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Cost of Capitol: Analyzing Congressional Insider Trading Regulation

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Cost of Capitol: Analyzing Congressional Insider Trading Regulation

by

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The American people don't want us day trading for profit, and engaging in active trading of the very equities that are connected to the policies that we are deciding on and voting on every day.[1]

Introduction

The United States Congress has involved itself with the financial regulation of big business for decades. The legislative body has passed a multitude of laws over time which foster greater transparency and trust between individual investors and big business. Until recently, legislators have avoided passing laws which regulate their own financial activity. Recent investigations revealing that dozens of federal lawmakers have violated financial disclosure laws and made stock trades on insider information has successfully angered the public and forced Congress to consider tighter restrictions. But can Americans trust their legislators to effectively regulate themselves? If no legislative action is taken, can the market adapt to the information asymmetry? This analysis explores the potential solutions to insider trading proposed in the halls of Congress, in other arenas in Washington, and beyond. In surveying the various approaches, one proposed bill stands out as likely to make the greatest positive impact in regulation of the financial activity of government officials.

Modern History of Financial Regulation in Congress

Throughout time, the United States Government has passed a variety of legislation with the purpose of protecting investors and promoting transparency and fairness in business. These regulations have often been introduced following the exposure of widespread fraudulent practices which caused financial disaster for countless American people. A stark example of this is the accounting scandals of the early-2000s. The practice of "cooking the books" used by multiple large corporations, most notably energy giant Enron, led Congress to act.[2] In February of 2002, Representative Michael G. Oxley introduced the Corporate and Auditing Accountability, Responsibility, and Transparency Act.[3] The bill's stated purpose is:

> *To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws, and for other purposes.*[4]

Now known as the Sarbanes-Oxley Act (SOX Act), the bill established the Public Company Accounting Oversight Board.[5] The Public Company Accounting Oversight Board was given many responsibilities:

[1] Chip Roy, U.S Representative of the 21st Congressional District of Texas.
[2] "Sarbanes-Oxley Act", *Legal Information Institute* (Cornell Law School, April 2021), accessed at https://www.law.cornell.edu/wex/sarbanes-oxley_act.
[3] Titles - H.R.3763 – 107th Congress (2001-2002): Sarbanes-Oxley Act of 2002, H.R. 3763, *107th Cong.* (2002), accessed at https://www.congress.gov/bill/107th-congress/house-bill/3763/titles.
[4] Text - H.R.3763 – 107th Congress (2001-2002): Sarbanes-Oxley Act of 2002, H.R. 3763, *107th Cong.* (2002), accessed at: https://www.congress.gov/bill/107th-congress/house-bill/3763/text.
[5] Ibid.

The Board shall…register public accounting firms that prepare audit reports for issuers…establish or adopt, or both, by rule, auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers…conduct inspections of registered public accounting firms…conduct investigations and disciplinary proceedings…impose appropriate sanctions…promote high professional standards…[6]

The SOX Act passed and was signed into law in July of 2002.[7] It is one of the most influential pieces of regulatory legislation in our history, as it has greatly improved the reliability of corporate financial disclosures, while also sparking the corporate social responsibility movement.[8]

Just five years after the SOX Act passed, the United States experienced the worst economic nosedive since the Great Depression.[9] The 2011 Financial Crisis Inquiry Commission cited causes such as firms shouldering too much risk, excessive consumer and corporate borrowing, a real-estate bubble, and government failure in regulating the financial industry.[10] The 2007-2008 Recession revealed the need for more expansive financial regulation, which pushed Congress to act again. In late 2009, the Dodd-Frank Wall Street Reform and Consumer Protection Act was introduced to the 111th Congress.[11] Key provisions of the Dodd-Frank Act include establishment of the Financial Stability Oversight Council, establishment of the Consumer Financial Protection Bureau, along with new restrictions for banks on their investment practices.[12] All in all, the Dodd-Frank Act passed with a purpose of creating a more secure financial system for all Americans in the aftermath of a period of economic turmoil.

Former President Barack Obama had a clear objective of cleaning up Wall Street during the first term of his presidency, as he advocated for the reforms encompassed by the Dodd-Frank Act.[13] Attention later turned from Wall Street toward Washington. The Stop Trading on Congressional Knowledge Act of 2012, or STOCK Act, was brought to the Senate, with the goal of curbing stock trades made based on insider information by government officials. A key part of the STOCK Act requires that officials such as the President, Vice President, and member of Congress, must:

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[6] Ibid.
[7] Actions - H.R.3763 – 107th Congress (2001-2002): Sarbanes-Oxley Act of 2002, H.R. 3763, *107th Cong.* (2002), accessed at: https://www.congress.gov/bill/107th-congress/house-bill/3763/actions.
[8] Michael W. Peregrine, "The Lasting, Positive Impact of Sarbanes-Oxley", *Harvard Law School Forum on Corporate Governance* (December 2021), accessed at: https://corpgov.law.harvard.edu/2021/12/20/the-lasting-positive-impact-of-sarbanes-oxley/#:~:text=It%20sparked%20the%20corporate%20responsibility,directors%20and%20their%20professional%20advisors.
[9] Michael J. Boyle, "2008 Recession: What It Was and What Caused It", *Investopedia*, (February 2023), accessed at: https://www.investopedia.com/terms/g/great-recession.asp.
[10] Ibid.
[11] Summary – H.R.4173 – 111th Congress (2009-2010): Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R.4173, *111th Congress*, (2010), accessed at: https://www.congress.gov/bill/111th-congress/house-bill/4173.
[12] Adam Hayes, "Dodd-Frank Act: What It Does, Major Components, Criticisms", *Investopedia*, (September 2022), accessed at: https://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp.
[13] "Wall Street Reform: The Dodd-Frank Act", *President Barack Obama White House Archives*, accessed at: https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform.

…file reports within 30-45 days after receiving notice of a purchase, sale, or exchange which exceeds $1,000 in stocks, bonds, commodities futures, and other forms of securities.[14]

The STOCK Act had great potential to create a more ethically sound governmental body, by prohibiting trading on insider information by members of Congress, and by allowing members of the public to keep a closer eye on their financial activity through expansive financial disclosure requirements. Unfortunately, just one year after the STOCK Act passed, one of its key pillars was gutted.[15] From a statement by the Press Secretary:

On Monday, April 15, 2013, the President signed into law S. 716, which eliminates the requirement in the STOCK Act to make available on official websites the financial disclosure forms of employees of the executive and legislative branches…[16]

While this change does not affect the ban on insider trading in Congress, or the requirement to file financial disclosures, it greatly changes the accessibility to those disclosures. Instead of having convenient online access to the financial disclosure forms of the thousands of staffers working on Capitol Hill, individuals seeking information must go to the basement of the Cannon House Office Building in D.C., where rifling through the forms is more challenging:

You have to enter your name and address into a computer, and then you can search. But you have to know the name of the person you are searching for. If he or she has filed a financial disclosure form, it will come up as a PDF, which you can print at a cost of 10 cents a page.[17]

The extreme change to the STOCK Act was put into place after Congress delayed compliance with the law multiple times, and commissioned a report which concluded the possibility of security risks spawned by its transparency requirements.[18] The public and the press' lack of easy access to stock returns has allowed government officials to make financial trades without any close inspection of how the actions they take may correlate with information they receive on the job.

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[14] Text – S.2038 – 112th Congress (2011-2012): STOCK Act, S.2038, *112th Cong.* (2012), accessed at: https://www.congress.gov/bill/112th-congress/senate-bill/2038/text.

[15] Ron Formisano, "Our One Percent Government, Congress and Its Adjuncts: The Way to Wealth", in American Oligarchy: The Permanent Political Class, *University of Illinois Press*, (September 2017), p.38, accessed at: https://www.jstor.org/stable/pdf/10.5406/j.ctt1vjqrmq.6.pdf?refreqid=excelsior%3A2a26b87fd00f332beeedff921ff1cb5d&ab_segments=0%2FSYC-6646_phrase_search%2Fcontrol&origin=&initiator=.

[16] "Statement by the Press Secretary on S. 716", *The White House Office of the Press Secretary*, (2013), accessed at: https://obamawhitehouse.archives.gov/the-press-office/2013/04/15/statement-press-secretary-s-716.

[17] Tamara Keith, "How Congress Quietly Overhauled Its Insider-Trading Law", *NPR* (April 2013), accessed at: https://www.npr.org/sections/itsallpolitics/2013/04/16/177496734/how-congress-quietly-overhauled-its-insider-trading-law.

[18] Ron Formisano, "Our One Percent Government, Congress and Its Adjuncts: The Way to Wealth", in American Oligarchy: The Permanent Political Class, *University of Illinois Press*, (September 2017), p. 38, accessed at: https://www.jstor.org/stable/pdf/10.5406/j.ctt1vjqrmq.6.pdf?refreqid=excelsior%3A2a26b87fd00f332beeedff921ff1cb5d&ab_segments=0%2FSYC-6646_phrase_search%2Fcontrol&origin=&initiator=.

In looking at the financial regulations passed by Congress in recent years, it is evident that there is a bipartisan effort to create a fair system and protect investors from corporate greed. However, the changes made to the STOCK Act reveal that Congress is much more willing to regulate the financial activity on Wall Street than the financial activity in Washington. This statement continues to be supported by the failed attempts of Congress to pass further legislation regarding members' trades in recent years, as is discussed later.

The Controversy of Congressional Trading

Insider trading on knowledge obtained in the halls of Congress is not just a contemporary issue. Politicians have been profiting on insider information since the foundation of the United States of America:

> *Following the ratification of the Constitution, Treasury Secretary Alexander Hamilton persuaded Congress to redeem securities issued earlier by the federal government and the states. The securities were redeemed at face value, despite the fact that the market value of many securities had fallen to as low as ten percent of their initial worth. Aware of the redemption plan, many members of Congress bought up these securities in the market before news of the redemption plan became public.*[19]

Prior to passage of the STOCK Act, members of Congress had the ability to trade on confidential information which was readily available to them daily. In analyzing past returns, it is evident that government officials have been using this information to their advantage. A 2004 study analyzing the cumulative abnormal returns on the stock market of U.S. Senators from 1993 to 1998 had significant findings:

> *Combining the buy transactions with the sell transactions in a hedged portfolio we find that Senators outperform the market by 97 basis points (1%) per month on a trade-weighted basis.*[20]

Other studies conducted on market returns in the 1990s have found that U.S. households underperformed the market by 1.4% each year, and even corporate insiders only outperformed the market by about 6% each year.[21] Comparing these results to Senators who outperformed the market by a considerable 1% a month, or 12% each year, it is fair to conclude that at least some federal lawmakers benefited from valuable information learned on Capitol Hill.

Regardless of the greater than average rate of return, it is unethical to use insider information to make trades. Prior to the STOCK Act's ban on insider trading in Congress,

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[19] Bud W. Jerke, "Cashing in on Capitol Hill: Insider Trading and the Use of Political Intelligence for Profit", *University of Pennsylvania Law Review*, (April 2010), p. 1465, accessed at: https://www.jstor.org/stable/pdf/25682354.pdf?refreqid=excelsior%3Ad925f8cccd43ddf28eb9a13c94884f2d&ab_segments=0%2FSYC-6646_phrase_search%2Fcontrol&origin=&initiator=.

[20] Ziobrowski, et al., "Abnormal Returns from the Common Stock Investments of the U.S. Senate", *The Journal of Financial and Quantitative Analysis 39(4)*, (Cambridge University Press, December 2004), p. 674, accessed at: https://www.jstor.org/stable/pdf/30031880.pdf?refreqid=excelsior%3A5885ac359562dcdbfa31d883b293c798&ab_segments=&origin=&initiator=&acceptTC=1.

[21] Stephen M. Bainbridge, "The Stop Trading on Congressional Knowledge Act", *UCLA School of Law*, (August 2009), p.1, accessed at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1449744.

members were already required to be following the Code of Ethics for Government Service (1958), which states:

> *Any person in Government service should…Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.*[22]

In all fairness, the Code of Ethics for Government Service is a concurrent resolution, not a legally binding statute, so it did not make insider trading an illegal activity for members of Congress.[23] Despite this, ethical guidelines should be treated with high regard, as employees in other fields can easily be fired for violating their respective workplace codes of ethics.

The issue of trading on nonpublic information in Congress is not one which leans more heavily toward either side of the aisle. Additionally, it has a relatively equal impact on both legislative bodies. Democrats and Republicans alike in the Senate and the House of Representatives have been highly criticized for their financial trades in recent years.[24] These critiques have spawned from investigations which revealed that over 100 federal lawmakers and staffers have been violating the STOCK Act by ignoring the law's filing requirements, as well as continuing to trade in industries with which they have a conflict-of-interest.[25] Many of these lawmakers made trades which aligned with the work conducted through their respective committees:

> *Representative Bob Gibbs, an Ohio Republican on the House Oversight Committee, reported buying shares of the pharmaceutical company AbbVie in 2020 and 2021, while the committee was investigating AbbVie and five rivals over high drug prices.*
>
> *The timing of one trade by the wife of Representative Alan Lowenthal, Democrat of California, was especially striking: His disclosure statement said she had sold Boeing shares on March 5, 2020 – one day before a House committee on which he sits released damaging findings on the company's handling of its 737 Max jet, which was involved in two fatal crashes.*[26]

These two instances are a mere fraction of those flagged by the recent investigations. The New York Times found that over 90 federal lawmakers or their immediate family members traded financial assets between 2019 and 2022 that related to their committee matters[27] , and Insider

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[22] H. Con. Res. 175, 1958: Code of Ethics for Government Service, *Cong.*, (1958), accessed at: https://www.govinfo.gov/content/pkg/STATUTE-72/pdf/STATUTE-72-PgB12.pdf.

[23] Bud W. Jerke, "Cashing in on Capitol Hill: Insider Trading and the Use of Political Intelligence for Profit", *University of Pennsylvania Law Review*, (April 2010), p. 1465, accessed at: https://www.jstor.org/stable/pdf/25682354.pdf?refreqid=excelsior%3Ad925f8cccd43ddf28eb9a13c94884f2d&ab_segments=0%2FSYC-6646_phrase_search%2Fcontrol&origin=&initiator=.

[24] Dave Levinthal, "'Conflicted Congress': Key findings from Insider's five-month investigation into federal lawmakers' personal finances", *Insider*, (December 2021), accessed at: https://www.businessinsider.com/conflicted-congress-key-findings-stock-act-finances-investing-2021-12.

[25] Ibid.

[26] Kate Kelly, Adam Playford, and Alicia Parlapiano, "Stock Trades Reported by Nearly a Fifth of Congress Show Possible Conflicts", *New York Times*, (September 2022), accessed at: https://www.nytimes.com/interactive/2022/09/13/us/politics/congress-stock-trading-investigation.html.

[27] Ibid.

found 78 members of Congress who violated the STOCK Act's requirement of filing high dollar trades within 30-45 days.[28] Many of these recent filing delays have been substantial, such as these of Senator John Hickenlooper (D), and Representative Pat Fallon (R):

> *In May 2020, Hickenlooper was months – and in two cases, more than a year – late in disclosing five separate stock trades for himself or his wife that, taken together, are worth between $565,000 and $1.3 million…*
>
> *Fallon was months late disclosing dozens of stock trades during early- and mid-2021 that together are worth as much as $17.52 million. Fallon was late again in December 2021 disclosing stock trades.*[29]

These, along with dozens of other violations from various Democrats and Republicans in the House and the Senate, reveal how members of Congress do not take their legal responsibilities under the STOCK Act as seriously as required. Many officials have claimed their filing delays are due to clerical or accounting errors, or simply just ignorance regarding the law's requirements.[30] It is laughable to think the hundreds of violations of the STOCK Act within the past few years are due plainly to errors and ignorance, especially when the law has been in place for over a decade. The more logical reason for these delays is that access to government officials' financial disclosure forms is incredibly limited, and they do not care to closely follow the law until facing widespread criticism or large penalties for failing to do so.

The STOCK Act as it exists today does not do what it is intended to. Despite its great potential of preventing trades on conflicts of interest and its push for greater financial transparency of federal lawmakers, it has failed to properly regulate the trades made by members of Congress. If our representatives truly want to create and maintain a financial system that protects investors and promotes fairness in the market, then they must update the laws governing their trading activity in order to tighten restrictions on themselves. But the question remains: Can we trust our legislators to effectively regulate themselves?

The Combatting Financial Conflicts of Interest in Government Act

Just as the STOCK Act was introduced following negative attention in the press, the 2022 investigative reports by Insider and the New York Times were quickly followed by a new bill's introduction in Congress. On September 28, 2022, Representative Zoe Lofgren brought the Combatting Financial Conflicts of Interest in Government Act to the 117th Congress.[31] The bill states:

[28] Dave Levinthal and Madison Hall, "78 Members of Congress have violated a law designed to protect insider trading and stop conflicts-of-interest", *Insider*, (January 2023), accessed at: https://www.businessinsider.com/congress-stock-act-violations-senate-house-trading-2021-9.
[29] Ibid.
[30] Ibid.
[31] Text – H.R.8990 – 177th Congress (2021-2022): Combatting Financial Conflicts of Interest in Government Act, H.R.8990, *117th Cong.* (2022), accessed at: https://www.congress.gov/bill/117th-congress/house-bill/8990/text.

Conduct During Federal Service. – Except as described in paragraph (2) of subsection (b) or subsections (c) through (h), no covered person may own or trade any covered investment.

Compliance. – To comply with the requirements…a covered person shall divest of any covered investment within 180 days of the effective date…or the date on which an individual becomes a covered person, whichever is later –

(A) through gift or charitable donation of a covered investment
(B) by converting a covered investment to cash; or
(C) by placing a covered investment in a qualified blind trust in accordance with subsection (c).[32]

Put simply, this bill would ban "covered persons", such as members of Congress and their spouses and dependent children, from buying or selling "covered investments" which includes securities, commodities, futures, and cryptocurrencies. Additionally, the bill would return to the STOCK Act's original requirement of electronically filing financial disclosure forms, and would give public electronic access to information on members of Congress who paid penalty fees for violating disclosure rules.[33] On the surface, passage of this bill would appear to be a major victory for those looking to stop lawmakers from trading in industries with which they have a conflict-of-interest. However, upon closer examination, the language of the bill leaves legislators a gap which may render it ineffective.

As stated above, covered persons under the Combatting Financial Conflicts in Government Act are given the option of placing their investments in a blind trust in accordance with the bill. A blind trust is one in which the owner gives a trustee full control to manage their assets and investments, with no communication occurring between the two parties regarding the holdings of the trust.[34] The bill uses the definition of a blind trust which originates from the Ethics in Government Act of 1978, which has many strict conditions:

To qualify, blind trusts have to meet several conditions: the trustee and all of their employees must meet several criteria to be considered sufficiently independent, assets in the trust must not have restrictions with respect to their transfer or sale, the trustee must have sole control of the assets, and more.[35]

The Combatting Financial Conflicts in Government Act allows for this definition to be amended:

Notwithstanding subparagraphs (A) through (G), a form of a trust approved by the Office of Government Ethics, Judicial Conference, House of Representative, or Senate through rule making or by majority vote for its respective jurisdiction.[36]

[32] Ibid.
[33] Ibid.
[34] Will Kenton, "Defining a Blind Trust, How It Works, Examples", *Investopedia,* (July 2021), accessed at: https://www.investopedia.com/terms/b/blindtrust.asp.
[35] Donald Shaw, "Democrats' Stock Ban Bill Has a Major Loophole, Ethics Expert Says", *Sludge*, (September 2022), accessed at: https://readsludge.com/2022/09/28/democrats-stock-ban-bill-has-a-major-loophole-ethics-expert-says/.
[36] Text – H.R.8990 – 117th Congress (2021-2022): Combatting Financial Conflicts of Interest in Government Act, H.R.8990, *117th Cong.* (2022), accessed at: https://www.congress.gov/bill/117th-congress/house-bill/8990/text.

Succinctly, members of Congress would be restricting their financial trading activity to blind trusts, but they are also allowing themselves to redefine what terms are required of a blind trust. If this bill were to pass, could the public rely on lawmakers to uphold these terms of independence, or will it mark the end of the truly blind trust? At least for the near future, blind trusts must remain as they have been, as no action has been taken on the bill since the day of its introduction.[37] Despite the lack of action, similar bills on the topic of congressional stock trading have been floating around Washington recently, with one fighting to remain relevant.

The Transparent Representation Upholding Service and Trust in Congress Act

More than a year before the Combatting Financial Conflicts in Government Act was introduced, a similar bill was brought to the House of Representatives called the Transparent Representation Upholding Service and Trust in Congress Act, known familiarly as the TRUST in Congress Act.[38] The summary of the TRUST in Congress Act reads as follows:

> *This bill requires a Member of Congress, as well as any spouse or dependent child of a Member, to place specified investments into a qualified blind trust (i.e., an arrangement in which certain financial holdings are placed in someone else's control to avoid a possible conflict of interest) until 180 days after the end of their tenure as a Member of Congress.*[39]

This bill is quite similar to the Combatting Financial Conflicts in Government Act, as both pieces of legislation ban members of Congress from trading, as well as requiring the use of blind trusts. The key difference between the two bills is the way in which blind trusts are defined. While the Combatting Financial Conflicts in Government Act allows legislators a loophole to redefine the terms of a blind trust, the TRUST in Congress Act says:

> *The term "qualified blind trust" has the meaning given that term in section 102(f)(3) of [the Ethics in Government Act of 1978].*[40]

This bill solely relies on the current definition of a qualified blind trust and has no provision allowing for the definition to be amended. For this reason, the TRUST in Congress Act would be a superior piece of legislation when considering the goals of fairness and transparency. Unfortunately, the bill has also seen no action since its introduction. However, it cannot be considered a dead bill.

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[37] Actions – H.R.8990 – 117th Congress (2021-2022): Combatting Financial Conflicts of Interest in Government Act, H.R.8990, *117th Cong.* (2022), accessed at: https://www.congress.gov/bill/117th-congress/house-bill/8990/all-actions.

[38] Actions – H.R.336– 117th Congress (2021-2022): TRUST in Congress Act, H.R.336, *117th Cong.* (2021), accessed at: https://www.congress.gov/bill/117th-congress/house-bill/336/actions.

[39] Summary – H.R.336– 117th Congress (2021-2022): TRUST in Congress Act, H.R.336, *117th Cong.* (2021), accessed at: https://www.congress.gov/bill/117th-congress/house-bill/336.

[40] Text – H.R.336– 117th Congress (2021-2022): TRUST in Congress Act, H.R.336, *117th Cong.* (2021), accessed at: https://www.congress.gov/bill/117th-congress/house-bill/336/text.

It has been over two years since the TRUST in Congress Act was introduced by Representative Abigail Spanberger, yet she continues to fight for it to move forward through the legislative process.[41] In a recent letter to the U.S. House Committee on House Administration, she defends the importance of the issue:

> *We owe our constituents action – and the first step of the 118th Congress is for the Committee on House Administration to hold a hearing with good governance experts to reexamine proposals banning Members of Congress, their spouses, and their dependent children from trading individual stocks while in office. We must continue the momentum we saw last year across the political spectrum and within our districts to make reforms now.*[42]

Spanberger, a Democrat, reintroduced the bill for the second time with Republican Representative Chip Roy in January of 2023, and they have garnered bipartisan support from over 50 cosponsors in Congress.[43] This bill has great potential in making it to a vote, especially considering it has backing on both sides of the aisle. It is also important to note that the STOCK Act was first introduced in 2004, and only had six cosponsors at the time. The TRUST in Congress Act may take more time to gain serious traction, but it certainly has enormous potential.

The Consequences of Inaction

Despite renewed attention on the TRUST in Congress Act, alongside general bipartisan public interest in tighter regulation on the trading activity of federal legislators, there is a real possibility that no effective legislation will be passed in the near future. This could prove to be devastating, as the asymmetry of information will continue to make members of Congress richer, while the American people are kept in the dark. The COVID-19 pandemic exposed the ease and willingness of our lawmakers and other government officials to trade on nonpublic information:

> *By March [2020], every major agency was drawn into the pandemic response. That month was the most active for trading by officials across the federal government, including at HHS, in the Journal's analysis of financial disclosure forms for about 12,000 officials spanning 2016 to 2021. Federal officials reported more than 11,600 trades that month, 44% more than in any other month in the analysis.*[44]

In March of 2020, many of us were simply trying to wrap our heads around this new, rapidly spreading, global virus. Yet at the same time, federal officials in a variety of agencies – including

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[41] "Spanberger Presses For Hearing on Legislation to Ban Members of Congress & Their Families from Trading Individual Stocks", *Congresswoman Abigail Spanberger*, (February 2023), accessed at: https://spanberger.house.gov/posts/spanberger-presses-for-hearing-on-legislation-to-ban-members-of-congress-their-families-from-trading-individual-stocks.
[42] Ibid.
[43] Ibid.
[44] Rebecca Ballhaus, et al., "As Covid Hit, Washington Officials Traded Stocks With Exquisite Timing", *The Wall Street Journal*, (October 2022), accessed at: https://www.wsj.com/articles/covid-washington-officials-stocks-trading-markets-stimulus-11666192404?twclid=2-4kmksk57f53xsskvwdt86bo5l&mod=WSJ_ACQ_NA_TW_US_CONTENT_NA_PAID.

those in the Department of Health and Human Services, which houses the CDC – were making huge financial moves, buying up stock in companies that soon after received major government aid, such as Boeing and General Electric.[45] The information asymmetry during the early stages of the pandemic led many government officials to make a great deal of money in the market. If no legislative action is taken to limit or cease trading by members of Congress and other government officials, there is no doubt that this will continue to happen with other major international and domestic events.

The failure of the federal government to properly regulate its trading activity has caused various outside actors to come up with innovative solutions in order to help bridge the information gap. One such actor is CapitolTrades.com, a platform which gives free access to the trading activity of politicians as soon as it becomes available. From their Mission Statement:

> *Making CapitolTrades.com free for the public reflects our core values of accountability and transparency while reinforcing the importance of a free market economy that is accessible to all.*
> *We believe that through greater transparency, more informed individuals will enrich the system itself, therefore enabling a competitive market.*
> *Equally, we support the STOCK Act…and its enforcement and development. This will deliver a better, faster reporting system, efficient penalties and a more accountable approach to preventing the misuse of insider information.*[46]

The website has features allowing users to search through trade data by politician or stock issuer, and use filters such as political party, business sector, and asset type. Sorted by filing date, trades are listed in the following manner:

Figure 1: CapitolTrades.com Trade Data

POLITICIAN	TRADED ISSUER	PUBLISHED	TRADED	FILED AFTER	OWNER	TYPE	SIZE	PRICE
Morgan McGarvey Democrat / House / KY	Amazon.com Inc AMZN:US	24 Mar 2023	7 Feb 2023	44 days	Spouse	BUY*	1K–15K	102.11
Morgan McGarvey Democrat / House / KY	NVIDIA Corporation NVDA:US	24 Mar 2023	28 Feb 2023	23 days	Spouse	SELL*	1K–15K	232.16
Morgan McGarvey Democrat / House / KY	NVIDIA Corporation NVDA:US	24 Mar 2023	28 Feb 2023	23 days	Spouse	SELL*	1K–15K	232.16
French Hill Republican / House / AR	US TREASURY BILLS N/A	24 Mar 2023	23 Feb 2023	28 days	Undisclosed	BUY*	15K–50K	N/A
Rick Scott Republican / Senate / FL	CENTRAL TEXAS REGIO... N/A	23 Mar 2023	24 Feb 2023	27 days	Spouse	BUY*	500K–1M	N/A
Michael McCaul Republican / House / TX	Conocophillips COP:US	23 Mar 2023	13 Feb 2023	35 days	Spouse	BUY	100K–250K	112.31

Source: CapitolTrades.com

[45] Ibid.
[46] Capitol Trades, "About us", *2iQ Research,* (2023), accessed at: https://www.capitoltrades.com/about-us.

This platform provides a neutral and insightful look into the financial activity of members of Congress, while also providing a glimpse into how the original STOCK Act could have functioned before the e-filing requirement was gutted from the law.

Another innovative approach of those interested in closely following the financial activity of politicians comes from a collaboration between Unusual Whales, a retail trading data hub, and Subversive Capital, a Registered Investment Advisor. Together, they have launched two exchange-traded funds (ETFs): the Subversive Unusual Whales Democratic ETF (Ticker: NANC), and the Subversive Unusual Whales Republican ETF (Ticker: KRUZ).[47] Both funds invest in equity securities bought and sold by members of Congress and their spouses, separated by political affiliation.[48] During the announcement of these ETFs in February 2023, Portfolio Manager, Christian H. Cooper, stated:

> *A quick online search shows how members of Congress perform relative to the rest of the market. Congress has outperformed the market and beat the SPY index in 2021 and 2022. We believe members of Congress have more information than the rest of us, and if they can trade on that information, we should be able to do the same, and now we can.*[49]

Similar to CapitolTrades.com, these ETFs allow the public to capitalize on the financial moves made by government officials who may have made certain trades based on information received on the job. The main drawback to the ETFs and published trades is the issue of timing. The value in the trades made by members of Congress is often their ability to buy or sell based on information not yet made available to the public, as was the case with trades made at the beginning of the COVID-19 pandemic. If the trades are filed and publicly available until several weeks after they were made, it is likely that making a similar trade 30-plus days later would not be as financially lucrative.

Congress has shown no real effort to continue attempts to cease members' trading abilities, and outside actors can only work with weeks-old STOCK Act data. But there is a possibility of another source inside the federal government taking regulatory action against the unethical financial activity of government officials. Administrative agencies have the power not only to create new regulations through the rulemaking process, but also the power to enforce existing laws. When it comes to enforcing the STOCK Act, many believe the Securities and Exchange Commission (SEC) could be the perfect agency to do so:

> *The SEC's status as an independent commission, with seats divided between Democratic and Republican appointees, could therefore protect it from criticism that cases are politically motivated. And the commission has decades of experience monitoring markets for unusual activity and bringing insider-trading cases.*[50]

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[47] Subversive Capital, "Subversive ETFs", *Subversive Capital*, (2023), accessed at: https://www.subversive.com/etfs.
[48] Ibid.
[49] PR Newswire, "Subversive Partners with Unusual Whales to Launch Democratic and Republican Exchange Traded Funds", *Cision US Inc.*, (February 2023), accessed at: https://www.prnewswire.com/news-releases/subversive-partners-with-unusual-whales-to-launch-democratic-and-republican-exchange-traded-funds-301740496.html.
[50] C. Ryan Barber, "The SEC could be the last, best hope to keep members of Congress from insider trading. The agency already has one Republican senator on its radar.", *Insider*, (December 2021), accessed at: https://www.businessinsider.com/sec-could-enforce-stock-act-keep-congress-from-insider-trading-2021-12.

Violations of the STOCK Act are not uncommon, yet penalties are rarely given out. If the SEC were to take on the enforcement of the STOCK Act, it is likely that members of Congress would begin to take the law more seriously. Additionally, the SEC has the power through the rulemaking process to regulate the trading activity of government officials. So, if Congress does not pass new legislation regarding the issue, the SEC could choose to take it on. However, exerting this kind of power onto Congress may backfire, as agencies are limited by the delegations of Congress.[51] Additionally, the SEC has not shown any indication of wanting to regulate insider trading in Congress other than a recent investigation into Senator Richard Burr's well-timed sell of $1.65 million worth of stock in February 2020 that led to no further action by the agency.[52] All in all, the inaction of Congress regarding the regulation of members' trading activity has led to efforts by outside actors to capitalize on their trades and it has shown that it may take administrative agencies to regulate and enforce current laws themselves.

Conclusion

Throughout the history of the United States, Congress has passed a variety of legislation with a goal of protecting investors and promoting transparency and fairness in business. Through the many modern financial scandals, such as the 2001 fall of Enron and the 2007-2008 recession, the federal government has created new laws with a goal of protecting the public against big business. However, Congress is much more willing to regulate the financial activity on Wall Street than the financial activity in Washington, as seen through its efficient gutting of the 2012 STOCK Act. In recent years, a variety of investigations into the trading activity of members of Congress have alluded to the fact that many of them are using information they receive on the job to make personal financial trades. These investigations have led to bipartisan public outrage and have forced legislators to consider tighter regulation on themselves. None of the recent bills have succeeded in making it to a vote, yet some lawmakers continue to fight for the legislation. If Congress does not take action in the near future, the public may need to rely on outside actors to make members' trade disclosures easily accessible, and on administrative agencies to create rules that effectively regulate legislators. However, the most straightforward way to stop the unethical trading in Washington is for Congress to pass Representative Spanberger's TRUST in Congress Act, banning all members from using their confidential information for financial gain in the markets.

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[51] "Administrative law", *Legal Information Institute*, (Cornell Law School, 2023), accessed at: https://www.law.cornell.edu/wex/administrative_law.

[52] Dan Mangan, "SEC ends insider trading probe of ex-Sen. Richard Burr and brother-in-law without taking action, lawyers say", *CNBC*, (March 2023), accessed at: https://www.cnbc.com/2023/01/06/sec-ends-richard-burr-insider-trading-probe.html.