THE STOCK ACT TEN YEARS LATER: THE NEED FOR A NEW CONGRESSIONAL INSIDER TRADING REGULATORY SCHEME

ABSTRACT

A recent Pew Research poll indicated only 20% of Americans trust the federal government to "do the right thing."[1] *Although falling trust in government began in the mid-1960s and must be attributed to many factors,*[2] *a belief that members of Congress ("Members") exploit their access to confidential information in order to enrich themselves certainly cannot help alleviate this distrust. The recent 2020 congressional insider trading scandal, where senators traded securities after attending a private briefing about the likely effects the coronavirus would have on the United States economy, is a prime example of a way Members may potentially misuse their access to nonpublic information. As of the date of this Note's publication, none of these senators have been charged with violating federal securities laws. This is despite the existence of the STOCK Act, a law which explicitly extended the federal securities laws' insider trading prohibition to members of Congress.*

Part I of this Note provides a brief outline of insider trading law in the United States. Part II discusses congressional insider trading, the STOCK Act, and analyzes why investigators likely have struggled to prove Members have violated it. Part III then examines proposed legislation which would restrict Members' ability to trade securities and ultimately rejects this legislation in favor of supplementing the STOCK Act with a regulatory model based on the Rule 10b5-1 plans often used by corporate insiders.

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1. *See Americans' Views of Government: Low Trust, but Some Positive Performance Ratings*, PEW RSCH. CTR. (Sept. 14, 2020), https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/ [https://perma.cc/TNK6-C8NR] [hereinafter *Americans' Views*].
2. *See id.*

INTRODUCTION

Suspicion of insider trading in Congress is nothing new; one well-known study indicated a group of senators' securities portfolios beat the market by roughly ten percent per year over a five-year period.[3] In 2012, due to the seeming incoherency of insider trading law,[4] and uncertainty as to whether it was unlawful for members of Congress to trade securities on the basis of material, nonpublic information learned from their positions,[5] Congress passed the STOCK Act to clarify such trading would be unlawful.[6]

Despite good intentions, even those who helped write the STOCK Act have criticized it. [7] Since its enactment, the Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC) have never charged a member of Congress with insider trading in violation of the STOCK Act.[8] This is despite the fact that there have been several instances of suspicious trading by members of Congress.[9] The evidentiary obstacle posed by the Constitution's Speech or Debate Clause is likely a driving force behind this investigative passivity.[10]

Still, frustration with the perception of congressional insider trading has led lawmakers to introduce a new bill which would, among other things,[11] combat the suspicion of insider trading by members of Congress by prohibiting Members from owning the stock of individual companies unless

3. *See* Alan J. Ziobrowski, Ping Cheng, James W. Boyd & Brigitte J. Ziobrowski, *Abnormal Returns from the Common Stock Investments of the U.S. Senate,* 39 J. FIN. & QUANTITATIVE ANALYSIS 661, 661–62 (2004).

4. *See* Jason M. Breslow, *Quiz: Spot the Inside Trade*, PBS (Jan. 7, 2014, 9:44 PM), https://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/to-catch-a-trader/quiz-spot-the-inside-trade/ [https://perma.cc/2JKE-7N2Q] (providing an interactive quiz which demonstrates the complexity and seeming inconsistency of insider trading law); *see also infra* Part I.B (outlining insider trading theories of liability).

5. *See* Jeanne L. Schroeder, *Taking Stock: Insider and Outsider Trading by Congress*, 5 WM. & MARY BUS. L. REV. 159, 162, 165 (2014).

6. *See id.* at 162, 165.

7. *See* Tyler Gellasch, Opinion, *I Helped Write the STOCK Act. It Didn't Go Far Enough.*, POLITICO (Mar. 25, 2020, 3:50 PM), https://www.politico.com/news/magazine/2020/03/25/congress-stock-trade-148678 [https://perma.cc/F3W4-B3FC].

8. *See* Robert Anello, *How Senators May Have Avoided Insider Trading Charges*, FORBES (May 26, 2020, 9:28 PM), https://www.forbes.com/sites/insider/2020/05/26/how-senators-may-have-avoided-insider-trading-charges/?sh=2d69d70927ba [https://perma.cc/FT32-9KY3].

9. *See infra* Part II.C.

10. *See infra* Part II.C.

11. An emerging issue related to securities trading by members of Congress is the potential that owning stock of individual companies may create conflicts of interest. *See* Aaron D. Hill, Jason W. Ridge & Amy Ingram, *The Growing Conflict-of-Interest Problem in the U.S. Congress*, HARV. BUS. REV. (Feb. 24, 2017), https://hbr.org/2017/02/the-growing-conflict-of-interest-problem-in-the-u-s-congress [https://perma.cc/7SUZ-6G8Y]. For example, if a Member owns stock in a large credit card company, like Visa, this may influence the way she votes on legislation that could adversely affect credit card companies. *See id.* Although this is an important issue, it is outside the scope of this Note. This Note is limited to analyzing the best ways to prevent members of Congress from exploiting their access to material, nonpublic information in order to trade securities.

in a qualified blind trust.[12] Although well intentioned, this Note will ultimately reject this proposed regulatory framework because it is overinclusive and underinclusive in how it restricts and permits securities trading by Members.[13] Moreover, the bill's proposed enforcement structure would likely prove inadequate.[14] Rather, this Note argues a regulatory scheme modeled after Rule 10b5-1 plans would be a more effective and politically-feasible model for regulating securities trading by members of Congress.[15]

I. FEDERAL INSIDER TRADING LAW IN THE UNITED STATES

A. Textual Basis

In the United States, no federal statute explicitly prohibits insider trading.[16] In fact, though some statutes touch on insider trading indirectly[17] or in a limited fashion,[18] the federal securities laws do not even define the offense of insider trading.[19] Insider trading is commonly understood to "involve[] trading in a public company's stock by someone who has non-public, material information about that stock for any reason."[20] Though partially correct, the equality of access to information rationale undergirding this definition has been explicitly rejected by the Supreme Court.[21] Many people then may be surprised to learn that, in the United States, "insider

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12. *See* Press Release, Sen. John Ossoff, Sens. Ossoff, Kelly Introduce Bill Banning Stock Trading by Members of Congress (Jan. 12, 2022), https://www.ossoff.senate.gov/press-releases/sens-ossoff-kelly-introduce-bill-banning-stock-trading-by-members-of-congress/ [https://perma.cc/8BAJ-XH9E]; *see also* Ban Congressional Stock Trading Act, S. 3494, 117th Cong. (2022).

13. *See infra* Part III.B.1.

14. *See infra* Part III.B.1.

15. *See infra* Part III.B.2.

16. *See* Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1322 (2009).

17. Section 21A of the Securities Exchange Act of 1934 (the "Exchange Act") authorizes the SEC to seek a monetary penalty up to three times the amount of profits or losses avoided as the result of insider trading. *See* 15 U.S.C. § 78u-1(a)(2).

18. Section 16(b) of the Exchange Act provides that directors, officers, and shareholders owning more than ten percent of a public corporation's stock may be liable to such corporation for the profits obtained from any purchase and sale (or sale and purchase) of the corporation's stock within a six-month period. *See* 15 U.S.C. § 78p(b). Rule 14e-3 regulates insider trading in connection with tender offers. *See generally* 17 C.F.R. § 240.14e-3 (2021). It prohibits insiders of the bidder and target from disclosing material nonpublic information about the tender offer to people who are likely to trade on the information. *See* § 240.14e-3(d)(1). Subject to certain narrow exceptions, Rule 14e-3 also makes it unlawful for any person who possesses material nonpublic information related to a bidder's tender offer from trading in the securities of the target company if the bidder has commenced or taken "substantial steps" toward commencing a bid. *See* § 240.14e-3(a).

19. *See* Schroeder, *supra* note 5, at 163.

20. Akhilesh Ganti, *Insider Trading*, INVESTOPEDIA https://www.investopedia.com/terms/i/insidertrading.asp [https://perma.cc/BJ7H-8H6Q] (Mar. 7, 2022).

21. *See* Chiarella v. United States, 445 U.S. 222, 232–33 (1980).

trading liability is based on breaches of fiduciary duty, not on informational asymmetries."[22] To understand why breaches of fiduciary duty play such an important role in insider trading liability, one must first understand insider trading's statutory basis.[23]

The doctrine of insider trading law has developed through judicial interpretations of § 10(b) of the Securities Exchange Act of 1934[24] ("§ 10(b)" or "Section 10(b)") and Rule 10b-5[25] promulgated thereunder.[26] Section 10(b) states it shall be unlawful, by the use of any means or instrumentality of interstate commerce, the mails, or of any facility of any national securities exchange to:

> [U]se or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[27]

Pursuant to this rulemaking authority, the SEC in 1942 adopted Rule 10b-5.[28] Rule 10b-5 makes it unlawful for a person, intentionally or recklessly,[29] by the use of any means or instrumentality of interstate commerce, the mails, or of any facility of any national securities exchange:

> (a) To employ any device, scheme, or artifice to defraud,
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> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the

22. United States v. Newman, 773 F.3d 438, 449 (2d Cir. 2014); *see also Chiarella*, 445 U.S. at 232 ("[N]ot every instance of financial unfairness constitutes fraudulent activity under [the federal securities laws].").

23. It should be noted the term "insider trading" is misleading as to the reach of the law. *See* STEPHEN M. BAINBRIDGE, CORPORATE LAW 351 (3d ed. 2015). Although today's federal insider trading prohibition does apply to a corporation's officers and directors, it also reaches many people who would not generally be considered "insiders" of a company. *See id.* at 351–52.

24. 15 U.S.C. § 78j(b).

25. 17 C.F.R. § 240.10b-5 (2021).

26. *See* Nagy, *supra* note 16, at 1322.

27. 15 U.S.C. § 78j(b) (emphasis added).

28. *See* § 240.10b-5.

29. Though not explicitly stated in § 10(b) or Rule 10b-5, case law has imposed a scienter requirement on Rule 10b-5. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199, 201 (1976) (holding a violation of § 10(b) and Rule 10b-5 requires a showing that the defendant's misconduct was intentional). Lower courts would subsequently hold recklessness is also sufficient to establish scienter. *See, e.g.*, SEC v. Lehman Bros., 157 F.3d 2, 7 (1st Cir. 1998) (reasoning scienter can be established when someone "deliberately avert[s] his eyes from evident misconduct").

> light of the circumstances under which they were made, not misleading, or
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> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[30]

Only through various SEC administrative actions and judicial opinions did insider trading come to qualify as a "deceptive device" under § 10(b),[31] and a "device, scheme, or artifice to defraud" as well as an "act, practice, or course of business which operates . . . as a fraud or deceit" under Rule 10b-5.[32] Insider traders may face civil and criminal liability for violating § 10(b) and Rule 10b-5.[33]

B. Theories of Insider Trading Liability

The Supreme Court has recognized two forms of insider trading liability: the "classical" or "traditional" theory and the "misappropriation" theory.[34] The Court views these theories as complementary, with "each addressing efforts to capitalize on nonpublic information through the purchase or sale of securities."[35] Under both theories, the crucial element in determining whether a person's trading on the basis of nonpublic information violates § 10(b) and Rule 10b-5 is whether the person's silence regarding their informational advantage can be characterized as fraudulent or deceptive.[36] This element has led to fiduciary duties taking center stage in the doctrine of insider trading.[37]

1. The Classical Theory

Under the classical theory, § 10(b) and Rule 10b-5 are violated when "a corporate insider trades in the securities of his corporation on the basis of

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30. § 240.10b-5.
31. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642, 652 (1997).
32. *See* Salman v. United States, 137 S. Ct. 420, 423 (2016) (alteration in original) (internal citations omitted).
33. *See* Nagy, *supra* note 16, at 1322 n.29. Willful violations of the Exchange Act may be criminally prosecuted by the Department of Justice, who may seek fines not in excess of $5 million dollars and imprisonment for not more than twenty years. *See* 15 U.S.C. §§ 78u(d)(1), 78ff(a). The DOJ may also criminally prosecute insider trading as mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C § 1343, or under Title 18's securities fraud statute, 18 U.S.C. § 1348. *See* Nagy, *supra* note 16, at 1322 n.29.
34. *See O'Hagan*, 521 U.S. at 651–52.
35. *Id.* at 652.
36. *See* Nagy, *supra* note 16, at 1323–24.
37. *See id.* at 1324.

material, nonpublic information."[38] Such trading violates § 10(b) and Rule 10b-5 only because a "relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation."[39] As Justice Powell reasoned, trading by an insider in this situation, without first disclosing the material, nonpublic information, is fraudulent because at common law, "one who fails to disclose material information prior to the consummation of a transaction commits fraud . . . when he is under a duty to [disclose the information]."[40] And, at common law, a duty to disclose arose "when one party ha[d] information 'that the other [party] [was] entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'"[41] Thus, because corporate insiders owe both fiduciary duties and duties of trust and confidence to shareholders of their corporation, a duty to disclose material, nonpublic information to these shareholders or abstain from trading with them arises.[42]

Officers and directors of a corporation are the typical "corporate insiders."[43] However, under certain circumstances, "outsiders" such as underwriters, accountants, or lawyers may become fiduciaries of a corporation's shareholders.[44] These types of people are commonly referred to as "constructive insiders."[45] The grounds for recognizing the fiduciary duty which renders someone a constructive insider is that "they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes."[46] Indeed, the Court has stated that for such a duty to be imposed "the corporation must expect the outsider to keep the disclosed nonpublic information confidential, and the relationship at least must imply such a duty."[47]

2. *The Misappropriation Theory*

Under the misappropriation theory, a person commits fraud in connection with the purchase or sale of securities, in violation of § 10(b) and Rule 10b-5, when "he misappropriates [material] confidential information for securities trading purposes, in breach of a duty owed to the

38. *O'Hagan*, 521 U.S. at 651–52.
39. Chiarella v. United States, 445 U.S. 222, 228 (1980) (footnote omitted).
40. *Id*.
41. *Id.* (quoting Restatement (Second) of Torts § 551(2)(a) (AM. L. INST. 1976)).
42. *See O'Hagan*, 521 U.S. at 652.
43. *See id.*
44. *See* Dirks v. SEC, 463 U.S. 646, 655 n.14 (1983).
45. *See* BAINBRIDGE, *supra* note 23, at 353–54.
46. *Dirks*, 436 U.S. at 655 n.14.
47. *Id*.

source of the information."[48] The misappropriation theory reasons a fiduciary's "undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information."[49] Thus, in dicta in *United States v. O'Hagan*, Justice Ginsburg reasoned "[b]ecause the deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no 'deceptive device' and thus no § 10(b) violation . . . ."[50] Notably, the First Circuit in *S.E.C. v. Rocklage*,[51] when confronted with such a disclosure, still found a violation of § 10(b) and Rule 10b-5.[52]

In 2000, the SEC adopted Rule 10b5-2,[53] which provides a "non-exclusive definition of circumstances in which a person has a duty of trust or confidence for purposes of the 'misappropriation' theory of insider trading."[54] These situations are:

> (1) Whenever a person agrees to maintain information in confidence;
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> (2) Whenever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality; or
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> (3) Whenever a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling; *provided*, however, that the person receiving or obtaining the information may demonstrate that no duty of trust or confidence existed with respect to the information, by establishing that he or she neither knew nor reasonably should have known that the person who was the source of the information expected that the person would keep the information confidential, because of the parties' history, pattern, or practice of sharing and maintaining confidences, and because there was no

48. *O'Hagan*, 521 U.S. at 652. In cases arising under § 10(b) and Rule 10b-5, liability only arises when material information is misused. *See* BAINBRIDGE, *supra* note 23, at 347.
49. *O'Hagan*, 521 U.S. at 652.
50. *Id.* at 655. Justice Ginsburg does note that this fiduciary may remain liable to the source of information under state law for breach of a duty of loyalty. *See id.*
51. SEC v. Rocklage, 470 F.3d 1 (1st Cir. 2006).
52. *See id.* at 12–14 (reasoning that, although the trader disclosed to the source of the information her plans to trade after receiving the confidential information at issue, she still obtained this confidential information through deceptive means).
53. 17 C.F.R. § 240.10b5-2 (2021).
54. *Id.*

agreement or understanding to maintain the confidentiality of the information.[55]

3. Tipper-Tippee Liability

A person can also violate § 10(b) and Rule 10b-5 by disclosing material nonpublic information to someone else.[56] This "tipper" is only liable if they disclose material nonpublic information to "an outsider for the . . . improper purpose of exploiting the information for their personal gain."[57] If the recipient of the information (the "tippee") trades on the information, she can only be liable if "(1) the tipper breached a fiduciary duty to the corporation by making the tip and (2) the tippee knew or had reason to know of the breach."[58]

Whether the tipper's disclosure breached a duty depends "in large part on the purpose of the disclosure [to the tippee]."[59] Thus, courts examine whether the tipper "receive[d] a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings."[60] A breach of fiduciary duty by the tipper is also established when he "makes a gift of confidential information to a trading relative or friend" because "[t]he tip and trade resemble trading by the [tipper] followed by a gift of the profits to the recipient."[61] With this survey of insider trading law complete, one can now examine how these theories of liability apply to members of Congress, how the STOCK Act impacted the law, and issues pertaining to Members' history of insider trading.

II. INSIDER TRADING AND CONGRESS

A. The Classical and Misappropriation Theory Applied to Members of Congress

As shown above, insider trading liability is centered around breaches of fiduciary duty. This centrality of fiduciary duties, however, led scholars to disagree about whether securities trading by government officials on the basis of material nonpublic information gleaned from their official positions would violate § 10(b) and Rule 10b-5.[62] Before the STOCK Act was

55. § 240.10b5-2(b) (emphasis in original).
56. *See* Dirks v. SEC, 463 U.S. 646, 659 (1983).
57. *Id.* (citing 15 U.S.C. § 78t(b)).
58. BAINBRIDGE, *supra* note 23, at 355 (discussing tipper-tippee liability under *Dirks*).
59. *Dirks*, 463 U.S. at 662.
60. *Id.* at 663.
61. *Id.* at 664.
62. *See* Schroeder, *supra* note 5, at 162.

enacted, Professor Donna M. Nagy argued members of Congress could be liable for insider trading under either the classical or misappropriation theory.[63]

Under the classical theory, Professor Nagy first argued Members could be viewed as "public fiduciar[ies]" who thus owe disclosure duties to at least some of the shareholders of publicly traded companies.[64] So, a member of Congress would commit fraud in violation of § 10(b) and Rule 10b-5 if they were to trade with any of these shareholders without disclosing the material, nonpublic information she knew about the company.[65] Professor Nagy also argued members of Congress may be liable under the classical theory as constructive insiders.[66] Indeed, members are often entrusted with nonpublic company-specific information which they are expected to maintain in confidence.[67] Status as a constructive insider would then give rise to the same duty to disclose or abstain from trading applicable to conventional insiders.[68]

Under the misappropriation theory, Professor Nagy argued a Member's undisclosed use of material, nonpublic congressional information to trade securities violates § 10(b) and Rule 10b-5 because this deceives the United States and its citizens, the federal government in its capacity as an employer, and fellow members of Congress.[69] And Professor Nagy argued a member of Congress owes a fiduciary duty to each of these groups.[70] Alternatively, Professor Nagy contended such undisclosed trading also constitutes a breach of a duty of trust and confidence because the Code of Ethics for Government Services prohibits federal employees from profiting off of confidential information learned in the course of their governmental duties.[71]

B. The STOCK Act's Passage

The Stop Trading on Congressional Knowledge Act of 2012 (the STOCK Act) ended the debate as to whether Members of Congress would violate § 10(b) and Rule 10b-5 if they traded on the basis of material,

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63. *See* Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. REV. 1105, 1139–57 (2011).
64. *See id.* at 1140.
65. *See supra* Part I.B.1.
66. *See* Nagy, *supra* note 63, at 1139–40.
67. *See id.*
68. *See supra* Part I.B.1.
69. *See* Nagy, *supra* note 63, at 1148.
70. *See id.*
71. *See id.* at 1158.

nonpublic information learned from their positions. In relevant part, the Act states:

> [S]olely for purposes of the insider trading prohibitions arising under [the Securities Exchange Act of 1934] and Rule 10b–5 thereunder, each Member of Congress or employee of Congress owes a duty arising from a relationship of trust and confidence to the Congress, the United States Government, and the citizens of the United States with respect to material, nonpublic information derived from such person's position as a Member of Congress or employee of Congress or gained from the performance of such person's official responsibilities.[72]

Thus, by clarifying that Members owe duties of trust and confidence to Congress and the United States Government, the STOCK Act subjected Members to the misappropriation theory of insider trading liability.[73] And through imposing upon Members a limited duty of trust and confidence to citizens of the United States, the STOCK Act may allow prosecutors to also use the classical theory.[74]

Though enacted on April 4, 2012,[75] the STOCK Act was first introduced in the House of Representatives on March 28, 2006.[76] The bill gained thirteen co-sponsors, then proceeded to die in committee.[77] The STOCK Act was reintroduced in the House in 2007 and 2009, failing to make it out of committee on both occasions.[78] Having been rejected three times before, a fourth version of the bill, introduced into the House in March of 2011, likely faced the same fate.[79] By November 4, 2011, the bill had only attracted eight co-sponsors.[80]

Then, on November 13th, *60 Minutes* aired a story titled "Insiders."[81] The story discussed congressional corruption and honest graft, with a

72. 15 U.S.C. § 78u-1(g)(1). The STOCK Act imposes an identical duty of trust and confidence on executive branch employees, judicial officers, and judicial employees. *See* 15 U.S.C. § 78u-1(h)(1). The Act also created requirements for the reporting of securities transactions by public officials. *See* 5 U.S.C. app. § 103.

73. *See supra* Part I.B.2.

74. *See supra* Part I.B.1. As members of Congress do not owe a duty to non-U.S. citizens under the STOCK Act, if a Member solely traded with non-U.S. citizens, prosecutors could not use the classical theory. *See supra* Part I.B.1.

75. *See* Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, 126 Stat. 291.

76. Ian Cherry, Amanda Heitz & Candace E. Jens, *Change in Capitol: How a 60 Minutes Exposé and the STOCK Act Affected the Investment Activity of U.S. Senators*, SSRN (June 10, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905309# [https://perma.cc/4T4T-TEP3].

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*

particular focus on insider trading by members of Congress.[82] The most egregious example of alleged insider trading was that of Representative Stephen Bachus, then the ranking member on the House Financial Services Committee.[83]

During mid-September of 2008, Treasury Secretary Henry Paulson and Federal Reserve Chair Ben Bernanke held closed door briefings for Congressional leaders, which Bachus attended.[84] During these meetings, Paulson and Bernanke warned the Members present that a global financial meltdown was imminent.[85] The day after one of these briefings, Representative Bachus purchased call options[86] on the Proshares Ultra-Short QQQ index fund, which is designed to increase in value as the Nasdaq stock market index loses value.[87] Bachus sold these options just a few days later, making nearly a 100% return on his investment.[88] Representative Bachus made several similar trades during this period.[89] Although not mentioned in the *60 Minutes* story, Representative Bachus was not the only member of Congress to attend the Paulson/Bernanke briefings and make suspicious securities trades in the following days.[90]

Near the end of the story, Steve Kroft spoke with then-Representative Brian Baird about a solution to the perceived problem of congressional

82. *See* 60 Minutes, *Congress: Trading Stock on Inside Information?*, YOUTUBE (Sept. 8, 2019), https://www.youtube.com/watch?v=2zh30lm7aSQ [https://perma.cc/DP43-D5VZ].

83. *See id.*

84. *See id.*

85. *Id.* On September 15, 2008, the DJI closed at 11,220.96. On October 10th the Dow Jones Industrial Average (DJI) closed at 8,451.19, a loss of 25% from September 15th. The DJI would eventually bottom out at 6,547.05 on March 9, 2009. *See Dow Jones Industrial Average*, YAHOO! FINANCE, https://finance.yahoo.com/quote/%5EDJI?p=%5EDJI [https://perma.cc/8S7X-J3H6] (last visited Aug. 4, 2022).

86. Call options are contracts which give the holder the right to purchase an underlying security at a certain price (the "strike price") within a specified time period. *See* Jason Fernando, *Call Option Definition*, INVESTOPEDIA (Jan. 11, 2022), https://www.investopedia.com/terms/c/calloption.asp [https://perma.cc/Y6EC-4UPK]. If the market price of the underlying security rises above the strike price during the specified time period, the holder can exercise his call option to purchase the security at the strike price, then sell the security at the higher market price. *See id.* Alternatively, the holder can simply sell the call option. *See id.* If the market price does not rise above the strike price during the specified time period, the call option expires worthless. *See id.* One call option usually gives the holder the right to buy 100 shares of the underlying security. *See id.* In this way, call options effectively give the holder leveraged exposure to the underlying security. *See id.*

87. *See* PETER SCHWEIZER, THROW THEM ALL OUT: HOW POLITICIANS AND THEIR FRIENDS GET RICH OFF INSIDER STOCK TIPS, LAND DEALS, AND CRONYISM THAT WOULD SEND THE REST OF US TO PRISON 28 (2011). The Proshares Ultra-Short QQQ index fund seeks a return that is inversely correlated to the Nasdaq 100 index by a factor of two (i.e. if the Nasdaq decreases by 100 points, the Proshares Ultra-Short QQQ index should increase by 200 points). *See id*.

88. Bachus purchased $7,486 worth of call options and sold them for a little over $13,000. *Id.* at 28–29.

89. *See id.* at 28–30.

90. *See id.* at 33–34. Other notable traders included Senators John Kerry, Dick Durbin, and Shelden Whitehouse and Representatives Jim Moran and Shelly Moore Capito, who is now a senator. *Id.*

insider trading, the STOCK Act.[91] At that time, Baird was struggling to win over co-sponsors and appeared resigned to the fact that the STOCK Act would almost certainly not make it out of committee.[92] Yet, this was not to be the bill's fate. Just twenty-four hours after the broadcast, the STOCK Act picked up ten new co-sponsors.[93] By the end of November, the bill had 112 co-sponsors.[94] In his State of the Union Address, President Barack Obama implored Congress to pass the STOCK Act.[95] On February 2, 2012, the STOCK Act passed the Senate by a 96-3 vote.[96] The House then passed the STOCK Act by a vote of 417-2 on February 9th.[97] President Obama signed the STOCK Act into law on April 4th, 2012.[98] With this, the underdog story was complete. The STOCK Act had seemingly finally won the big game. Reality, of course, had a different ending in mind.

C. The STOCK Act's Inadequacies

Since its passage, federal authorities have never charged a member of Congress with violating the STOCK Act.[99] Yet, Congress's insider trading problem is anything but cured. The recent controversy over securities trades made by Members in the early days of the Covid-19 pandemic illustrates the extent of the remaining problem.

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91. *See* 60 Minutes, *supra* note 82.

92. *See id.* Referring to the seeming legality of insider trading by members of Congress, the story concludes with Baird exclaiming "you feel like an idiot [for] not taking advantage of it!" *Id.*

93. Cherry, Heitz & Jens *supra* note 76, at 11.

94. *Id.*

95. *See Remarks by the President in State of the Union Address*, OBAMA WHITE HOUSE ARCHIVES (Jan. 24, 2012, 9:10 PM), https://obamawhitehouse.archives.gov/the-press-office/2012/01/24/remarks-president-state-union-address [https://perma.cc/493Q-NZWQ] ("Send me a bill that bans insider trading by members of Congress; I will sign it tomorrow.").

96. *Roll Call Vote 112th Congress - 2nd Session: On Passage of the Bill (S. 2038 As Amended)*, U.S. SENATE (Feb. 2, 2012), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1122/vote_112_2_00014.htm#position [https://perma.cc/GT7T-WUZD] [hereinafter *Roll Call Vote (S. 2038)*].

97. *Roll Call 47 | Bill Number: S. 2038*, U.S. HOUSE OF REPS. (Feb. 9, 2012), https://clerk.house.gov/Votes/201247?Date=2%2F9%2F2012 [https://perma.cc/8ZR8-8T37].

98. Matt Compton, *President Obama Signs the STOCK Act*, OBAMA WHITE HOUSE ARCHIVES (Apr. 4, 2012, 5:16 PM), https://obamawhitehouse.archives.gov/blog/2012/04/04/president-obama-signs-stock-act [https://perma.cc/C7JL-6QX6].

99. *See* Anello, *supra* note 8. Notably, Representative Chris Collins was sentenced to twenty-six months in prison for conspiring to commit securities fraud by insider trading in violation of 18 U.S.C. § 1348. *See* Press Release, U.S. Att'y's Off. S.D.N.Y, Former Congressman Christopher Collins Sentenced for Insider Trading Scheme and Lying to Federal Law Enforcement Agents (Jan. 17, 2020), https://www.justice.gov/usao-sdny/pr/former-congressman-christopher-collins-sentenced-insider-trading-scheme-and-lying [https://perma.cc/XD27-G9TQ]. However, Representative Collins learned of the material, nonpublic information upon which he traded through his role as a director of a publicly traded company. *See id.* Thus, his insider trading was covered by the "classical" theory of insider trading. *See supra* Part I.B.1. And these trades did not actually violate the STOCK Act. *See* 15 U.S.C. § 78u-1(g)(1) (limiting liability to the use of material, nonpublic information "derived from such person's position as a Member of Congress").

On January 24, 2020, the Senate Health and the Senate Foreign Relations Committees hosted a briefing for all senators with top Trump administration health officials regarding the outbreak of the coronavirus which had recently been detected in Wuhan, China.[100] Just a few days after this meeting, Senators Burr, Feinstein, Inhofe, Loeffler, Perdue, and Hoeven collectively sold millions of dollars' worth of stock.[101] In March of 2020, it was reported that the Department of Justice—in partnership with the SEC—had begun an investigation into the trades made by Senators Burr, Feinstein, Inhofe, and Loeffler.[102]

Senator Burr sold between $628,000 and $1.72 million[103] of his stock holdings on January 31st and February 13th in 33 separate transactions.[104] These sales included as much as $150,000 in Wyndham Hotel and Resort's stock and as much as $150,000 in Extended Stay America stock.[105] Senator Burr's brother-in-law, Gerald Fauth, also sold between $97,000 and $280,000 worth of stock in six companies.[106] Fauth allegedly called his broker to place a trade one minute after speaking with Senator Burr over the

100. *See* Press Release, U.S. Senate Comm. on Health, Educ., Lab. & Pensions, Senate Health Committee Announces Briefing to Update Senators on Coronavirus (Jan. 23, 2020), https://www.help.senate.gov/chair/newsroom/press/senate-health-committee-announces-briefing-to-update-senators-on-coronavirus [https://perma.cc/JJ9Q-QWBM]. In this press release, Senate Health Committee Chair Lamar Alexander and Ranking Member Patty Murry stated "[t]he novel coronavirus is an emerging public health threat" and at this meeting "Senators will have the opportunity to hear directly from senior government health officials regarding what we know about the virus so far, and how our country is prepared to respond as the situation develops." *Id.*

101. *See* Anthony Zurcher, *Coronavirus: US Senators Face Calls to Resign Over 'Insider Trading'*, BBC (Mar. 20, 2020), https://www.bbc.com/news/world-us-canada-51976484 [https://perma.cc/7AP6-NDR4].

102. David Shortell, Evan Perez, Jeremy Herb & Kara Scannell, *Exclusive: Justice Department Reviews Stock Trades by Lawmakers After Coronavirus Briefings*, CNN (Mar. 30, 2020, 10:22 AM), https://www.cnn.com/2020/03/29/politics/justice-stock-trades-lawmakers-coronavirus/index.html [https://perma.cc/35SS-BVF5].

103. Members of Congress' periodic financial transaction disclosure forms only require them to report their transactions in dollar amount ranges. Thus, it is not possible from these forms to determine the precise dollar amount of a Member's transactions.

104. *See* U.S. SENATE FIN. DISCLOSURES, RICHARD M. BURR PERIODIC DISCLOSURE OF FIN. TRANSACTIONS, (Feb. 26, 2020), https://efdsearch.senate.gov/search/view/paper/c5ce97f8-72c9-4067-b789-34b656af4fb4/ [hereinafter FEBRUARY 26, 2020 DISCLOSURE].; U.S. SENATE FIN. DISCLOSURES, RICHARD M. BURR PERIODIC DISCLOSURE OF FIN. TRANSACTIONS, (Feb. 27, 2020), https://efdsearch.senate.gov/search/view/paper/156b69ba-6f48-4a32-b796-707093c476c6/ [hereinafter FEBRUARY 27, 2020 DISCLOSURE].

105. *See* FEBRUARY 26, 2020 DISCLOSURE, *supra* note 104; FEBRUARY 27, 2020 DISCLOSURE, *supra* note 104.

106. Robert Faturechi, *Burr's Brother-in-Law Called Stock Broker, One Minute After Getting Off Phone with Senator*, PROPUBLICA (Oct. 28, 2021, 12:05 PM), https://www.propublica.org/article/burrs-brother-in-law-called-stock-broker-one-minute-after-getting-off-phone-with-senator [https://perma.cc/92BN-B2AZ].

phone.[107] Notably, Senator Burr was one of the three Senators who voted against the STOCK Act in 2012.[108]

In transactions on January 31st and February 18th, Senator Feinstein and her husband[109] sold between a $1.5 million and $6 million in stock of a biotech company, Allogene Therapeutics.[110] Senator Inhofe sold between $180,000 and $400,000 in stock in five transactions on January 27th.[111] And between $50,000 and $100,000 in one transaction on February 20th.[112] Senator Loeffler and her husband[113] sold between $2.1 million and $5.5 million dollars in stock and put options[114] from January to March of 2020 and purchased between $3.2 million and $7.4 million in stock, municipal

107. *Id.*

108. *See Roll Call Vote (S. 2038)*, *supra* note 96.

109. At the time of the transactions, Diane Feinstein's husband, Richard Blum, was the founder and chair of Blum Capital LP, a San Francisco based private equity firm. *Richard Charles Blum*, BLOOMBERG https://www.bloomberg.com/profile/person/1431613 [https://perma.cc/K2XX-BXVR]. Richard Blum passed away on February 27, 2022, after a prolonged battle with cancer. *See* Jeremy B. White, *Feinstein's Husband, Richard Blum, Dies*, POLITICO (Feb. 28, 2022, 12:46 PM), https://www.politico.com/news/2022/02/28/feinsteins-husband-richard-blum-dies-00012347 [https://perma.cc/A6QK-TFLW].

110. *See* U.S. SENATE FIN. DISCLOSURES, DIANE FEINSTEIN PERIODIC DISCLOSURE OF FIN. TRANSACTIONS, (Feb. 28, 2020), https://efdsearch.senate.gov/search/view/paper/4c78ce9f-d842-4f36-9102-48e43377166b/; *See* U.S. SENATE FIN. DISCLOSURES, DIANE FEINSTEIN PERIODIC DISCLOSURE OF FIN. TRANSACTIONS, (Mar. 17, 2020), https://efdsearch.senate.gov/search/view/paper/680b4c2d-8eea-48c5-b79e-df2754e37ac4/.

111. *See* U.S. SENATE FIN. DISCLOSURES, JAMES M. INHOFE PERIODIC DISCLOSURE OF FIN. TRANSACTIONS, (Feb. 14, 2020), https://efdsearch.senate.gov/search/view/ptr/f9e84e52-f7f3-4457-987e-a85d75f2a0d2/.

112. *See* U.S. SENATE FIN. DISCLOSURES, JAMES M. INHOFE PERIODIC DISCLOSURE OF FIN. TRANSACTIONS, (Mar. 13, 2020), https://efdsearch.senate.gov/search/view/ptr/02f8b979-2850-4db9-a537-a768e1eb7a67/.

113. Kelly Loeffler's husband, Jeffrey Sprecher, is the Chairman and CEO of Intercontinental Exchange and Chairman of the New York Stock Exchange (Intercontinental Exchange owns the New York Stock Exchange). *See Jeffrey Sprecher*, INTERCONTINENTAL EXCH., https://ir.theice.com/governance/board-of-directors-and-committee-composition/person-details/default.aspx?ItemId=d37de393-9b46-499e-ae8b-cb3379a02014 [https://perma.cc/HU6Y-Y68P] (last visited Aug. 5, 2022).

114. A put option gives the holder the right to sell a security at a certain price (the "strike price") within a specified period of time. *See* James Chen, *Put Option*, INVESTOPEDIA (Mar. 2, 2022), https://www.investopedia.com/terms/p/putoption.asp [https://perma.cc/33NG-VJSP]. It appears Loeffler and her husband were writing these put options, not selling existing put options. Thus, they were obligating themselves to buy stock from the holder of the put option. Writing put options on a security is consistent with a belief that the price of the security will rise or remain stagnant. *See id.*

bonds, and real estate investment trusts (REITs) during this same time period.[115]

In May of 2020, the DOJ announced it was closing its investigation of Senators Feinstein, Inhofe, and Loeffler.[116] The DOJ later closed its investigation of Senator Burr in January of 2021.[117] The SEC is still investigating Senator Burr and recently obtained a court order to compel Gerald Fauth to comply with an investigative subpoena for his testimony.[118] Still, the DOJ closing its investigation into Senators Burr, Feinstein, Inhofe, and Loeffler has led one of the drafters of the STOCK Act to conclude it "didn't go far enough" in policing insider trading by Members of Congress.[119]

A likely impediment to investigations under the STOCK Act is the Constitution's Speech or Debate Clause.[120] The Speech or Debate Clause provides:

> Senators and Representatives shall . . . in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and *for any Speech or Debate in either House, they shall not be questioned in any other Place.*[121]

To be clear, the Speech or Debate Clause would almost certainly not prevent the prosecution of a member of Congress for insider trading in violation of the STOCK Act.[122] Nor would it immunize Members from SEC

115. *See* U.S. SENATE FIN. DISCLOSURES, KELLY LOEFFLER PERIODIC DISCLOSURE OF FIN. TRANSACTIONS, (Mar. 12, 2020); https://efdsearch.senate.gov/search/view/ptr/370492b8-ed0a-4792-b45b-972d5da8a1e5/; *See* U.S. SENATE FIN. DISCLOSURES, KELLY LOEFFLER PERIODIC DISCLOSURE OF FIN. TRANSACTIONS, (Mar. 31, 2020), https://efdsearch.senate.gov/search/view/ptr/425096a9-b206-40a7-86b8-67fa4081b252/; U.S. SENATE FIN. DISCLOSURES, KELLY LOEFFLER PERIODIC DISCLOSURE OF FIN. TRANSACTIONS, (May 1, 2020), https://efdsearch.senate.gov/search/view/ptr/2b47d301-0318-4604-bd14-a0b9c1b8437f/.

116. Ryan Lucas, *Justice Department Closes Investigations of 3 Senators; Burr Inquiry Continues*, NPR (May 26, 2020, 5:31 PM), https://www.npr.org/2020/05/26/862692569/justice-department-closes-investigations-of-3-senators-burr-inquiry-continues [https://perma.cc/4FRL-NXE9].

117. Vanessa Romo, *DOJ Drops Insider Trading Investigation into Sen. Richard Burr*, NPR (Jan. 19, 2021, 9:12 PM), https://www.npr.org/2021/01/19/958622574/doj-drops-insider-trading-investigation-into-sen-richard-burr [https://perma.cc/LS8B-A6PD].

118. Press Release, U.S. Sec. & Exch. Comm'n, SEC Obtains Court Order to Enforce Investigative Subpoena for Testimony, (Nov. 10, 2021), https://www.sec.gov/litigation/litreleases/2021/lr25261.htm [https://perma.cc/5GNH-JUMP].

119. *See* Gellasch, *supra* note 7.

120. *See* Stephen M. Bainbridge, *Insider Trading Inside the Beltway*, 36 J. CORP. L. 281, 302–03 (2011).

121. U.S. CONST. art. I, § 6 (emphasis added).

122. *See* Gravel v. United States, 408 U.S. 606, 615 (1972) (citations omitted) (reasoning the Speech or Debate Clause "does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members").

enforcement actions.[123] Yet, the Speech or Debate Clause poses a substantial evidentiary hurdle in prosecuting members of Congress for insider trading.[124]

The Speech or Debate Clause traces its roots to the English Bill of Rights of 1689.[125] It represents the "culmination of a long struggle for parliamentary supremacy."[126] Indeed, as Justice Harlan observed, "[b]ehind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators."[127]

Today, the clause serves the purpose of "reinforcing the separation of powers,"[128] as it "protect[s] the integrity of the legislative process by insuring the independence of individual legislators."[129] Therefore, the Supreme Court has reasoned "legislators engaged in the 'sphere of legitimate legislative activity,' should be protected not only from the consequences of litigation's results but also from the burden of defending themselves."[130] And the protection of the clause is not limited to words spoken in debates in the House or Senate, but rather the protection covers "[c]ommitte reports, resolutions, and . . . 'things generally done in a session of the House [or Senate] by one of its members in relation to the business before it.'"[131]

The difficulties presented by such an evidentiary burden are clear. In *United States v. Rayburn*,[132] the D.C. Circuit held that an FBI seizure of legislative materials, pursuant to a search warrant, from Representative Willliam Jefferson's congressional office violated the Speech or Debate Clause.[133] The court described the privilege of the Speech or Debate Clause as "absolute."[134] Moreover, the court reasoned considerations such as the degree of disruption caused by the seizure and whether the seized documents will be used for testimonial or evidentiary purposes are immaterial.[135] Thus, some observers see *Rayburn* as standing for the proposition that "not only are members of congress (sic) immune from

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123. *See id.* at 614 (stating the Speech or Debate clause does not "confer immunity on a Member [of Congress] from service of process as a defendant in civil matters").

124. *See* Nagy, *supra* note 63, at 1135–36.

125. *See* United States v. Johnson, 383 U.S. 169, 177–78 (1966).

126. *Id.* at 178.

127. *Id.*

128. *Id.*

129. United States v. Brewster, 408 U.S. 501, 507 (1972).

130. Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) (citation omitted).

131. Powell v. McCormack, 395 U.S. 486, 502 (1969) (quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1880)).

132. United States v. Rayburn House Off. Bldg., 497 F.3d 654 (D.C. Cir. 2007).

133. *See id.* at 655–56.

134. *See id.* at 660.

135. *See id.*

prosecution for legislative acts, but—at least within the D.C. Circuit—they also cannot be compelled to produce documents related to actions within the legislative sphere."[136]

Accordingly, some argue that if prosecutors were to allege a member of Congress traded on the basis of information learned during a formal committee briefing, the Speech or Debate Clause "would likely preclude the introduction of evidence, or even the allegation in an indictment, of the information provided during that briefing, thereby precluding the prosecution from proving an essential element of the offense."[137] That is to say, under either the classical or misappropriation theory, prosecutors must demonstrate the securities trades were entered into on the basis of material nonpublic information.[138] However, the broad protections afforded by the Speech or Debate Clause would likely prevent investigators from proving this element of the offense.[139]

III. PROPOSED REGULATORY SCHEMES

A. The Ban Congressional Stock Trading Act

On January 12, 2022, Senators Jon Ossoff and Mark Kelly introduced the Ban Congressional Stock Trading Act (the "Ossoff-Kelly Bill" or the "Bill").[140] The Ossoff-Kelly Bill largely mirrors Senators Jeff Merkley and Sherrod Brown's "Ban Conflicted Trading Act," which they have introduced several times.[141] Past bipartisan support for the Ban Conflicted Trading Act is notable. Both Democrat Alexandria Ocasio-Cortez and Republican Matt Gaetz supported the version of the bill introduced in 2021.[142]

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136. Robert K. Kelner, Peter Koski & Clayton Bailey, *The Challenges of Prosecuting Congressional Insider Trading*, LAW360 (June 18, 2020, 5:32 PM), https://www.law360.com/articles/1281399/the-challenges-of-prosecuting-congressional-insider-trading [https://perma.cc/LM23-CGYF].

137. *Id.* As Senator Burr allegedly tipped his brother-in-law, these phone records as well as the content of Burr and his brother-in-law's conversation would likely not be protected by the Speech or Debate Clause. *See* Hutchinson v. Proxmire, 443 U.S. 111, 133 (1979) (holding that dissemination of information outside the legislative branch is unprotected by the Speech or Debate Clause).

138. *See supra* Part I.B.

139. *See* Kelner et al., *supra* note 136.

140. *See* Ban Congressional Stock Trading Act, S. 3494, 117th Cong. (2022).

141. *See* Gregory H. Shill, *Congressional Securities Trading*, 96 IND. L.J. 313, 316 (2020).

142. *See* Press Release, Sen. Jeff Merkley, Members of Congress Introduce Bipartisan Legislation to Stop Government Officials from Profiting off of Insider Information (Mar. 3, 2021), https://www.merkley.senate.gov/news/press-releases/members-of-congress-introduce-bipartisan-legislation-to-stop-government-officials-from-profiting-off-of-insider-information-2021 [https://perma.cc/R5HR-DXQU]. According to one ideological scoring metric, in 2020, Gaetz was the eleventh most conservative member of the House while Ocasio-Cortez was the eighth most liberal member. *See 2020 Report Cards: Ideology Score*, GOVTRACK, https://www.govtrack.us/

The Ossoff-Kelly Bill would require members of Congress, within 120 days after its enactment, to either divest or place in a "qualified blind trust"[143] each "covered investment" owned by the Member, the Member's spouse, or a dependent of the Member.[144] The term "covered investment" means an "investment in a security, a commodity, or a future" and "any economic interest comparable to a[] [security, commodity, or future] that is acquired through synthetic means, such as the use of a derivative, including an option, warrant, or other, similar means."[145] The Bill specifically excludes diversified mutual funds and diversified exchange traded funds from the "covered investment" definition.[146] To be "diversified," the fund must "not have a stated policy of concentrating its investment in any industry, business, single country other than the United States, or bonds of a single State."[147] The bill would be enforced by each house's ethics committee.[148] Any member who fails to place a covered investment in a qualified blind trust by the 120-day deadline will be fined the equivalent of one month's pay.[149]

B. An Alternative Regulatory Scheme

1. Issues with the Ossoff-Kelly Bill

Though a laudable attempt at policing congressional insider trading, the Ossoff-Kelly Bill suffers from being both underinclusive and overinclusive; it simultaneously under restricts and over restricts Members' ability to engage in securities transactions. This is a consequence of the Bill's decision to not restrict the ability of Members to trade diversified funds, while effecting a near complete restriction on Members' ability to trade individual stocks. Additionally, the House and Senate Ethics Committees have frequently been criticized as ineffective regulators.[150] Ultimately, rather than invent a new regulatory scheme, Congress should base its

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congress/members/report-cards/2020/house/ideology [https://perma.cc/CV3N-EQVT] (last visited Aug. 22, 2022).

143. For its definition of "qualified blind trust," the Bill cites to § 102(f)(3) of the Ethics in Government Act. *See* S. 3494 § 2. To be a qualified blind trust, among other more specific requirements, the trustee and employees of the trust must meet certain criteria to demonstrate their independence from the interested party, the assets in the trust must generally be free from restrictions on their transfer, and the trustee must not consult with or notify the interested party regarding the trustee's ability to manage the assets in the trust. *See* 5a U.S.C. § 102(f)(3).

144. S. 3494 § 2.

145. *See id.*

146. *Id.*

147. *Id.*

148. *See id.*

149. *See id.*

150. *See, e.g.*, Bainbridge *supra* note 120, at 304.

scheme on the Rule 10b5-1 model which has been available to corporate insiders since 2000.[151]

As members of Congress may still freely trade "diversified" mutual funds and exchange traded funds (ETFs), commentators have noted they will still have ample opportunities to trade on the basis of material nonpublic information gleaned from their positions.[152] Indeed, in the five weeks following Senator Burr's mid-February 2020 sales of stock, the S&P 500 lost a third of its value.[153] So, assuming the Ossoff-Kelly Bill was in effect and Senator Burr owned shares of an S&P 500 ETF instead of individual stocks, the Ossoff-Kelly Bill would have allowed him to sell these shares at will.[154] In effect, the Ossoff-Kelly Bill does not alter the deficient STOCK Act regulatory scheme in respect to diversified mutual funds and ETFs.

It is entirely possible then that members of Congress would simply use diversified mutual funds and ETFs, rather than individual stocks, as a tool to trade on the basis of macro information that would affect entire markets.[155] For example, if a hypothetical senator attended a secret intelligence briefing a week before Russia's February 24, 2022 invasion of Ukraine which indicated this invasion was likely to occur, this senator, under the Ossoff-Kelly Bill, could have traded European stock index funds to profit off this information.[156] Personally, this feels no less egregious than if a member of Congress were to simply trade individual stocks of Ukrainian-based companies. In this way, the Ossoff-Kelly Bill does little more than alter the means by which Members could trade on material nonpublic information learned through their positions.

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151. *See* 17 C.F.R. § 240.10b5-1 (2021).

152. *See, e.g.*, Matt Levine, *Congress Might Have to Stop Trading Stocks*, BLOOMBERG (Jan. 13, 2022, 12:17 PM), https://www.bloomberg.com/opinion/articles/2022-01-13/congress-might-have-to-stop-trading-stocks [https://perma.cc/ZJW5-ANZD].

153. *See id.*

154. Of course, these trades could still violate Rule 10b-5 and the STOCK Act. However, as discussed above, there are significant evidentiary obstacles to successfully prosecuting STOCK Act violations. *See supra* Part II.C.

155. Representative Stephen Bachus did something just like this before the financial crises. *See supra* Part II.B. Though he could not have bought call options under the Ossoff-Kelly Bill, he could still have purchased shares of a Nasdaq correlated index fund directly. Additionally, though not a member of Congress, Vice Chair of the Federal Reserve Richard Clarida came under controversy for trades he made in diversified stock and bond funds in the early days of the pandemic. *See* Levine, *supra* note 152.

156. The Ossoff-Kelly Bill does not prohibit short sales of diversified index funds. *See* Ban Congressional Stock Trading Act, S. 3494, 117th Cong. § 2 (2022). Thus, this Senator could short the Euro Stoxx 50 index. Alternatively, if the Senator wanted to avoid short selling, she could purchase the Lyxor Euro Stoxx 50 Daily (-1x) or (-2x) Inverse index. The Lyxor Euro Stoxx 50 Daily (-2x) Inverse would allow this Senator to effectively leverage her position. Between February 17, 2022, to March 7, 2022, the Euro Stoxx 50 Daily lost approximately 20% of its value. *See EURO STOXX 50 EW Index*, FIN. TIMES, https://markets.ft.com/data/indices/tearsheet/summary?s=OEWZ:STX [https://perma.cc/Z52U-Q2KZ] (last visited Aug. 22, 2022).

At the same time, the Ossoff-Kelly Bill over restricts Members' ability to trade individual stocks. A study of SEC and DOJ insider trading cases brought between 1996 and 2013 showed insider traders held their purchased securities for a median of ten trading days.[157] Thus, a congressional securities trading regulation scheme which deprived Members of the ability to quickly trade securities would be more tailored and likely prove as effective as the Bill's blind trust approach applicable to securities of individual companies.

Moreover, only approximately four percent of the bills introduced during the 117th Congress became law.[158] By writing a regulation that is broader than needed, Ossoff and Kelly risk toughening the already arduous process of making law. Indeed, several members of Congress have reportedly voiced concerns that a near ban on individual company stock ownership could deter capable people from running for Congress.[159] Regardless of the merits of this argument, it nonetheless illustrates a criticism of the Ossoff-Kelly Bill that could be avoided by tailoring a narrower solution toownership of stock of individual companies by members of Congress.

Lastly, the Ossoff-Kelly Bill's enforcement scheme, oversight by the House and Senate Ethics Committees, is likely inadequate. The House and Senate Ethics Committees have long been perceived as ineffective and reluctant to prosecute members.[160] Indeed, self-regulatory organizations in general are often viewed with suspicion due to the seeming conflict of interests which arise when the regulator and regulated belong to the same group.[161] Lastly, in the past two years, more than sixty Members of Congress have allegedly violated the reporting requirements of the STOCK Act, which is enforced by the Senate and House Ethics Committees, with little consequences.[162]

157. *See* Kenneth R. Ahern, *Information Networks: Evidence from Illegal Insider Trading Tips*, 125 J. FIN. ECON. 26, 32 (2017). The mean time an insider trader held their purchased securities was 21.3 trading days. *See id.*

158. *Statistics and Historical Comparison*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics [https://perma.cc/N896-M6LW] (last visited Aug. 22, 2022).

159. Jonathan Weisman, *Stock Trading Ban for Lawmakers Gains Momentum on Capitol Hill*, N.Y. TIMES (Feb. 9, 2022), https://www.nytimes.com/2022/02/09/us/politics/pelosi-stock-trading-congress.html [https://perma.cc/E99N-7A7K].

160. *See, e.g.*, Bainbridge, *supra* note 120, at 304.

161. *See* Barbara Black, *Punishing Bad Brokers: Self-Regulation and FINRA Sanctions,* 8 BROOK. J. CORP. FIN. & COM. L. 23, 25–26 (2013) (discussing critiques of FINRA).

162. *See* David Levinthal, *63 Members of Congress Have Violated a Law Designed to Stop Insider Trading and Prevent Conflicts-of-Interest*, INSIDER (May 31, 2022, 7:15 AM), https://www.businessinsider.com/congress-stock-act-violations-senate-house-trading-2021-9 [https://perma.cc/TJW2-9SF6].

2. *The Rule 10b5-1 Model*

Adopted in 2000, Rule 10b5-1, among other things, established an affirmative defense to § 10(b) and Rule 10b-5 insider trading liability.[163] In order to satisfy this affirmative defense, the trader must show her trades were made pursuant to a binding contract to trade securities, instructions to another person to trade securities for the trader's account, or a written trading plan (collectively or individually a "Plan" or "Rule 10b5-1 Plan") entered into when the trader was not aware of material nonpublic information.[164] The Plan must provide some specification or formula to predetermine the amount of securities to be bought or sold.[165] And the securities trades must occur pursuant to the Plan.[166] Lastly, Rule 10b5-1's affirmative defense is only available if the Plan was "entered into in good faith and not as part of a plan or scheme to evade the prohibitions of [Rule 10b-5]."[167]

It should be noted that Rule 10b5-1 Plans have come under criticism. Studies have shown corporate insiders who trade pursuant to Rule 10b5-1 Plans consistently outperform corporate insiders who do not trade pursuant to Rule 10b5-1 Plans.[168] Problematic practices that may be fueling these results include corporate insiders entering into multiple overlapping 10b5-1 Plans, then selectively cancelling plans based on material nonpublic information they learn and corporate insiders commencing trades shortly after the adoption or modification of a Rule 10b5-1 Plan.[169] Additionally, commentators have raised concerns that corporate insiders may be improperly accelerating or delaying the announcement of material nonpublic information in a way that benefits the insiders predetermined Rule 10b5-1 Plans.[170]

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163. *See* 17 C.F.R. § 240.10b5-1(c) (2021).
164. *See* § 240.10b5-1(c)(1)(i)(A).
165. *See* § 240.10b5-1(c)(1)(i)(B).
166. *See* § 240.10b5-1(c)(1)(i)(C).
167. *See* § 240.10b5-1(c)(1)(ii).
168. *See generally* Alan D. Jagolinzer, *SEC Rule 10b5-1 and Insiders' Strategic Trade*, 55 MGMT. SCI. 224 (2009); M. Todd Henderson, Alan D. Jagolinzer & Karl A. Muller, III, *Offensive Disclosure: How Voluntary Disclosure Can* Increase *Returns from Insider Trading*, 103 GEO. L.J. 1275 (2015); Taylan Mavruk & H. Nejat Seyhun, *Do SEC's 10b5-1 Safe Harbor Rules Need to be Rewritten?*, 2016 COLUM. BUS. L. REV. 133; Artur Hugon & Yen-Jung Lee, *SEC Rule 10b5-1 Plans and Strategic Trade Around Earnings Announcements* (2016), https://ssrn.com/abstract=2880878 [https://perma.cc/CYN8-Z2C8].
169. *See generally* John P. Anderson, *Anticipating a Sea Change for Insider Trading Law: From Trading Plan Crisis to Rational Reform*, 2015 UTAH L. REV. 339.
170. *See, e.g.*, Allan Horwich, *The Legality of Opportunistically Timing Public Company Disclosures in the Context of SEC Rule 10b5-1*, 71 BUS. LAW. 1113, 1116–18 (2016).

The SEC recently released a new proposed rule to amend Rule 10b5-1 to address the above concerns.[171] Under the amended Rule 10b5-1, a trader would be subject to a 120-day mandatory cooling-off period after the adoption of a Rule 10b5-1 plan.[172] Thus, to garner the protection of the Rule 10b5-1 affirmative defense, a trader may not purchase or sell securities within 120 days after the adoption or modification of a Plan.[173] The Rule 10b5-1 affirmative defense would also not apply to multiple overlapping Rule 10b5-1 Plans.[174] Lastly, the proposed rule would create a quarterly disclosure framework for the adoption and termination of Rule 10b5-1 Plans by corporate insiders.[175]

Thus, the already existing Rule 10b5-1 framework, coupled with these proposed changes, provides a superior starting point for regulation of congressional insider trading than the Ossoff-Kelly Bill. Its more tailored approach makes it neither underinclusive nor overinclusive. And allocating enforcement responsibility to the SEC provides a superior alternative to the House and Senate Ethics Committees. Importantly though, rather than an affirmative defense, all members of Congress should be required to enact a Rule 10b5-1 Plan. And these Trading Arrangements should be disclosed within five trading days after adoption or modification.

Unlike the Ossoff-Kelly Bill, this proposal would not allow Members of Congress to insider trade via diversified mutual funds or ETFs. Indeed, the 120-day cooling-off period would make it extremely difficult for members of Congress to trade swiftly enough or plan far enough in advance to insider trade profitably.[176] Additionally, this proposal would still allow members of Congress to own individual stocks and retain some control over how these stocks are traded. Lastly, commentators view the SEC as a more capable enforcer of insider trading regulation than the House and Senate Ethics Committees.[177] Although there are concerns that any government agency may be reluctant to "bite the budgetary hand that feeds it," clear statements of SEC authority to regulate Congressional Rule 10b5-1 Plans could alleviate some of these concerns.[178]

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171. *See* Rule 10b5-1 and Insider Trading, 87 Fed. Reg. 8686, (proposed Feb. 15, 2022) (to be codified at 17 C.F.R. pts. 229, 232, 240, 249).

172. *See id.* at 8688.

173. *See id.*

174. *See id.* at 8689.

175. *See id.*

176. *See* Ahern, *supra* note 157, at 32.

177. *See, e.g.*, Bainbridge, *supra* note 120, at 303–04.

178. *See id.* at 304.

CONCLUSION

In a time of record-level distrust in government,[179] a regulatory scheme which prevents members of Congress from exploiting their access to material nonpublic information could help chip away at this distrust. The broad ideological support for past regulatory schemes shows there is rare bipartisan appetite for regulation which would restrict Members' ability to trade securities.[180] Although a commendable starting point, the Ossoff-Kelly Bill suffers from several defects that would render it a flawed regulatory scheme for preventing insider trading by members of Congress.[181] Conversely, a regulatory scheme based on Rule 10b5-1 which incorporates recent modifications proposed by the SEC would offer a superior model for regulating such insider trading.[182]

Andrew Krueger[183]

179. *See Americans' Views*, *supra* note 1.
180. *See supra* note 142 and accompanying text.
181. *See supra* Part III.B.1.
182. *See supra* Part III.B.2.
183. J.D. Candidate (2023), Washington University School of Law; B.S. 2020, DePaul University. Thank you to everyone on the *Washington University Law Review* staff for their feedback and assistance during the editing process. I would also like to thank my parents for their continuous love and support.