congress as effectively as on the public.

The two versions of the STOCK Act differ in provisions relating to those in the financial information business and the extent of those covered by the Act. Those that gather Congressional information and sell it to assist in trading and financial transactions could also be impacted by the STOCK Act. The House version of the STOCK Act would extend coverage to the Executive Branch as well. The House version does not contain provisions on those in the financial information business, while the Senate version does include the provisions. The House Majority Leader, Eric Cantor, modified the provisions by striking those that call on financial information sellers to register in the same fashion that lobbyists register.

At this point, the House and Senate can get together in Conference to work out the differences, or the Senate can adopt the version passed by the House. Democrats are calling for a formal conference to come to an agreement. Several Senators are disappointed that the House decided to delete provisions for financial information sellers to register with the government like lobbyists do. Currently, no members of Congress have been arrested or are under investigation for insider trading aside from a 60 Minutes expose detailing the problem. The passage of the STOCK Act may prompt new investigations, but currently there is no confirmation that the SEC is prepared to open any investigations.

Sources:

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