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## Blacking Out Congressional Insider Trading: Overlaying a Corporate Mechanism Upon Members of Congress and Their Staff to Curtail Illegal Profiting

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# **BLACKING OUT CONGRESSIONAL INSIDER TRADING: OVERLAYING A CORPORATE MECHANISM UPON MEMBERS OF CONGRESS AND THEIR STAFF TO CURTAIL ILLEGAL PROFITING**

*Nicholas Gervasi\**

## **ABSTRACT**

Congressional insider trading involves members of Congress or their staff trading on material, nonpublic information attained while executing their official responsibilities. This type of private profit-making, while in a government role, casts doubt on the efficacy and impartiality of lawmakers to regulate companies they hold shares of. Egregious acts of illegal profiting from insider trading based on information entrusted to the government escape prosecution and liability due to fundamental gaps in the common law and the Congress specific statutes lack enforcement. Recent calls on Congress by the public and multiple bipartisan proposed bills in both chambers have begun to address this issue of illicit profiteering. However, these bills suffer from the same enforcement and disclosure hurdles that stymied the now decade old Stop Trading on Congressional Knowledge Act of 2012 (“STOCK Act”). Adopting a corporate mechanism, congressional blackout periods surrounding key events is a trackable and simple-to-monitor system to keep lawmakers in check. Congressional blackout periods bookending closed door hearings would prevent trading at moments where material, nonpublic information is likely to be used to avoid losses or extract higher gains.

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## INTRODUCTION

Sen. Richard J. Durbin (D-IL) sold mutual-fund shares the day after a closed door hearing with Treasury Secretary Henry M. Paulson Jr. and Federal Reserve Chairman Ben S. Bernanke, where both financial

officials briefed leaders of Congress on the financial crisis and potential bailout strategies.<sup>1</sup>

This example illustrates the issue with federal securities laws to prohibit insider trading and their application to members of Congress.<sup>2</sup> Moreover, when 72 members of Congress violate the Stop Trading on Congressional Knowledge Act of 2012 (“STOCK Act”), a law designed to combat insider trading, without prosecution, a new enforcement mechanism is needed.<sup>3</sup>

Members of Congress and their staff gain information on macro events that can move markets before the investing public has a chance to act.<sup>4</sup> For example, due to his official position, Sen. Richard Burr (R-NC) had access to classified intelligence reports on the severity of the pandemic and he sold over \$1 million in stocks before the markets collapsed in the following weeks.<sup>5</sup> Burr’s brother-in-law, Gerald Fauth, is the chairman of the National Mediation Board, an agency that deals with labor-management regarding the railroad and airline industries.<sup>6</sup> From the obtained cellphone records, after Burr called his stockbroker to make the trades, he called Fauth, a call that lasted under a minute. After this call, Fauth called his stockbroker a minute later to also make stock sales.<sup>7</sup> Although some of the Department of Justice’s documents have been made public, Burr was not charged with any federal securities laws violations related to the trades.<sup>8</sup>

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1. *Durbin’s Insider Trading*, WASH. TIMES (June 18, 2009), <https://www.washingtontimes.com/news/2009/jun/18/durbins-insider-trading/> [https://perma.cc/ZX3X-FJRR].

2. *See generally* Dave Levinthal, *72 Members of Congress Have Violated a Law Designed to Prevent Insider Trading and Stop Conflicts-of-interest*, BUS. INSIDER (Sept. 8, 2022, 9:08 AM), <https://www.businessinsider.com/congress-stock-act-violations-senate-house-trading-2021-9> [https://perma.cc/M8AV-C3TW].

3. *Id.*

4. Dan Mangan, *Sen. Richard Burr, Brother-In-Law Spoke on Phone Just Before Stock Sales that are Under Investigation, SEC Says*, CNBC (Oct. 28, 2021, 6:31 PM), <https://www.cnbc.com/2021/10/28/sec-probes-possible-insider-stock-trades-by-sen-richard-burr-relative.html> [https://perma.cc/E7HJ-FZLJ].

5. *Id.*

6. *Id.*

7. *Id.*

8. Sarah D. Wire, *Justice Department Makes Public Search Warrant Targeting Sen. Richard Burr over Stock Trades*, L.A. TIMES (June 17, 2022, 8:02 PM), <https://www.latimes.com/politics/story/2022-06-17/justice-department-makes-public-burr-stock-trading-warrant-in-times-lawsuit> [https://perma.cc/W8HJ-4WAT].

Senators, on average, beat the market by 12 percent a year during the 1990s.<sup>9</sup> As evidenced by the enactment of several statutes specifically tailored to halt congressional insider trading, the common law's breadth has precluded the capture of members of Congress under insider trading claims.<sup>10</sup> The current Congress has proposed several bills to amplify the STOCK Act and further tighten the restrictions on trading activity.<sup>11</sup>

Some of these proposed bills address trades made by spouses of members of Congress.<sup>12</sup> Speaker of the House Nancy Pelosi and her husband Paul Pelosi provide an illustration of the link between a member of Congress and a spouse trading.<sup>13</sup> Paul Pelosi made millions of dollars on trades of Alphabet, Inc., Amazon.com Inc., and Apple Inc. in the weeks preceding the House Judiciary Committee's vote on antitrust legislation that impacted the aforementioned companies.<sup>14</sup> The timing of the trades and the angst surrounding their revelation through financial disclosures has led lawmakers to propose total bans on individual stock trading.<sup>15</sup>

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9. Stephen M. Bainbridge, *Insider Trading Inside the Beltway 1* (UCLA Sch. of Law, Law-Econ Research Paper No. 10-08), <https://ssrn.com/abstract=1633123> ("U.S. households on average underperformed the market by 1.4 [percent] a year and even corporate insiders on average beat the market by only about 6 [percent] a year during that period."). Bainbridge adds that "[i]t seems unlikely that United States Senators as a group have such unique investment skills that they can outperform not only the market as a whole but also corporate insiders over an extended period." *Id.*

10. See *infra* Section I.C.

11. Levinthal, *supra* note 2.

12. Bill Summary, Ban Congressional Stock Trading Act (2021) <https://www.ossoff.senate.gov/wp-content/uploads/2022/01/BAN-CONGRESSIONAL-STOCK-TRADING-ACT-SUMMARY-.pdf> [<https://perma.cc/XX49-FQRN>].

13. A study of Pelosi's reported transactions from 2020-2021 examined whether an investor should duplicate her husband's trading activities, advising to follow: purchases of Apple shares, Microsoft Corporation shares, Amazon shares, and NVIDIA Corporation shares. Jackie Johnson, *Nancy Pelosi: Are Her Reported Stock Trades Worth Copying?*, (Feb. 11, 2022), <https://ssrn.com/abstract=4032267>. The study concluded to not follow Pelosi blindly, explaining that of the 20 companies she invested in, half the trades were "long term call options, ill-timed share sales, or purchases without any clear potential for profit." *Id.* at 33.

14. Billy House & Anna Edgerton, *Pelosi's Husband Locked in \$5.3 Million from Alphabet Options*, BLOOMBERG LAW (July 7, 2021).

15. See Christina Wilkie, *Congress Moves to Ban Members From Trading Stocks as Pelosi Drops Opposition*, CNBC (Feb. 9, 2022, 8:27 PM), <https://www.cnn.com/2022/02/09/congress-moves-towards-banning-members-from-trading-stocks.html> [<https://perma.cc/U9ME-JMZC>].

Members of Congress and their staff should be prohibited from trading on information obtained from closed door hearings. The proposed bills, with complete bans on individual stock trading, apply too broad a prohibition that does not account for the various actions of a typical member.<sup>16</sup> Congressional blackout periods would better curb insider trading by providing a clear and date-based system, mirroring corporate blackout periods which are monitored by financial regulators.<sup>17</sup>

This Note addresses stemming congressional insider trading by proposing congressional blackout periods to bookend closed hearings, where material, nonpublic information is exchanged. Part I discusses the evolution of federal securities laws regarding insider trading and the jurisprudence that shaped liability. After framing the laws designed for corporate insiders, Part I subsequently moves to the enacted statutes and proposed legislation specifically created to curtail congressional insider trading. Part I identifies the gaps in insider trading prohibitions when applied to members of Congress. Using a hypothetical trade, covering members of Congress and their employees, Part II grapples with the limitations of the laws for corporate insiders and the extreme nature of the proposed bills aimed at Congress. By superimposing the proposed bills over the hypothetical scenarios, Part II highlights the simultaneous over- and under-inclusivity of the pending bills. Part III proposes the adaptation of corporate blackout periods to congressional closed hearings.

## I. THE EXISTING AND PROPOSED SETS OF LAWS THAT GOVERN CONGRESSIONAL INSIDER TRADING

### A. DEFINING INSIDER TRADING

The U.S. Securities and Exchange Commission (SEC) defines illegal insider trading<sup>18</sup> as “buying or selling a security, in breach of a fiduciary

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16. *See infra* Section II.C.2.a.

17. *See infra* Section III.A.

18. This Note will address illegal insider trading, as insider trading is not always illegal. It is legal when corporate insiders trade in their own companies within the limits of company policy and the governing regulations. Although some critics argue that insider trading is favorable because it makes markets more efficient by allowing nonpublic information to be reflected in the price of securities, this Note will focus on the downsides of insider trading. Insider trading erodes the integrity of the markets, leading investors to believe that markets are rigged and unfair. Prolonged perceptions of unfairness could undermine confidence in the financial system and even drive them out

duty or other relationship of trust and confidence, on the basis of material, nonpublic information about the security.”<sup>19</sup> Violations may extend to “tipping” material, nonpublic information, trading by the “tipped” person, and trading “by those who misappropriate such information.”<sup>20</sup> There is not an express definition of “insider trading” in the federal securities laws.<sup>21</sup> Congress and the SEC have disagreed over the definition of insider trading. The SEC has resisted a bright-line rule because of concerns that a clear definition would induce more fraud.<sup>22</sup>

The SEC has generally brought insider trading actions against corporate officers, directors, or employees.<sup>23</sup> However, this group has been expanded through the common law and the SEC’s decisions of who to charge, including lawyers,<sup>24</sup> software engineers,<sup>25</sup> political intelligence consultants,<sup>26</sup> and hedge fund managers.<sup>27</sup> “Insiders” encompasses many corporate outsiders, such as members of Congress, their staffers, other government officials.<sup>28</sup>

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completely. Thomas C. Newkirk, Associate Director, Division of Enforcement & Melissa A. Robertson, Senior Counsel, Division of Enforcement, U.S. Sec. & Exch. Comm’n, Speech by SEC Staff at 16th International Symposium on Economic Crime, Jesus College, Cambridge, England, Insider Trading – A U.S. Perspective (Sept. 19, 1998).

19. *Insider Trading*, U.S. SEC. & EXCH. COMM’N <https://www.investor.gov/introduction-investing/investing-basics/glossary/insider-trading> [<https://perma.cc/UJG4-MYH2>] (last visited May 27, 2022).

20. *Id.*

21. Eric C. Surette, Annotation, *Application of Holding in Dirks v. S.E.C., 463 U.S. 646 (1983), that Recipient of Tip from Insider Must Abstain from Using Such Information if Insider Will Benefit from Disclosing Tip*, 42 A.L.R. Fed. 3d Art. 8 § 2 (2019).

22. Cindy A. Schipani & H. Nejat Seyhun, *Defining “Material, Nonpublic”: What Should Constitute Illegal Insider Information?*, 21 FORDHAM J. CORP. & FIN. L. 327, 335 (2016).

23. *Insider Trading*, *supra* note 19.

24. *United States v. O’Hagan*, 521 U.S. 642, 652 (1997).

25. Jordan Novet, *SEC Charges Twilio Engineers with Insider Trading During Early Days of Pandemic*, CNBC (Mar. 28, 2022, 8:27 PM), <https://www.cnbc.com/2022/03/28/sec-charges-twilio-engineers-with-insider-trading-.html> [<https://perma.cc/XKT4-T6QB>] (charging three software engineers at cloud software vendor Twilio).

26. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Pol. Intel. Firm (Nov. 24, 2015), <https://www.sec.gov/news/pressrelease/2015-266.html> [<https://perma.cc/KR F3-JUPD>] (agreeing to admit wrongdoing and pay a \$375,000 penalty for compliance failures).

27. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Hedge Fund Manager Leon Cooperman with Insider Trading (Sept. 21, 2016), <https://www.sec.gov/news/pressrelease/2016-189.html> [<https://perma.cc/9RQF-7UWA>].

28. *See SEC v. Tome*, 638 F. Supp. 596, 616 (S.D.N.Y. 1986) (“The term ‘insider trading’ actually is a misnomer, only imperfectly describing the proscribed conduct, since



Trading includes buying or selling securities.<sup>29</sup> Trading includes trades executed: on an exchange, such as the New York Stock Exchange (NYSE), in an over-the-counter (“OTC”) market, to an electronics communications network (“ECN”) or to an internal division of the broker’s firm to be filled out by the firm’s own inventory.<sup>30</sup> Trading is not limited to traditional broker-dealers, but includes trading apps, such as Robinhood Markets Inc.<sup>31</sup> Several insider trading cases have begun with a call to the SEC from an options writer on out-of-the-money<sup>32</sup> (“OTM”) contracts.<sup>33</sup> The SEC uses sophisticated tools to track the timing of trades and detect insider trading.<sup>34</sup>

The SEC lists examples of insider trading cases it has brought, including against “[g]overnment employees who traded based on confidential information they learned because of their employment with the government.”<sup>35</sup> Members of Congress and their subordinates are government employees and the hypothetical in Section II will address their use of confidential information learned from their employment.<sup>36</sup>

#### B. DEFINING CONGRESSIONAL INSIDER TRADING

Congress has access to information that market players do not, which presents opportunities for insider trading.<sup>37</sup> As some members of

liability under the securities laws can extend to those who are not insiders, as that term is commonly understood . . .”).

29. *Insider Trading*, *supra* note 19.

30. *Trade Execution*, U.S. SEC. & EXCH. COMM’N (Jan. 16, 2013), <https://www.sec.gov/reportspubs/investor-publications/investorpubstradexechtm.html> [<https://perma.cc/74PH-LR78>].

31. Siqi Wang, *Consumers Beware: How Are Your Favorite “Free” Investment Apps Regulated?*, 19 DUKE L. & TECH. REV. 43, 48 (2021).

32. Cory Mitchell, *Out of the Money (OTM)*, INVESTOPEDIA, <https://www.investopedia.com/terms/o/outofthemoney.asp> [<https://perma.cc/93RC-4JWK>] (last updated June 1, 2022) (“‘Out of the money’ (OTM) is an expression used to describe an option contract that only contains extrinsic value.”).

33. Newkirk & Robertson, *supra* note 18.

34. Elvis Picardo, *How the SEC Tracks Insider Trading*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/021815/how-sec-tracks-insider-trading.asp> [<https://perma.cc/F8EH-KZ4G>] (last updated July 13, 2022).

35. *Insider Trading*, *supra* note 19.

36. *See infra* Part II.

37. *Durbin’s Insider Trading*, *supra* note 1. *See generally* Letter from Richard W. Painter, S. Walter Richey Professor of Corp. L., U. Minn. L. Sch., to Nancy Pelosi,

Congress concurrently have stock portfolios while writing legislation in relation to potentially the same companies, a conflict of interest can arise.<sup>38</sup>

Although it was eventually scrapped, before the 2022 midterm elections, Democrats in the U.S. House of Representatives had planned to unveil a stock trading ban for members of Congress, their spouses, and senior staff members.<sup>39</sup> The proposed legislation would have presented two options, either putting covered assets into a blind trust or selling the assets.<sup>40</sup>

There is suspicion around members of Congress who profited from the timing of macro events and trades.<sup>41</sup> In early February 2020, Senate Intelligence Committee Chairman Richard Burr (R-NC) publicly downplayed the potential threat of the coronavirus; however, in private meetings he analogized the coronavirus to the 1918 pandemic, as he sold large portions of his holdings.<sup>42</sup> Another event sparking explanation was when around “75 members of Congress or their spouses bought or sold stocks in companies [related to] COVID-19 testing kits, vaccines, or treatments.”<sup>43</sup> These transactions create a perception that Congress is profiting from its position in receiving information and altering the composition of their stock portfolios.<sup>44</sup>

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Speaker of the U.S. House of Representatives (Dec. 11, 2020) (<https://law.indiana.edu/publications/faculty/2020/nagy-painter-letter.pdf>).

38. See *infra* notes 46-47 and accompanying text.

39. Mike Lillis, *Democrats Scrap Plan to Vote on Stock Trading Ban Before Elections*, HILL (Sept. 29, 2022, 1:27 PM), <https://thehill.com/policy/finance/3667251-democrats-scrap-plan-to-vote-on-stock-trading-ban-before-elections/>.

40. Alexandra Ma, Kimberly Leonard & Dave Levinthal, *Democrats Planning Legislation to Ban Stock Trading in Congress after Insider Exposed Widespread Wrongdoing*, BUS. INSIDER (July 28, 2022, 12:06 PM), <https://www.businessinsider.com/congress-stock-trading-house-dems-close-proposing-ban-report-2022-7> [<https://perma.cc/B3CC-HX86>].

41. Mangan, *supra* note 4.

42. Jacob Winton, *Congressional Insider Trading: How the COVID-19 Pandemic Shed New Light on a Decades-Old Form of Corruption*, WAKE FOREST L. REV.: CURRENT ISSUES BLOG, <http://www.wakeforestlawreview.com/2022/04/congressional-insider-trading-how-the-covid-19-pandemic-shed-new-light-on-a-decades-old-form-of-corruption/>.

43. Dave Levinthal, *Ban Federal Lawmakers and Their Family Members from Trading Stocks, 37 Former Lawmakers Tell Congress*, BUS. INSIDER (Apr. 6, 2022, 11:00 AM), <https://www.businessinsider.com/congress-stock-trade-ban-lawmakers-issue-one-2022-4> [<https://perma.cc/N5Q8-V3NH>].

44. Mangan, *supra* note 4.

The Russian invasion of Ukraine has raised potential insider trading issues in Congress.<sup>45</sup> For example, by purchasing stocks in defense contractors before a 40 billion dollar aid package for Ukraine was approved, some members of Congress may profit from the invasion of Russia into Ukraine.<sup>46</sup> Rep. John Rutherford of Florida and Rep. Marjorie Taylor Greene of Georgia purchased shares of two weapons manufacturers, Raytheon Technologies and Lockheed Martin, respectively, the day of and days before the invasion.<sup>47</sup> A reasonable inference from the timing of these stock purchases and the enacted legislation is that these members of Congress were privy to information on the impact of the legislation on boosting the share prices.<sup>48</sup>

A peripheral issue to insider trading is when lawmakers choose investments against their values. Dozens of anti-abortion Republican lawmakers have together invested millions of dollars in companies that will financially support employees travel costs for an abortion.<sup>49</sup> Rep. Marjorie Taylor Greene has concurrently invested in three major COVID-19 vaccine manufactures while publicly defending her unvaccinated status.<sup>50</sup> As many as 22 Democrats across the U.S. House and Senate, with high scores from an environmental advocacy group, held stocks in fossil

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45. See *infra* notes 46-47.

46. Kimberly Leonard, *20 Members of Congress Personally Invest in Top Weapons Contractors that'll Profit from the Just-passed \$40 Billion Ukraine Aid Package*, BUS. INSIDER (May 19, 2022, 1:55 PM), <https://www.businessinsider.com/congress-war-profiteers-stock-lockheed-martin-raytheon-investment-2022-3> [<https://perma.cc/AB9L-85LF>].

47. Justin Farmer, *Lawmakers Make Stock Trades Days Before Russian Invasion of Ukraine, Report Shows*, WSB-TV (Mar. 18, 2022, 7:05 PM), <https://www.wsbtv.com/news/local/atlanta/lawmakers-make-stock-trades-days-before-russian-invasion-ukraine-report-shows/3QN6T7XE6ZFIZMRB2ZVPTPVP2M/>; Kimberly Leonard, *GOP Rep. John Rutherford of Florida Bought Raytheon Stock the Same day Russia Invaded Ukraine*, BUS. INSIDER (Mar. 21, 2022, 3:34 PM), <https://www.businessinsider.com/john-rutherford-raytheon-stock-investment-russia-invasion-2022-3>. Both these weapons manufacturers create missiles—presently being sent to Ukraine—capable of destroying tanks and low-flying aircraft. *Id.*

48. Leonard, *supra* note 46.

49. Warren Rojas & Dave Levinthal, *From Rep. Marjorie Taylor Greene to Sen. Tommy Tuberville, Meet the Republican Lawmakers Heavily Invested in Companies that Will Pay for Employees to Get Out-of-State Abortions*, BUS. INSIDER (July 4, 2022, 9:00 AM), <https://www.businessinsider.com/abortion-republicans-corporations-companies-travel-payments-congress-2022-7> [<https://perma.cc/8Y78-PDWF>].

50. *Id.*

fuel companies, such as Exxon Mobil and Chevron.<sup>51</sup> Rep. Frank Pallone of New Jersey authored an anti-tobacco bill while his spouse held shares of Philip Morris International, a multinational tobacco company.<sup>52</sup> These actions, preaching a set of policies while holding stocks of companies that directly inhibit those policies, are certainly hypocritical, but they do not violate insider trading laws.<sup>53</sup>

### C. JUDICIAL INTERPRETATION OF RULE 10B-5 AND APPLICATION TO CORPORATE INSIDERS

Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) is the primary guide for judicial interpretation of whether illegal insider trading has occurred. It is one of the general anti-fraud provisions of federal securities law.<sup>54</sup> Section 10(b) prohibits the employment of “any manipulative or deceptive device or contrivance” in “connection with the purchase or sale of any security.”<sup>55</sup> Congress intended to prevent “inequitable and unfair practices and to insure fairness in securities transactions generally.”<sup>56</sup> Described as a set of “broad remedial provisions,” Section 10(b) was designed to capture activities that may circumvent common law actions for fraud and deceit.<sup>57</sup>

In the first insider trading case under Rule 10b-5, *Cady, Roberts*,<sup>58</sup> the SEC argued the director violated Rule 10b-5 when he sold securities of his corporation after learning about an impending dividend cut at a

51. Warren Rojas, et al., *22 Democrats Hailed as Environmental Champions Have Personally Pumped Money into Companies that Rely on Fossil Fuels*, BUS. INSIDER (Dec. 13, 2021, 5:03 AM), <https://www.businessinsider.com/congress-democrats-with-fossil-fuel-stocks-investments-2021-12> [https://perma.cc/8SVX-9SH4].

52. Kimberly Leonard, *Some of the Same Members of Congress Pushing to Restrict Cigarettes and Vapes Are Quietly Investing in Tobacco Giants*, BUS. INSIDER (Dec. 14, 2021, 9:06 AM), <https://www.businessinsider.com/congress-tobacco-stocks-philip-morris-altria-vaping-cigarettes-2021-12> [https://perma.cc/DV2K-TNMG].

53. *Id.*

54. Kevin J. Harnisch & Samuel J. Hest, *The Scope of Scheme Liability Under the Federal Securities Laws*, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, <https://www.friedfrank.com/uploads/siteFiles/Publications/EB07EC1E7328B8F5FA2179736E483A06.pdf> [https://perma.cc/LS7Y-S7LS] (last visited Nov. 22, 2022).

55. John P. Anderson, Jeremy L. Kidd & George A. Mocsary, *Public Perceptions of Insider Trading*, 51 SETON HALL L. REV. 1035, 1042 (2021).

56. SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 847-48 (2d Cir. 1968).

57. See *Cady, Roberts & Co.*, Exchange Act Release No. 6668, 1961 WL 60638, at \*3 (Nov. 8, 1961).

58. *Id.* at \*1.

board meeting.<sup>59</sup> For the insider trading violation, the key for the SEC was that the director abused his status as a corporate insider with access to information and used that information in trading without disclosure.<sup>60</sup>

#### D. RULES FOR CORPORATE INSIDERS

##### 1. *Origins of Insider Trading Common Law: Equal Access Theory*

Embracing the SEC's view of Rule 10b-5, the U.S. Court of Appeals for the 2nd Circuit articulated a broad theory of insider trading, known later as the "equal access theory," which was based on the idea that all investors should have equal access to material information about the securities they trade.<sup>61</sup> Once the material information has been "effectively disclosed in a manner sufficient to insure its availability to the investing public," insiders may act upon it.<sup>62</sup> Furthermore, the 2nd Circuit added "[t]he core of Rule 10b-5 is the implementation of the Congressional purpose that all investors should have equal access to the rewards of participation in securities transactions."<sup>63</sup> Additionally, false, misleading, or incomplete assertions made "in a manner reasonably calculated to influence the investing public" violate Rule 10b-5.<sup>64</sup>

In 1957, Texas Gulf Sulphur ("TGS")<sup>65</sup> began exploratory activities<sup>66</sup> on the Canadian Shield in eastern Canada, leading to a detection of numerous geological anomalies from aerial geophysical surveys.<sup>67</sup> After a series of drillings and cores, substantial copper mineralization had been encountered, indicating that there was potentially a body of commercially mineable ore.<sup>68</sup> Prompted by visual examination

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59. *See id.*

60. *Id.*

61. JAY B. SYKES, CONG. RSCH. SERV., IF11966, INSIDER TRADING I (2021).

62. SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968).

63. *Id.* at 852 (holding "that all transactions in TGS stock or calls by individuals apprised of the drilling results of K-55-1 were made in violation of Rule 10b-5.").

64. *Id.* at 862.

65. Tex. Gulf Sulphur Co., 258 F. Supp. 262, 268 (S.D.N.Y. 1966) (stating that in 1963-64 the Texas Gulf Sulphur Company was the world's largest supplier of sulfur and its stock was listed on the New York Stock Exchange).

66. *See id.* at 268-69 (searching for sulfide deposits).

67. Tex. Gulf Sulphur Co., 401 F.2d at 843.

68. *See id.* at 844.

of these cores, TGS sought to acquire other sections of the nearby land.<sup>69</sup> Deceiving the public, the TGS press release disclaimed the rumors of a major ore strike from the company's drilling operations near Timmins, Ontario, Canada.<sup>70</sup> Before a formal announcement of the finding, "numerous TGS insiders [and tippees] bought stock or stock options" in TGS, doubling the value of their investment once the news was released.<sup>71</sup>

For these TGS insiders and individuals holding material information, the 2nd Circuit gave two options, either disclose or abstain from trading.<sup>72</sup> The court instructed that if a person chooses not to disclose the information to the public or if the person is unable to disclose it to the public, then the person must not trade the securities concerns until the information is eventually disclosed.<sup>73</sup>

## 2. *The Classical Theory: Chiarella v. United States*

The U.S. Supreme Court rejected the equal access theory of *Texas Gulf Sulphur* in promulgation of the "classical theory" under *Chiarella v. United States*.<sup>74</sup> This shift marked the Court's change in focus to "disclosure obligations arising out of fiduciary relationships."<sup>75</sup> Vincent Chiarella, the trader, worked for Pandick Press, a financial printing company, and he had access to documents announcing corporate takeover bids.<sup>76</sup> Although when these documents were delivered to Pandick Press blank spaces concealed the identities of the target corporations, Chiarella successfully "deduce[d] the names of the target companies."<sup>77</sup> Chiarella

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69. See *Tex. Gulf Sulphur Co.*, 258 F. Supp. at 268 (explaining that mining industry practices after such a discovery were put into place including the suspension of drilling on the anomaly and instructing the exploration group members to keep the result confidential).

70. *Tex. Gulf Sulphur Co.*, 401 F.2d at 845-47.

71. *Fair To All People: The SEC and the Regulation of Insider Trading*, SEC. & EXCH. COMM'N HISTORICAL SOC'Y [https://www.sechistorical.org/museum/galleries/it/takeCommand\\_c.php](https://www.sechistorical.org/museum/galleries/it/takeCommand_c.php) [<https://perma.cc/H5YX-BT9B>] (last visited Oct. 18, 2022).

72. See *Tex. Gulf Sulphur Co.*, 401 F.2d at 848.

73. *Id.*

74. 445 U.S. 222 (1980). The equal access theory is now limited to situations involving a tender offer. Anderson et al., *supra* note 55.

75. Stephen M. Bainbridge, *Equal Access to Information: The Fraud at the Heart of Texas Gulf Sulphur*, 71 SMU L. REV. 643, 647 (2018).

76. *Chiarella*, 445 U.S. 222, 224 (1980).

77. *Id.*

“purchased stock in the target companies and then sold those shares immediately after the takeover attempts were made public.”<sup>78</sup>

The Court reversed the decision of the U.S. Court of Appeals for the 2nd Circuit and held Chiarella did not violate Section 10(b) because he had no duty to disclose.<sup>79</sup> Chiarella was neither a corporate insider nor a fiduciary.<sup>80</sup> The Court refused to recognize “a general duty between all participants in market transactions to forgo actions based on material, nonpublic information.”<sup>81</sup> The Court notably concluded that Chiarella was not a corporate insider because he did not get the information from the target company.<sup>82</sup>

Shortly after the *Chiarella* decision, the SEC adopted Exchange Act Rule 14e-3, directed at anyone possessing material, nonpublic information related to a tender offer, which, had it been in place, would have likely found Vincent Chiarella liable.<sup>83</sup>

### 3. *The Misappropriation Theory: United States v. O'Hagan*

Another theory under which liability can be proven, the “misappropriation theory” relies on a duty between the trader and the source of the information, as articulated by the Supreme Court in *United States v. O'Hagan*.<sup>84</sup> The Supreme Court described both theories, classical and misappropriation, as “complementary,” each focusing on a different set of actors.<sup>85</sup> The misappropriation theory captures corporate outsiders who abuse their position, where they have gained access to confidential information, and owe no fiduciary duty to the shareholders of the company in which they traded.<sup>86</sup>

The source of the information is considered the principal and the fraudulent act is the trader violating the principal's exclusive use of the

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78. *Id.*

79. *Id.* at 236-37.

80. *See id.* at 229.

81. *Id.* at 233.

82. Anthony Michael Sabino & Michael A. Sabino, *From Chiarella to Cuban: The Continuing Evolution of the Law of Insider Trading*, 16 FORDHAM J. CORP. & FIN. L. 673, 692 (2011).

83. Anderson et al., *supra* note 55.

84. 521 U.S. 642, 652 (1997).

85. *Id.*

86. *Id.* at 653.



information by trading.<sup>87</sup> Liability is based upon this violation of the trader's access to confidential information as opposed to the classical theory where liability is based on the fiduciary relationship between the company and the trader.<sup>88</sup> A prerequisite for applying the misappropriation theory is that the trader must have a duty to disclose trading to the source of the information.<sup>89</sup> This duty is also tied to the principal's reasonable expectation of privacy in the information given.<sup>90</sup>

James O'Hagan was a partner at the law firm Dorsey & Whitney and he illegally profited by executing call options<sup>91</sup> on the stock of Pillsbury Company when the company his firm represented, Grand Metropolitan PLC ("Grand Met"), announced a tender offer<sup>92</sup> for Pillsbury Company.<sup>93</sup> As a client of the law firm, Grand Met entrusted Dorsey & Whitney to keep confidential its plans for the tender offer.<sup>94</sup> O'Hagan breached his duty to his law firm, the source of the information, by trading.<sup>95</sup> If O'Hagan had disclosed his trading to his law firm he would not have been liable for insider trading; however, he would likely have been fired for driving up the cost of the tender offer through his trading.<sup>96</sup>

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87. *See id.* at 652.

88. *See id.*

89. *See* Bainbridge, *supra* note 9, at 16.

90. *See* Randall W. Quinn, *The Misappropriation Theory of Insider Trading in the Supreme Court: A (Brief) Response to the (Many) Critics of United States v. O'Hagan*, 8 *FORDHAM J. CORP. & FIN. L.* 865, 887 (2003).

91. A call option allows the buyer to have the right, but not the obligation, to purchase a stock at a set price within a certain future time period. The buyer profits when the share price rises above the set price, as the buyer is able to collect the difference. Jason Fernando, *What is a Call Option and How to Use it With Example*, *INVESTOPEDIA* (Aug. 31, 2022), <https://www.investopedia.com/terms/c/calloption.asp> [<https://perma.cc/59X4-FZTM>].

92. A tender offer is when an investor (Grand Met) proposes buying an amount of shares from current shareholders (of the Pillsbury Company) typically at a premium above the current share price. Adam Hayes, *Tender Offer*, *INVESTOPEDIA* (Apr. 15, 2022), <https://www.investopedia.com/terms/t/tenderoffer.asp/> [<https://perma.cc/VX4L-MA88>].

93. *O'Hagan*, 521 U.S. at 647-48.

94. *Id.* at 647.

95. *Id.* at 647-48.

96. Bainbridge, *supra* note 9.



#### 4. Tipper-Tippee Liability

A person can violate securities laws by providing a “tip” based on insider information to someone else who then trades on this information.<sup>97</sup> Tipper-tippee liability is both-or-none as the “tipper’s liability for tipping inside information is dependent upon whether the direct or indirect tippees trade.”<sup>98</sup>

Unlike an insider, a tippee may not have the fiduciary duty of an insider to the corporation and its shareholders.<sup>99</sup> The U.S. Supreme Court clarified that tippees assume an insider’s duty to the shareholders when the information “has been made available to them *improperly*.”<sup>100</sup>

Raymond Dirks was considered a tippee as “an officer of a New York broker-dealer firm who specialized in providing investment analysis of insurance company securities to institutional investors.”<sup>101</sup> Linked in liability to Ronald Secrist, the tipper, the Court explained tipper-tippee liability occurs when the tippee assumes the tipper’s fiduciary duty when the tipper discloses material, nonpublic information to the tippee and the tippee knew or should have known of the breach.<sup>102</sup> For Dirks to have an obligation to disclose or abstain, Secrist’s tip needed to constitute a breach of his fiduciary duty.<sup>103</sup> The tipper must receive a “personal benefit,” such as receiving payment in exchange for information, to have breached the duty.<sup>104</sup>

The U.S. Supreme Court reversed the U.S. Court of Appeals for the District of Columbia holding that Dirks committed no actionable securities violation and “had no duty to abstain from use of the inside information that he obtained.”<sup>105</sup>

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97. Anton Metlitsky & Kendall Turner, *Second Circuit Expands Scope of Insider-Trading Liability*, BLOOMBERG LAW (Feb. 21, 2020, 4:00 AM), [https://www.bloomberglaw.com/bloomberglawnews/white-collar-and-criminal-law/XAOCFQE0000000?bna\\_news\\_filter=white-collar-and-criminal-law#jcite](https://www.bloomberglaw.com/bloomberglawnews/white-collar-and-criminal-law/XAOCFQE0000000?bna_news_filter=white-collar-and-criminal-law#jcite).

98. BRENT A. OLSON, 2 PUBLICLY TRADED CORPORATIONS HANDBOOK § 17:25 (2022) (scope of tipper–tippee liability under Rule 10b-5).

99. *Dirks v. SEC*, 463 U.S. 646, 655 (1983).

100. *Id.* at 660.

101. *Id.* at 648.

102. *Id.* at 660.

103. *Id.* at 661.

104. Nicole Vanatko, CONG. RSCH. SERV., LSB10028, THE LATEST CHAPTER IN INSIDER TRADING LAW: MAJOR CIRCUIT DECISION EXPANDS SCOPE OF LIABILITY FOR TRADING ON A “TIP” 2 (2017).

105. *Dirks*, 463 U.S. at 665, 667.

The difficulties in determining which relationships are appropriate for tipper-tippee liability lead courts to conduct their own analysis that can produce inconsistent results.<sup>106</sup> Tipper-tippee liability is a method to link the tippee-trader to the tipper-non-trader, when the tippee would not be liable under the other theories.<sup>107</sup>

##### 5. *Insider Trading and Securities Fraud Enforcement Act of 1988*

The Insider Trading and Securities Fraud Enforcement Act of 1988 (“ITSFEA”) augmented the implementation of securities laws relating to insider trading “through a variety of measures designed to provide greater deterrence, detection, and punishment of insider-trading violations and other perceived market abuses.”<sup>108</sup> ITSFEA is not another theory of liability, but rather bolsters the enforcement mechanisms of the existing theories.<sup>109</sup> ITSFEA’s purpose was to promote investor confidence in equity markets and ensure the continuing flow of business capital.<sup>110</sup> Congress passed ITSFEA as a “pragmatic” response to increasing insider trading concerns in the securities markets.<sup>111</sup> It amended the Exchange Act and revised the SEC’s authority to seek civil penalties, including authorization to “impose civil penalties upon any person who, at the time of the violation, directly or indirectly controlled the person who committed the illegal insider trading.”<sup>112</sup> For broker-dealers and investment advisors, ITSFEA imposed “mandatory compliance programs.”<sup>113</sup> Furthermore, ITSFEA grants the SEC the authority to require “specific compliance policies or procedures” for those entities.<sup>114</sup> ITSFEA amends Section 15 of the Securities Exchange Act of 1934, adding that registered brokers or dealers need to enforce reasonable

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106. Matthew Williams, *Mind the Gap(s): Solutions for Defining Tipper-Tippee Liability and the Personal Benefit Test Post-Salman v. United States*, 23 *FORDHAM J. CORP. & FIN. L.* 597, 620 (2018).

107. OLSON, *supra* note 98.

108. *Notice To Members 89-5: Insider Trading and Securities Fraud Enforcement Act of 1988*, FINRA <https://www.finra.org/rules-guidance/notices/89-5> [<https://perma.cc/NTM6-55QR>] (last visited May 15, 2022).

109. *Id.*

110. See generally M. J. Chmiel, *Insider Trading and Securities Fraud Enforcement Act of 1988: Codifying a Private Right of Action*, U. ILL. L. REV. 654 (1990).

111. Howard M. Friedman, *The Insider Trading and Securities Fraud Enforcement Act of 1988*, 68 *N.C.L. REV.* 465, 494 (1990).

112. H.R. Res. 5133, 100th Cong. (1988) (enacted).

113. Friedman, *supra* note 111, at 477.

114. *Id.* at 478.

business-related policies and procedures related to the type of work they do.<sup>115</sup>

### 6. Corporate Blackout Periods

Corporations extensively regulate insider trading of their employees.<sup>116</sup> The majority of publicly traded companies have insider trading policies.<sup>117</sup> These policies protect the company from legal and reputational risk.<sup>118</sup> Moreover, these policies can go beyond what is required by the law.<sup>119</sup> These policies exist because corporate executives may receive a large portion of their compensation through stocks and options.<sup>120</sup>

A corporate blackout period is a set period of time where specific persons are not allowed to purchase or sell shares of their company's stock.<sup>121</sup> A corporate blackout period can apply to a specified or restricted list of individuals or expanded to include larger portions of the company, such as the finance or accounting departments.<sup>122</sup> For corporations, blackout periods often bookend quarterly earnings reports, to ensure that trading does not occur right before or after.<sup>123</sup> Blackout periods can also accompany other significant corporate events, such as mergers, acquisitions, board meetings, bankruptcy filings, major product

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115. H.R. Res. 5133.

116. See generally J.C. Bettis et al., *Corporate Policies Restricting Trading by Insiders*, 57 J. FIN. ECON. 191 (2000).

117. Wayne R. Guay et al., *Determinants of Insider Trading Windows* 1, 8 (Sept. 19, 2022), <https://ssrn.com/abstract=3844986>.

118. *Id.*

119. Wayne Guay, *How Companies Are Working to Curb Insider Trading*, KNOWLEDGE AT WHARTON (July 6, 2021), <https://knowledge.wharton.upenn.edu/article/how-companies-are-working-to-curb-insider-trading/> [<https://perma.cc/8R2M-BLE4>].

120. *So, You Have Company Stock Trading Restrictions: Blackout Periods & 10b5-1 Plans*, BUCKHEAD CAP. MGMT. (May 10, 2021), <https://buckheadcapital.com/so-you-have-company-stock-trading-restrictions-blackout-periods-10b5-1-plans/> [<https://perma.cc/23T3-8GCU>].

121. Christina Majaski, *Blackout Periods*, INVESTOPEDIA (Apr. 15, 2021), <https://www.investopedia.com/ask/answers/08/blackout-period.asp> [<https://perma.cc/D5GF-59FE>].

122. R. Douglas Harmon, *Shedding Light on Blackout Periods*, PARKER POE: CLIENT ALERTS (July 26, 2012), <https://www.parkerpoe.com/news/2012/07/shedding-light-on-blackout-periods> [<https://perma.cc/LR8G-M42K>].

123. Joseph A. Hall et al., *Securities Offerings During Closed Windows and Blackout Periods*, 28 CORP. GOVERNANCE ADVISOR 11, 11 (2020).

announcements, or dividend announcements.<sup>124</sup> These types of corporate blackout periods, known as “ad hoc blackout periods,” may even be undisclosed to the public.<sup>125</sup>

Outside of corporate blackout periods are trading windows where employees are allowed to trade stocks.<sup>126</sup> A study of about 4,000 companies found the typical open trading window is about six weeks, although the study noted “there is substantial variation across firms in the length and timing of these allowed trading windows.”<sup>127</sup> In another study of corporate blackout policies, the most common trading window lasted for 10 days, starting on day three after the quarterly earnings announcement and ending on day 12.<sup>128</sup>

The gravity of concerns over information asymmetry<sup>129</sup> can drive the trading window policy.<sup>130</sup> Furthermore, the faster the information asymmetry can be resolved, the sooner the trading window can open.<sup>131</sup> Media coverage and uptake by financial news publications also influence timing.<sup>132</sup> Corporations have installed blackout periods to avoid the appearance of insiders trading on material, nonpublic information.<sup>133</sup> Insiders can still trade during a corporate blackout period if they attain the proper clearance from a compliance officer or other corporate entity authorized to grant the request.<sup>134</sup> Companies have the discretion to grant or deny this request.<sup>135</sup> Self-imposed corporate blackout periods can be elevated to compulsory to prevent insider trading.<sup>136</sup>

124. Bettis et al., *supra* note 116, at 217.

125. Guay et al., *supra* note 117, at 2.

126. Bob Schneider, *What is a Blackout Period?*, INVESTOPEDIA (June 3, 2022), <https://www.investopedia.com/ask/answers/08/blackout-period.asp> [https://perma.cc/D5GF-59FE].

127. Guay et al., *supra* note 117, at 4; Guay, *supra* note 119.

128. Bettis et al., *supra* note 116, at 191.

129. See Evan Tarver, *How Financial Markets Exhibit Asymmetric Information*, INVESTOPEDIA (July 28, 2022), <https://www.investopedia.com/ask/answers/042915/how-do-financial-market-exhibit-asymmetric-information.asp> [https://perma.cc/4K7E-ZGCF] (information asymmetry is when one party knows something the other does not, such as if the buyer knows an asset is underpriced).

130. Guay et al., *supra* note 117, at 5.

131. *Id.* at 8.

132. Guay, *supra* note 119.

133. Hall et al., *supra* note 123.

134. Bettis et al., *supra* note 116, at 208.

135. *Id.*

136. Pierpaolo Pattitoni et al., *Insider Trading and Blackout Periods: Evidence from Italy*, 20 APPLIED ECONOMICS LETTERS 1625 (2013).

On the enforcement side, the SEC monitors trading of a company's stock around major announcements.<sup>137</sup> The SEC has a tripartite mandate to ensure fair and efficient markets, promote capital formation, and protect investors.<sup>138</sup> Data suggests that corporate blackout periods curtail insider trading.<sup>139</sup> For corporations, if there is a change in the dates of the blackout period, the issuer must file a Form 8-K with the SEC, which contains the updated dates and the reasoning for the change.<sup>140</sup> The majority of major securities legislation has passed with substantial bipartisan support.<sup>141</sup>

#### E. RULES RELATED TO CONGRESS

##### 1. *Stop Trading on Congressional Knowledge Act of 2012*

Signed into law to make insider trading prosecutions easier, the STOCK Act affirmed that the federal securities laws on insider trading applied to members of Congress and their staff.<sup>142</sup> The STOCK Act received strong bipartisan support.<sup>143</sup> The STOCK Act established a reporting regime, where these groups must disclose their trades within 45 days.<sup>144</sup> Disclosure rules also apply to spouses.<sup>145</sup> This information must

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137. Andrew Sebastian, *How Insider Trading is Prevented in Corporations*, INVESTOPEDIA (Jan. 21, 2022), <https://www.investopedia.com/articles/investing/092616/how-insider-trading-prevented-corporations.asp> [<https://perma.cc/7RX5-WHWY>].

138. Daniel M. Gallagher, Jr., *Lecture: The Securities and Exchange Commission - the Next 80 Years*, 20 FORDHAM J. CORP. & FIN. L. 626, 626 (2015).

139. Bettis et al., *supra* note 116, at 208.

140. 17 C.F.R. § 245.104(b)(3)(iii).

141. Daniel M. Gallagher, Jr., Symposium, *Are We Ready for the Next Financial Crisis: Keynote Address*, 21 FORDHAM J. CORP. & FIN. L. 272, 275 (2016).

142. Press Release, White House, Fact Sheet: The STOCK Act: Bans Members of Congress from Insider Trading (Apr. 4, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/04/04/fact-sheet-stock-act-bans-members-congress-insider-trading> [<https://perma.cc/GC2S-4DUV>].

143. Jason Fernando, *STOCK Act*, INVESTOPEDIA (Aug. 31, 2022), <https://www.investopedia.com/terms/s/stop-trading-on-congressional-knowledge-act.asp> [<https://perma.cc/R88U-B5EQ>].

144. Joan E. Greve, *Money Unites: Republicans and Democrats Find Rare Bipartisanship over Trading Stocks*, GUARDIAN (Feb. 22, 2022), <https://www.theguardian.com/us-news/2022/feb/22/us-politicians-trading-stocks-bipartisan-idea> [<https://perma.cc/2JXN-PXNZ>].

145. Deirdre Walsh, *A Push to Ban Members of Congress from Trading Individual Stocks Gains Momentum*, NPR: MORNING EDITION (Jan. 19, 2022), <https://www.npr.org/>

also be publicly available online through searchable databases.<sup>146</sup> Arising from a relationship of trust and confidence, the STOCK Act instituted several pairings of duties between: a member of Congress and the U.S. government, the entire Congress itself, and U.S. citizens.<sup>147</sup> The STOCK Act also created these same pairings for employees of members of Congress.<sup>148</sup>

## 2. Proposed Bills

Table 1: A Breakdown of the Proposed Bills on Insider Trading

Attribute		Proposed Bills			
		Ban Congressional Stock Trading Act <sup>149</sup>	Banning Insider Trading in Congress Act <sup>150</sup>	Ban Conflicted Trading Act <sup>151</sup>	STOCK Act 2.0 <sup>152</sup>
Covered Persons	Member of Congress (MOC)	X	X	X	X
	MOC Spouse	X	X		
	MOC Dependent	X			
	MOC Officer/Employee			X	X
	President of the U.S.				X
	Vice President of the U.S.				X

2022/01/19/1073865837/a-push-to-ban-members-of-congress-from-trading-individual-stocks-gains-momentum [https://perma.cc/3NNE-RFKU].

146. See Fact Sheet: The STOCK Act: Bans Members of Congress from Insider Trading, *supra* note 142.

147. STOCK Act, Pub. L. No. 112-105, § 4, 126 Stat. 291, 292 (codified as amended at 15 U.S.C. §§ 78j, 78u (2012)).

148. *Id.*

149. Ban Congressional Stock Trading Act, S. 3494, 117th Cong. § 201 (2022).

150. Banning Insider Trading in Congress Act, S. 3504, 117th Cong. § 201 (2022).

151. Ban Conflicted Trading Act, H.R. 1579, 117th Cong. § 2 (2021).

152. STOCK Act 2.0, S. 3612, 117th Cong. § 1 (2022).

	U.S. Supreme Court Justices				X
	Federal Reserve Bank (FRB) Presidents				X
	FRB Vice Presidents				X
	Federal Reserve Board of Governors				X
<b>Covered Investments</b>	An investment in a security	X	X	X	X
	A futures contract	X	X	X	X
	A derivative, option, or warrant	X	X	X	X
	A trust (other than a qualified blind trust)	X			
	An employee benefit plan	X			
	A deferred compensation plan	X			
<b>Excluded Investments</b>	A diversified mutual fund	X	X	X	X
	A diversified exchange-traded fund	X	X		
	A U.S. Treasury bill, note, or bond	X	X	X	X
	Compensation from the primary occupation of a MOC spouse or dependent	X	X		
	Any investment fund held in a Federal, State, or local government employee retirement plan.	X			

<b>Options for Compliance</b>	Divest covered investments	X	X	X	X
	Place covered investments in a qualified blind trust	X	X	X	X
	Sell covered investments within 180 days of bill's enactment		X		X

### 3. *Ban Congressional Stock Trading Act*

The Ban Congressional Stock Trading Act (“BCSTA”) would require all members of Congress, their spouses, and their dependents to either put all covered investments into a blind trust or to divest from these investments.<sup>153</sup> The bill’s sponsors cite the access to confidential information and the susceptibility to corruption as the impetus for the proposal.<sup>154</sup> Fulfilling a pledge to constituents, the bill’s sponsors put their covered investments into blind trusts.<sup>155</sup> The rest of Congress would have 120 days to do the same or divest.<sup>156</sup> BCSTA violators would be fined their entire Congressional salary, which is exceedingly higher than the fines of the STOCK Act and other proposals.<sup>157</sup> For disclosure to the public, ethics committees in both chambers must make the trust agreements or proof of divestment publicly available.<sup>158</sup>

### 4. *Banning Insider Trading in Congress Act*

The Banning Insider Trading in Congress Act (“BITCA”) applies to members of Congress and their spouses and bans them from holding or

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153. S. 3494, 117th Cong. (2022).

154. Press Release, Sen. Jon Ossoff, Sens. Ossoff, Kelly Introduce Bill Banning Stock Trading by Members of Cong. (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/EF5T-H2Z2].

155. *Id.*

156. Bill Summary, Ban Congressional Stock Trading Act, *supra* note 12.

157. Ossoff, *supra* note 154.

158. S. 3494, 117th Cong. (2022).



trading any individual stocks.<sup>159</sup> The bill's sponsor explained that elected officials should not be enriched by their close work with industries under regulation.<sup>160</sup> Similar to BCSTA, the proposed bill exempts "diversified mutual funds, exchange-traded funds, or U.S. Treasury bonds . . . ."<sup>161</sup> If enacted, the bill would give members of Congress six months to divest their current holdings or place such holdings in a blind trust. For BITCA violations, the investment profits would be forfeited to the U.S. Treasury.<sup>162</sup> The bill's proponents rationalize the bill through the lack of trust in Congress and that even a perceived conflict of interest must be extinguished.<sup>163</sup>

### 5. *Ban Conflicted Trading Act*

The Ban Conflicted Trading Act ("BCTA") would prohibit members of Congress and their senior staff from buying or selling individual stocks.<sup>164</sup> Senior staff includes any "individual employed as an officer or employee of Congress required to file a report under the Ethics in Government Act of 1978."<sup>165</sup> The Ethics in Government Act of 1978 outlines which individuals are required to file by referencing Section 109(13), which defines an "officer or employee of the Congress" as a person "whose compensation is disbursed by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives."<sup>166</sup>

Both groups would have the option of holding onto the shares they currently own or putting those shares in a blind trust.<sup>167</sup> The BCTA would

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159. Press Release, Sen. Josh Hawley, Hawley Introduces Bill Banning Insider Trading in Cong. (Jan. 13, 2022), <https://www.hawley.senate.gov/hawley-introduces-bill-banning-insider-trading-congress> [<https://perma.cc/8RJH-NUXF>].

160. *Id.*

161. *Id.*

162. *Id.*

163. Josh Hawley & Vicky Hartzler, *Hawley and Hartzler: Ban Stock Trading in Congress*, SPRINGFIELD NEWS-LEADER (Feb. 9, 2022, 6:29 AM), <https://www.news-leader.com/story/opinion/2022/02/09/ban-stock-trading-congress/6693580001/> [<https://perma.cc/2K9Q-W5BF>].

164. H.R. 1579, 117th Cong. (2021); Greve, *supra* note 144.

165. H.R. 1579, § 2.

166. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824–1867.

167. Press Release, Sen. Jeff Merkley, Members of Cong. Introduce Bipartisan Legis. to Stop Gov't Off. from Profiting off of Insider Info. (Mar. 3, 2021), <https://www.merkley.senate.gov/news/press-releases/members-of-congress-introduce->

also prevent these groups from serving on corporate boards.<sup>168</sup> The bill’s sponsors state the rationale for the bill is to remove the bias from legislators who own shares of companies they regulate and to prevent legislators from trading on information not known to the public.<sup>169</sup> In addition, these proponents also cite raising accountability and transparency in Congress, as well as honoring the public trust by not placing financial gains above constitutional obligations.<sup>170</sup>

### 6. *The STOCK Act 2.0*

The STOCK Act 2.0 builds upon the STOCK Act by strengthening the disclosure rules and expanding the categories of persons affected by the STOCK Act.<sup>171</sup> The STOCK Act 2.0 bars individual stock trading by members of Congress and requires members of Congress, senior congressional staff, their spouses, and their dependents to disclose when receiving “a payment of money or any other item of value made, or promised to be made, by the Federal Government.”<sup>172</sup> Among others, the expanded trading ban would also cover Supreme Court Justices and Federal Reserve governors.<sup>173</sup> These benefits include loans, agreements, contracts, grants, payments, and agricultural subsidies.<sup>174</sup> The ban does not include real estate or other business assets.<sup>175</sup> An objective of this proposed bill is to restore the public’s faith in Congress.<sup>176</sup> The STOCK Act 2.0 increases the penalty to file transaction reports from \$200 to

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bipartisan-legislation-to-stop-government-officials-from-profiting-off-of-insider-information-2021 [https://perma.cc/AR25-ZXER].

168. *Id.*

169. *Id.*

170. *Id.*

171. Press Release, Rep. Katie Porter, Rep. Katie Porter, Sen. Kirsten Gillibrand Reintroduce Stock Act 2.0 (Feb. 9, 2022) (on file with author).

172. STOCK Act 2.0, S. 3612, 117th Cong. § 201 (2022).

173. Michelle Shen, *Sen. Elizabeth Warren Calls for Members of Congress to Sell all Individual Stocks*, USA TODAY (Feb. 17, 2022, 12:48 PM), <https://www.usatoday.com/story/money/2022/02/17/elizabeth-warren-congress-trading-stock/6820868001/> [https://perma.cc/C4D2-G9Z3].

174. Press Release, Rep. Katie Porter, *supra* note 171.

175. William D’Urso, *Rep. Porter and Sen. Gillibrand Push to Tighten Stock Trading for Members of Congress*, SPECTRUM NEWS 1 (Feb. 10, 2022, 9:55 AM), <https://spectrumnews1.com/ca/la-west/politics/2022/02/10/porter-and-gillibrand-eye-tighter-rules-on-financial-transactions-for-members-of-congress--executive-branch-> [https://perma.cc/FE9Q-DUN9].

176. Press Release, Rep. Katie Porter, *supra* note 171.

\$500.<sup>177</sup> The penalty for failing to comply would be at least 10 percent of the value of the covered investment that was bought or sold.<sup>178</sup>

## II. A HYPOTHETICAL PUT OPTION TO ILLUSTRATE THE ISSUES OF THE EXISTING REGULATIONS AND THE PROPOSED BILLS

### A. SETTING UP THE HYPOTHETICAL – AN OVERVIEW OF CLOSED SESSIONS

#### 1. *Closed Session Congressional Meetings and Hearings*

Typically, committee meetings and hearings in either chamber of Congress are open to the public, but under limited circumstances, a committee member may vote to close the meeting or hearing.<sup>179</sup> These types of meetings would be non-public with the likely rationale that material information is being exchanged between Congress and the party brought in to testify.<sup>180</sup> From these meetings, members of Congress would be presented with opportunities for insider trading.<sup>181</sup> These closed door hearings are analogous to private investor meetings, where a corporate insider will selectively disclose information to specific investors often with the motivation to gain favor.<sup>182</sup>

The House of Representatives and the Senate excludes the press and the public through a “secret” or “closed session,” where discussions have centered on deliberations during impeachment trials, national security issues, sensitive communications from the President, or other confidential information.<sup>183</sup> Secret sessions are uncommon, but any member of Congress may request to have one.<sup>184</sup> The Constitution grants the authority for the House and the Senate to abstain from publishing their

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177. *Id.*

178. *Id.*

179. *See* Senate Rule XXVI(5)(b); House Rule XI(g)(1)(2).

180. CONG. RSCH. SERV., RL30548, HEARINGS IN THE U.S. SENATE: A GUIDE FOR PREPARATION AND PROCEDURE 16-17 (2010).

181. *See* discussion *supra* Introduction.

182. Martin Bengtzen, *Private Investor Meetings in Public Firms: The Case for Increasing Transparency*, 22 FORDHAM J. CORP. & FIN. L. 33, 35 (2017).

183. MILDRED AMER, CONG. RSCH. SERV., RS20145, SECRET SESSIONS OF CONGRESS: A BRIEF HISTORICAL OVERVIEW 1 (2008).

184. *Id.*

proceedings “as may in their Judgment require Secrecy.”<sup>185</sup> Members and their staffs are barred from sharing information from these sessions, and all staff must sign an oath of secrecy.<sup>186</sup>

Congress can be broken down into committees, which take on varying roles and function as self-regulated groups.<sup>187</sup> Congress has divided its “legislative, oversight, and international administrative tasks” amongst 200 committees and subcommittees, which act as functional subunits.<sup>188</sup> Committees and subcommittees conduct many tasks: “gather information; compare and evaluate legislative alternatives; identify policy problems and propose solutions to them; select, determine the text of, and report out measures for the full chambers to consider; monitor executive branch performance of duties (oversight); and look into allegations of wrongdoing (investigation).”<sup>189</sup> Committees operate independently of each other and their parent chambers as “each committee adopts its own rules addressing organizational, structural, and procedural issues.”<sup>190</sup> Committees can have closed hearings between their members and witnesses, which does not include the entire House or Senate as in a secret session.<sup>191</sup> To receive testimony from individuals not on the committee, committees hold a hearing, which can be for legislative, oversight, or investigative purposes.<sup>192</sup> Committees gather information by inviting experts—called witnesses—to testify at these hearings.<sup>193</sup> Generally, witnesses willingly testify upon invitation and some even request to testify, but committees may subpoena individuals to testify.<sup>194</sup> Committees must give public notice of the hearing’s date, place, and subject, although only the date is required for closed hearings.<sup>195</sup>

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185. U.S. CONST. art. I, § 5; AMER, *supra* note 183.

186. AMER, *supra* note 183.

187. VALERIE HEITSHUSEN, CONG. RSCH. SERV., 98-241, COMMITTEE TYPES AND ROLES 2 (2017).

188. *Id.*

189. JUDY SCHNEIDER, CONG. RSCH. SERV., RS20794, THE COMMITTEE SYSTEM IN THE U.S. CONGRESS I (2009).

190. *Id.*

191. HEARINGS IN THE U.S. SENATE, *supra* note 180, at 16-17 (2010).

192. SCHNEIDER, *supra* note 189, at 4 (defining the different types of hearings: legislative hearings address policy issues, oversight hearings concentrate on the implementation and administration of programs, and investigative hearings confront allegations of misconduct by public officials or private citizens or “seek the facts behind a major disaster or crisis”).

193. *Id.*

194. *Id.*

195. *Id.*

An example of a committee that has closed hearings and how these hearings procedurally function is the U.S. Senate Select Committee on Intelligence<sup>196</sup> which routinely has closed hearings.<sup>197</sup> The location and time is listed for these hearings, but not the subject matter or content.<sup>198</sup> No hearing transcripts are posted as well.<sup>199</sup> At these closed hearings, senior intelligence community officials, such as “heads of agencies, senior program managers, and senior intelligence analysts,” testify and answer questions.<sup>200</sup> Some topics covered are “agency activities, intelligence collection programs, and intelligence analysis on a geographic region or issue (e.g., stability in the Middle East, Iran’s nuclear program, terrorism threats).”<sup>201</sup> Rule 9.7 of the Rules of Procedure of the Select Committee on Intelligence bars disclosure of the contents of closed hearings as:

No member of the Committee or of the Committee staff shall disclose, in whole or in part or by way of summary, the contents of any classified or committee sensitive papers, materials, briefings, testimony, or other information received by, or in the possession of, the Committee to any other person, except as specified in this rule.<sup>202</sup>

This rule grants several exceptions to non-disclosure, including persons in the executive branch, and members and staff of the Senate, based on three conditions.<sup>203</sup> Violation of Rule 9.7 leads to notification of the Majority and Minority Leaders, followed by referral to the Select

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196. *See id.* at 1 (explaining that select committees are often established because the existing standing committee system is not addressing the particular issue or an event has triggered the desire for an investigation).

197. According to its 2022 online calendar, the U.S. Senate Select Committee on Intelligence had closed hearings: 8 days in March, 3 days in April, and 5 days in May. *Latest Updates*, U.S. S. SELECT COMM. ON INTEL., <https://www.intelligence.senate.gov/> (last visited May 19, 2022) [hereinafter *Committee Calendar*].

198. *Closed Hearings*, U.S. S. SELECT COMM. ON INTEL., <https://www.intelligence.senate.gov/hearings/closed> [<https://perma.cc/4Z95-ZNCC>] (last visited Oct. 19, 2022).

199. *Id.*

200. *About the Committee*, U.S. S. SELECT COMM. ON INTEL., <https://www.intelligence.senate.gov/about> [<https://perma.cc/AP44-68TW>] (last visited Oct. 19, 2022).

201. *Id.*

202. *Rules of Procedure*, U.S. S. SELECT COMM. ON INTEL., <https://www.intelligence.senate.gov/about/rules-procedure> [<https://perma.cc/N8V2-AQQL>] (last visited May 19, 2022).

203. *Id.*

Committee on Ethics.<sup>204</sup> Under Rule 9.10, persons outside the Committee can attend a closed meeting, although attendance “shall be kept at a minimum and shall be limited to persons with appropriate security clearance and a need-to-know the information under consideration for the execution of their official duties.”<sup>205</sup>

This example illustrates the type of information and officials involved in a closed committee session, mirroring a non-public meeting between corporate executives discussing an important business issue.<sup>206</sup> Without a transcript or disclosure of the information shared, the congressional insider trading issue magnifies due to the inability of the public to uptake the secret information.<sup>207</sup> Members of Congress are able to gain insights into macro events that will have substantial impacts on the markets before the severity of the events is publicly revealed.<sup>208</sup> This advantage can lead to timing the sale of stocks to avoid losses or the purchase of stocks at a lower price to capture gains before the price elevates.<sup>209</sup> Finally, similar to traders, there is great variation amongst the members of Congress in access to corporate insiders, nonpublic information, skillset to amalgamate disparate information into trade determining information, and skills in trading.<sup>210</sup>

## 2. *The Hypothetical Put Option and Questions Presented*

This hypothetical is based on the past events where the U.S. Congress has frequently met with the chief executives of major Wall Street banks through hearings covering diversity in leadership, foreign affairs, climate change initiatives, and the response of lenders in the recovery from the COVID-19 pandemic.<sup>211</sup>

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204. *Id.*

205. *Id.*

206. Guay et al., *supra* note 119.

207. *Closed Hearings*, *supra* note 198.

208. *See* discussion *supra* Section I.B.

209. *See* discussion *supra* Introduction.

210. *See generally* James P. Jalil, *Proposals for Insider Trading Regulation After the Fall of the House of Enron*, 8 *FORDHAM J. CORP. & FIN. L.* 689 (2003).

211. Thomas Franck, *Watch Live: The Nation's Top Bank CEOs Testify Before Congress*, *CNBC* (May 26, 2021, 10:21 AM), <https://www.cnn.com/2021/05/26/watch-live-top-bank-ceos-testify-before-congress.html> [https://perma.cc/P3EU-PG5E]; *DealBook Briefing: What Bank C.E.O.s Said to Congress*, *N.Y. TIMES* (Apr. 11, 2019), <https://www.nytimes.com/2019/04/11/business/dealbook/bank-ceos-congress.html> [https://perma.cc/J4WA-GN5N]; Sylvan Lane, *Big Bank CEOs to Testify Before Congress in May*, *HILL* (Apr. 15, 2021, 2:11 PM), <https://thehill.com/policy/finance/>

The following hypothetical is designed to test the limits of insider trading common law and the statutes specifically aimed at Congress that have been passed and proposed.<sup>212</sup> Hypothetically, Congress fears that the actions of bank holding companies (“BHCs”) are too reckless and will cause another recession.<sup>213</sup> The U.S. Senate Committee on Banking, Housing, and Urban Affairs (the “Committee”) plans to hold a meeting and further, to make the meeting a closed hearing.<sup>214</sup> The Committee issues an invitation to the representatives of Big Bank Holding Company A (“BHC-A”)<sup>215</sup> to attend. The substance of the meeting is not disclosed to the public.<sup>216</sup> The objective of the meeting is to hear testimony from BHC-A on its recent actions.<sup>217</sup> The Committee seeks to determine if further regulation of BHC-A is required, based on an in-depth look at the financial health and decision-making of BHC-A.<sup>218</sup>

The Chairperson, Senator X, sends a notice to BHC-A, summoning it to appear.<sup>219</sup> BHC-A shares material, nonpublic information with Senator X and the Committee. Before sending the notice, in this scenario (“Scenario One”), Senator X buys a put option,<sup>220</sup> which is a way of

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548490-big-bank-ceos-to-testify-before-congress-in-may/ [https://perma.cc/6YQ7-X6HR].

212. See *supra* Section I.E.

213. Franck, *supra* note 211.

214. See *supra* note 198 and accompanying text.

215. Julia Kagan, *Bank Holding Company*, INVESTOPEDIA (Nov. 23, 2020), <https://www.investopedia.com/terms/o/one-bank-holding-company.asp> [https://perma.cc/2YNT-RFTP] (“A bank holding company is a corporation that owns a controlling interest in one or more banks but does not itself offer banking services.”); Dafna Avraham, Patricia Selvaggi & James Vickery, *A Structural View of U.S. Bank Holding Companies*, FED. RESRV. BANK N.Y. ECON. POL’Y REV., July 2012, <https://www.newyorkfed.org/medialibrary/media/research/epr/12v18n2/1207avra.pdf> [https://perma.cc/2BA5-5TRU] (listing bank holding company examples of Goldman Sachs, Morgan Stanley, JP Morgan Chase, and Bank of America).

216. AMER, *supra* note 183.

217. Franck, *supra* note 211.

218. *Id.*

219. CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., 98-304, HOUSE COMMITTEE HEARINGS: ARRANGING WITNESSES 1 (2015) (explaining that after the “suitable witnesses are identified[,]” typically the committee chair “sends each witness a formal letter of invitation”).

220. James Chen, *Put Option: What It Is, How It Works, and How to Trade Them?*, INVESTOPEDIA (Mar. 2, 2022), <https://www.investopedia.com/terms/p/putoption.asp> [https://perma.cc/G2JK-QP8S] (A put option is “a contract giving the option buyer the

profiting when the share price goes down, of BHC-A stock. Is Senator X liable for insider trading?

Alternatively, Senator X asks her Chief of Staff Y (CS-Y) to draft the notice letter, to be sent via email to BHC-A. In this scenario (“Scenario Two”), CS-Y buys a put option<sup>221</sup> of BHC-A stock, before forwarding his draft email to his boss.<sup>222</sup> Is CS-Y liable for insider trading?

Finally, Senator X instructs her Staffer Z to prepare background research on notices to BHCs.<sup>223</sup> In this scenario (“Scenario Three”), Staffer Z buys a put option of BHC-A stock. Is Staffer Z liable for insider trading?

## B. ESTABLISHING LIABILITY FOR INSIDER TRADING UNDER THE RULES FOR CORPORATE INSIDERS

### 1. *Applying the Classical Theory of Insider Trading to Members of Congress and Their Staff*

The classical theory of insider trading is ill-fitting to demonstrate liability for members of Congress and their staffers.<sup>224</sup> The classical theory is rooted in the fiduciary relationship between the corporate insider and the securities issuer.<sup>225</sup> Here, that relationship is absent in all three scenarios. In Scenario One, Senator X has no duty to disclose based on

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right, but not the obligation, to sell—or sell short—a specified amount of an underlying security at a predetermined price within a specified time frame.”).

221. *What are Call and Put Options?*, VANGUARD, <https://investor.vanguard.com/investor-resources-education/understanding-investment-types/what-are-call-put-options> [<https://perma.cc/G7D3-4EQF>] (last visited Oct. 19, 2022) (explaining that after buying a put option, one makes a profit by buying the security on the open market when the security’s price falls and then exercising the put option at the higher strike price). A put option does not have to be purchased through a broker, it can be purchased on trading apps such as Robinhood. *See Placing an Options Trade*, ROBINHOOD, <https://robinhood.com/us/en/support/articles/placing-an-options-trade/> [<https://perma.cc/V5F8-L3FJ>] (last visited May 24, 2022).

222. *See* R. ERIC PETERSEN, CONG. RSCH. SERV., R44324, STAFF PAY LEVELS FOR SELECTED POSITIONS IN SENATORS’ OFFICES, FY2001-FY2020 1 (2021) (listing twenty-four staff position titles typically found in Senators’ offices, such as chief of staff, legislative assistant, and staff assistant).

223. HEARINGS IN THE U.S. SENATE, *supra* note 180 at 9.

224. *See infra* Section III.A.1.

225. *See supra* Section I.D.2.



her interaction with BHC-A.<sup>226</sup> This interaction does not establish any role for Senator X within the corporate structure of BHC-A. Moreover, Senator X is not a director, officer, or even employee of BHC-A. CS-Y and Staffer Z are even further removed, regarding their status, from BHC-A.<sup>227</sup> In all three scenarios, the link between the person who traded and BHC-A does not resemble the traditional connection described in *Chiarella*.<sup>228</sup> There is no duty to the shareholders of BHC-A, which is the linchpin for the insider trading analysis.<sup>229</sup> The Supreme Court in *Chiarella* emphasized that there must be a pre-existing relationship between the trader and the issuer, which does not exist.<sup>230</sup> This meeting may even be the first time Senator X even speaks with any employee of BHC-A. All three persons would be able to successfully analogize themselves to Vincent Chiarella, avoiding liability as he did.<sup>231</sup> Under *Chiarella*, their mere possession of material, nonpublic information is not enough for liability.<sup>232</sup>

A former member of Congress would be liable under the classical theory, not due to his status in Congress, but rather his board position.<sup>233</sup> Charged with insider trading, former Rep. Chris Collins (R-NY)—while a board member of a biotech company—found out a clinical trial had poor results and warned his son and others before the news became public to sell their shares to avoid a major loss.<sup>234</sup>

A secondary prong of the classical theory is related to temporary or constructive insiders.<sup>235</sup> Even under this extended rule and broader category, it is still unlikely that any person who traded in any of the scenarios would be held liable for insider trading.<sup>236</sup> A person is considered a temporary insider when they hold information as a fiduciary to the issuer.<sup>237</sup> Persons who work closely with a board of directors or

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226. DAVIS, *supra* note 219.

227. Sabino & Sabino, *supra* note 82.

228. *Chiarella v. United States*, 445 U.S. 222, 233 (1980).

229. *See supra* Section I.D.2.

230. Sabino & Sabino, *supra* note 82.

231. *See supra* Section I.D.3.

232. Sabino & Sabino, *supra* note 82, at 691.

233. Kayla Quigley, *The Insider Trading Prohibition Act: A Small Step Towards a Codified Insider Trading Law*, 26 FORDHAM J. CORP. & FIN. L. 183, 185 (2021).

234. *Id.*

235. *See supra* Section I.D.2.

236. *Id.*

237. *Id.*

corporate insiders may become temporary insiders.<sup>238</sup> The definition of temporary insider has expanded over time to include corporate counsel, outside counsel, underwriters, consultants, and financial advisers.<sup>239</sup> For Scenario One to find liability, Senator X would have to be similarly situated to those occupations.

Senator X and BHC-A did not enter into a special confidential relationship because of the key differences between this closed session interaction and the typical temporary insider interaction. Senator X is not being compensated by BHC-A, unlike consultants or advisers who are given confidential information and paid to provide feedback. In addition, Senator X is not providing market insights to BHC-A. Although commentary from Senator X may ultimately inform how BHC-A operates—or lead BHC-A to change its actions—the purpose of this meeting is one-sided. It is a one-way information exchange as BHC-A is detailing to the Committee its inner workings and recent actions. Even if hearing material, non-public information were sufficient to classify someone as a temporary insider, it is unlikely that a corporation would tell such information to a temporary insider without a contractual relationship. There is no contractual relationship between Senator X and BHC-A.

Another factor that casts doubt on Senator X being a temporary insider is that Senator X may have a prior history with BHC-A from public hearings, where there is no expectation of keeping the exchanged information confidential.<sup>240</sup> If the relationship between the parties involves a mix a public and non-public interactions, then perhaps there is no expectation that the information will remain secret. In conclusion, Senator X, CS-Y, and Staffer Z would all avoid liability under the classical theory.

## 2. *Applying the Misappropriation Theory of Insider Trading to Members of Congress and Their Staff*

The misappropriation theory is a more viable option for finding liability for members of Congress and their staffers, but ultimately it will

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238. 17 C.F.R. § 243.100(b)(2); *see also* 65 Fed. Reg. 51715, 51720 (explaining that “Rule 100(b)(2) [excludes] ‘temporary insider[s]’” from coverage).

239. *Key Concepts Under the Insider Trading Laws—Definition of “Insider”*, CORPORATE COUNSEL’S GUIDE TO INSIDER TRADING & REPORTING § 1:5 (2021 ed.).

240. *Dirks v. SEC*, 463 U.S. 646, 667 (1983).

likely fall short.<sup>241</sup> The misappropriation theory is designed for corporate outsiders as it shifts the duty to the source of the information, finding liability when that duty is breached.<sup>242</sup> It has been advocated as the only relevant theory of insider trading liability for members of Congress and government officials.<sup>243</sup>

The misappropriation theory jurisprudence, built to prosecute insider trading for corporate insiders, is only successful when members of Congress essentially act as corporate insiders. For example, serving from 1993 to 2011, former Rep. Stephen Buyer (R-IN) was charged with insider trading in 2018 and 2019 when, in his role as a consultant, he received news from clients about impending merger and acquisition announcements and he purchased shares before this material information went public.<sup>244</sup> Buyer was charged not due to his status as a member of Congress, but rather because he misappropriated information from his clients.<sup>245</sup>

Starting with Scenario One, the difficulty in holding Senator X liable under the misappropriation theory is the issue of identifying the source of the information and the nature of the relationship.<sup>246</sup> The Court in *O'Hagan* addressed this issue as James O'Hagan was found liable because of his relationship, as a partner, to the law firm he worked for.<sup>247</sup> *O'Hagan* postulated that the client gave the material, non-public information to the law firm and James O'Hagan violated his duties as a partner by using that information to profit via trading ahead of the

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241. United States v. O'Hagan, 521 U.S. 642, 653 (1997).

242. *Id.*

243. Bainbridge, *supra* note 9, at 8.

244. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Former Indiana Congressman with Insider Trading (July 25, 2022), <https://www.sec.gov/news/press-release/2022-128> [<https://perma.cc/F3LM-JXW6>]; Christina Wilkie & Dan Mangan, *Former GOP Rep. Stephen Buyer Charged with Insider Trading by Federal Prosecutors*, SEC, CNBC (July 25, 2022, 8:52 PM), <https://www.cnbc.com/2022/07/25/sec-charges-former-gop-rep-stephen-buyer-with-insider-trading-.html> [<https://perma.cc/U4HW-838E>].

245. *SEC Charges Former Indiana Congressman with Insider Trading*, *supra* note 244; Wilkie & Mangan, *supra* note 244.

246. Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 92 (2013).

247. *O'Hagan*, 521 U.S. at 647-48.

merger.<sup>248</sup> Illicitly using the information, James O'Hagan feigned loyalty to the principal, who was the source of the information.<sup>249</sup>

Determining fiduciary law for public officials presents challenges in defining the group to whom the duty is owed.<sup>250</sup> For example, an assemblywoman may have a fiduciary duty to both the constituents of her district and the people of the state she represents.<sup>251</sup> These groups could have conflicting stances and it may be irreconcilable to satisfy the duty to both.<sup>252</sup> Governing bodies face collective action problems, and the imposition of the will of a select few members skews the overall direction of the group.<sup>253</sup>

If in Scenario One, Senator X has no duty then neither would CS-Y and Staffer Z because they are both further removed as unelected staff. Without liability in Scenario One, then all three would not be liable in Scenario Two and Scenario Three. Compared to James O'Hagan, Senator X has more potential options, as the source of information could be Congress, the Senate, the Committee, Senator X's political party, or the general public. The source of information needs to be determined to then align Senator X with the proper party to whom to attach the duty. All these potential duties suffer from the same calibration issue, as it is unclear what values Senator X is obligated to uphold. The analysis for Senator X is not as straightforward as in *O'Hagan*, as Senator X's political groups are large and multi-faceted. The internal disagreements within political groups makes it likely that any act of Senator X would be disapproved by a portion of the group.<sup>254</sup>

A duty to the entire Congress would be too broad.<sup>255</sup> The link between Senator X and Congress is tenuous compared to the directness of James O'Hagan and the law firm.<sup>256</sup> Congress could be conceived as the source of the information, as Senator X is receiving the information while in her official position.<sup>257</sup> Similar to James O'Hagan's law firm,

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248. *Id.*; see *supra* Section I.D.3.

249. *O'Hagan*, 521 U.S. at 662.

250. See *infra* Section II.B.2.

251. Leib et al., *supra* note 246.

252. *Id.*

253. See generally D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. F. 671 (2013).

254. Leib et al., *supra* note 246.

255. See *infra* Section II.B.2.

256. *United States v. O'Hagan*, 521 U.S. 642, 647-48 (1997).

257. See *Rules of Procedure*, *supra* note 202; Press Release, Press Release, Sen. Josh Hawley, *supra* note 159.

Congress is the employer of Senator X.<sup>258</sup> A law firm or corporation would also have a definable agenda or limited purview when compared to Congress.<sup>259</sup> Additionally, Senator X could be in the minority political party, thus having a fiduciary duty to the entire Congress would go against her own agenda. Senator X would face a dilemma in how to cast her vote: go against her own positions and please her constituents or advocate for her own positions and displease her constituents.<sup>260</sup>

Although it is a smaller group than the entirety of Congress, a duty to the Senate begets the same issues as a duty to Congress.<sup>261</sup> Composed of 100 members ranging across the political spectrum, describing what the Senate would require Senator X to do in order to uphold the duty would be labyrinthine.<sup>262</sup> There are political outliers, mean or average supporters, and the pivotal 51st actor.<sup>263</sup> These three archetypes could have divergent views, leaving Senator X with little guidance on which path to follow.<sup>264</sup>

Under the authority of Congress, the Committee would be the group who directly received the information from BHC-A.<sup>265</sup> The smallest in number, the Committee could be analogized to a company, however, the Committee is composed of members of both political parties.<sup>266</sup> The majority party appoints all Committee chairpersons, thus Senator X would be in the majority as she is a chairperson.<sup>267</sup> Senator X as chairperson of the Committee could be compared to O'Hagan's management role in the law firm.<sup>268</sup> Both roles have leadership and responsibility components.<sup>269</sup> However, the roles differ in that the overarching institution of the Committee breaks down into members that

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258. *O'Hagan*, 521 U.S. at 647-48.

259. Leib et al., *supra* note 246.

260. *Id.*

261. *Id.*

262. *Id.*

263. Stephen Pettigrew, *These are the Two Pivotal Senators if There's a Vote to Replace Scalia*, WASH. POST (Feb. 14, 2016, 1:38 PM), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/14/these-are-the-two-pivotal-senators-if-theres-a-vote-to-replace-scalia/> [https://perma.cc/E3F9-85VB].

264. *Id.*

265. *See supra* Section II.A.1.

266. *Id.*

267. *Id.*

268. *United States v. O'Hagan*, 521 U.S. 642, 647-48 (1997).

269. *Id.*

fundamentally disagree with each other.<sup>270</sup> With a common business goal of running profitable firm, law firm partners do not face the type of disagreement Committee members face.<sup>271</sup>

As the largest group, a duty to the public would be overly complicated and expansive. Senator X, as a public official, could have a duty to the public as part of her election to Congress. Public officials have been characterized as having a fiduciary duty “to carry out their responsibilities in a manner that is faithful to the public trust that has been reposed in them.”<sup>272</sup> However, this would present issues of breaking down who the public is—the residents of her district, the entire citizenry of the United States, or the entire population of the United States.<sup>273</sup> There would even potentially be citizens on both sides of the transaction, where some would want BHC-A’s stock to increase while other citizens would want it to decrease. Thus, Senator X would be simultaneously satisfying and breaching her duty to the public.

### C. ESTABLISHING LIABILITY FOR INSIDER TRADING UNDER THE RULES FOR CONGRESS

#### 1. *Applying the STOCK Act to Members of Congress and Their Staff*

The purpose of the STOCK Act is to clarify that insider trading federal securities laws apply to the members of Congress and to prohibit their use of material, nonpublic information attained from their positions.<sup>274</sup> By its plain language, the STOCK Act should be enough to bar insider trading and prove liability in all three scenarios.<sup>275</sup> The STOCK Act resolves the complexities in establishing a fiduciary duty for members of Congress by explicitly stating a duty.<sup>276</sup> However, the

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270. HEITSHUSEN, *supra* note 187.

271. *See generally* George F. Carpinello, *Should Practicing Lawyers be Legislators*, 41 *Hastings L.J.* 87 (1989).

272. Vincent R. Johnson, *The Fiduciary Obligations of Public Officials*, 9 *ST. MARY’S J. LEGAL MALPRACTICE & ETHICS* 298, 298 (2019).

273. *Proportional Representation*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES <https://history.house.gov/Institution/Origins-Development/Proportional-Representation/> [<https://perma.cc/VA4F-VSEQ>] (last visited Oct. 19, 2022).

274. *See supra* Section I.E.1.

275. Greve, *supra* note 144; *see also* FINRA, *Notice To Members 89-5*, *supra* note 108.

276. Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, § 4(b), 126 Stat. 291 (2012).

STOCK Act creates enforcement and disclosure issues that have led it to be less effective than initially imagined.<sup>277</sup>

Under the section Prohibition of Insider Trading, the STOCK Act establishes for members and employees of Congress “a duty arising from a relationship of trust and confidence to the Congress, the United States Government, and the citizens of the United States” in relation to this possession of material, nonpublic information.<sup>278</sup> “Member of Congress” includes members of the Senate and the House, and “employees of Congress” includes “any individual (other than a Member of Congress), whose compensation is disbursed by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives.”<sup>279</sup>

The STOCK Act applies to all three scenarios as Senator X fits the definition of “member of Congress” and CS-Y and Staffer Z are included in the definition of “employee of Congress.”<sup>280</sup> By attending the closed session hearing, all three persons are acting in their official and respective roles.<sup>281</sup> The general prohibition on private profiting from material, nonpublic information based off of a member’s or employee’s official responsibilities creates insider trading liability in all three scenarios.<sup>282</sup>

Due to the breadth of the STOCK Act, it would appear that no further legislation is required to combat insider trading.<sup>283</sup> However, the STOCK Act presents enforcement issues as members of Congress disregard the rule, rendering it unsuccessful.<sup>284</sup> Violations of the STOCK Act have not led to prosecution.<sup>285</sup> Even repeat violators have avoided liability.<sup>286</sup>

Lack of adherence to the disclosure rules has also weakened the STOCK Act.<sup>287</sup> Members and employees of Congress are required to report covered financial transactions no later than 30 days after receiving notification or at most 45 days after the transaction.<sup>288</sup> The penalty for a

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277. Greve, *supra* note 144.

278. Pub. L. No. 112-105, § 4(b), 126 Stat. 291 (2012).

279. *Id.*

280. *Id.*

281. CONG. RSCH. SERV., RL30548, HEARINGS IN THE U.S. SENATE: A GUIDE FOR PREPARATION AND PROCEDURE 16-17 (2010).

282. *See* Pub. L. No. 112-105, § 4, 126 Stat. 291, 292 (2012).

283. *See* Press Release, Rep. Katie Porter, *supra* note 171.

284. Levinthal, *supra* note 2.

285. *See supra* Introduction.

286. *Id.*

287. *Id.*

288. Pub. L. No. 112-105, § 6, 126 Stat. 291, 293–94 (2012).



late filing is \$200.<sup>289</sup> There is no public record of administration of the fines.<sup>290</sup> This reporting and penalty structure disincentivizes compliance with the STOCK Act.<sup>291</sup> The cost of the effort required to track one's covered financial transactions and submit the paperwork exceeds the penalty amount, thus noncompliance proliferates.<sup>292</sup>

Recognizing the shortcomings of the STOCK Act, several proposed bills, including a STOCK Act 2.0 are being considered by Congress.<sup>293</sup> A sign of deterrence, the STOCK Act has “significantly reduced the amount of financial activity in the Senate.”<sup>294</sup>

## 2. *Applying the Proposed Bills to Members of Congress and Their Staff*

### a. Common Themes of the Proposed Bills

Several of the proposed bills<sup>295</sup> discussed below have a similar complete ban on the trading of individual stocks for members of Congress.<sup>296</sup> BCSTA and BITCA widen this ban to include spouses and dependents of members of Congress.<sup>297</sup> BCTA includes senior congressional staff in the ban. While these bills strive to simplify Congressional insider trading issues, collectively they are over-inclusive in their disallowance of trading.<sup>298</sup> Concurrently, the bills are under-inclusive as they do not address the actions of staffers. Although there are carve outs for holding index funds and mutual funds, the ban is not limited to an industry or specific sector.<sup>299</sup> The bills do not account for an externality of the ban, which is the discouragement of qualified individuals to run for Congress. A ban on congressional trading also incentivizes members of Congress to pass on stock tips for favors as

289. Greve, *supra* note 144.

290. *Id.*

291. *See supra* Introduction.

292. *Id.*

293. *Id.*

294. William Belmont et al., *Relief Rally: Senators as Feckless as the Rest of Us at Stock Picking 5* (Nat'l Bureau of Econ. Research, Working Paper No. 26975, 2020).

295. BCSTA, BITCA, BCTA, and the STOCK Act 2.0. *See* Ban Congressional Stock Trading Act, S. 3494, 117th Cong. § 201 (2022); Banning Insider Trading in Congress Act, S. 3504, 117th Cong. § 201 (2022); Ban Conflicted Trading Act, H.R. 1579, 117th Cong. § 2 (2021); STOCK Act 2.0, S. 3612, 117th Cong. § 1 (2022).

296. *See supra* Table 1: A Breakdown of the Proposed Bills on Insider Trading.

297. *See supra* Table 1: A Breakdown of the Proposed Bills on Insider Trading.

298. *See infra* Section III.A.1.

299. *See supra* Table 1: A Breakdown of the Proposed Bills on Insider Trading.



members of Congress will want to make use of the information. The ban also assumes Congress is inherently corrupt and proposes that no active participation in the capital markets is the solution.<sup>300</sup> Another downside of the complete trading ban is that traditional political outsiders, those from the business or corporate sector, may not even seek office due to the divestment measures.<sup>301</sup> By including spouses in the bans, the proposed bills fail to address the fairness of having a spouse who is a professional investor.<sup>302</sup> Under all the bills, Senator X would be found liable for insider trading. CS-Y would be found liable under a single bill, the BCTA, and Staffer Z would likely avoid liability under all bills.

On the policy side, the proposed bills depart from the impetus behind insider trading laws, which is to protect market fairness and efficiency, and instead focus on voter confidence in lawmakers.<sup>303</sup> It is true that the public will lose confidence in lawmakers who own stocks in the companies that they regulate, but this distrust is a different issue from insider trading.<sup>304</sup>

b. Applying the Ban Congressional Stock Trading Act to Members of Congress and Their Staff

Under the BCSTA, Senator X would be prohibited from trading any covered investment, thus she would not be allowed to buy the put option of BHC-A. BCSTA also applies to spouses and dependents of members of Congress. If Senator X had a spouse that was a professional investor, then that person would also be barred from trading during Senator X's tenure in Congress. If applicable, Senator X's children or "other relative

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300. See Opinion, *The Misguided Rush to Ban Congress's Stock Trades*, WALL ST. J. (Feb. 11, 2022, 6:44 PM), <https://www.wsj.com/articles/the-rush-to-ban-congress-stock-trades-11644417361> [<https://perma.cc/7M8F-NN46>].

301. *Id.*

302. *Id.*

303. Jennifer J. Schulp, *Banning Lawmakers from Trading Stocks Won't Fix Congress*, CATO INST. (Feb. 22, 2022), <https://www.cato.org/commentary/banning-lawmakers-trading-stocks-wont-fix-congress> [<https://perma.cc/8W6Z-6CZ3>]; see also *The Misguided Rush to Ban Congress's Stock Trades*, *supra* note 300.

304. Deirdre Walsh, *Bipartisan Duo Say Voters Want Congress to Stop Trading Stocks, Leaders Open to a Vote*, NPR: MORNING EDITION (Feb. 9, 2022, 3:26 PM), <https://www.npr.org/2022/02/09/1079364990/bipartisan-duo-say-voters-want-congress-to-stop-trading-stocks-leaders-open-to-a> [<https://perma.cc/Y9MK-7NG7>].

who is a resident of the immediate household of the individual [Senator X]” would similarly be unable to trade stocks.

For their respective scenarios, CS-Y and Staffer Z would not be impacted by BCSTA, as they fall outside the definition of “covered person.”<sup>305</sup> Hence, the passage of BCSTA would not add any additional liability or reporting structures for CS-Y and Staffer Z.<sup>306</sup>

c. Applying the Banning Insider Trading in Congress Act to Members of Congress and Their Staff

The BITCA has the same trading prohibition on members of Congress and their spouses as the BCSTA. However, the BITCA exempts dependents from the prohibition.<sup>307</sup> So the BITCA analysis for Senator X is identical to that under BCSTA, whereby Senator X would be barred from buying the put option. Similar to BCSTA, BITCA does not include employees of members of Congress, thus CS-Y and Staffer Z would not be barred from trading. Under BITCA, CS-Y and Staffer Z would gain no additional duties, so they each would be able to purchase the put option.<sup>308</sup>

d. Applying the Ban Conflicted Trading Act to Members of Congress and Their Staff

The BCTA not only includes the trading ban on members of Congress, but also adds congressional staff to the ban.<sup>309</sup> Under BCTA, Senator X would be prohibited from buying the put option. CS-Y would then be in the same position as Senator X in terms of liability for insider trading based on a single trade.<sup>310</sup> Staffer Z would also be found liable if he is required to file a report under the Ethics in Government Act of 1978.<sup>311</sup> Staffer Z would be an employee of Senator X and would be paid by the Secretary of the Senate under the Ethics in Government Act of 1978 and Section 109(13), thus expanding his liability. The BCTA trading ban would then apply to all three scenarios, finding each party liable for insider trading if they purchased the put option.

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305. Ban Congressional Stock Trading Act, S. 3494, 117th Cong. § 202(a), (c) (2022).

306. *Id.*

307. Banning Insider Trading in Congress Act, S. 3504, 117th Cong. § 202(a) (2022).

308. *Id.*

309. Ban Conflicted Trading Act, H.R. 1579, 117th Cong. §§ 2(3), 3(A) (2022).

310. *Id.*

311. 5 U.S.C. § 101 (2006); 5 U.S.C. § 109 (2014).

e. Applying the STOCK Act 2.0 to Members of Congress and Their Staff

The STOCK Act 2.0 calls for a prohibition on the purchase or sale of any covered investment, banning individual stock trading.<sup>312</sup> Combined with the STOCK Act, this amendment takes the general prohibition of private profiting and overlays an unequivocal ban.<sup>313</sup> To address disclosure noncompliance, the STOCK Act 2.0 raises the penalty from \$200 to \$500, while retaining the same day requirements for notification and reporting.<sup>314</sup> The STOCK Act 2.0 expands the covered persons—banned from trading stocks—to include U.S. Supreme Court Justices and Federal Reserve Governors.<sup>315</sup>

Under the STOCK Act 2.0, Senator X would be in violation for any trade made, regardless of the closed session hearing, due to the complete bar from trading individual stocks.<sup>316</sup> In the other two scenarios, the trading ban does not apply to CS-Y and Staffer Z as they are not included in the “covered persons” section.<sup>317</sup> Thus, CS-Y and Staffer Z would still be controlled by the STOCK Act’s original prohibition of private profiting.<sup>318</sup> The STOCK Act 2.0 greatly simplifies the insider trading liability analysis for Senator X. However, it is over-inclusive in its effort to curtail the enforcement issues of its predecessor.

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312. STOCK Act 2.0, S. 3612, 117th Cong. §§ 201(2), 202(a) (2022).

313. *Id.*

314. *Id.* § 20(a).

315. *Id.* §§ 201(3), 202(a).

316. *Id.* §§ 201(2)–(3), 202(a).

317. *Id.* § 201(3).

318. Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, § 4(b), 126 Stat. 291, 292 (2012).

Table Updated with Hypothetical Information: Summarizing When Each Person Would be Liable for Insider Trading

Theory of Liability	Senator X	Chief of Staff Y (CS-Y)	Staffer Z
Classical Theory	No	No	No
Misappropriation Theory	Unlikely	Unlikely	Unlikely
Ban Congressional Stock Trading Act <sup>319</sup>	Yes	No	No
Banning Insider Trading in Congress Act <sup>320</sup>	Yes	No	No
Ban Conflicted Trading Act <sup>321</sup>	Yes	Yes	Yes
STOCK Act	Yes	Yes	Yes
STOCK Act 2.0 <sup>322</sup>	Yes	No	No
Congressional Blackout Periods	Yes	Yes	Yes

### III. APPLYING THE CORPORATE POLICY OF STOCK TRADING BLACKOUT PERIODS TO MEMBERS OF CONGRESS AND THEIR STAFF RATHER THAN ADOPTING ANY OF THE PROPOSED BILLS

#### A. REPURPOSING CORPORATE BLACKOUT PERIODS AROUND CLOSED SESSION HEARINGS TO COMBAT CONGRESSIONAL INSIDER TRADING

##### 1. *The Rules for Corporate Insiders Are Not Readily Applicable to Members of Congress and Their Staff*

Evidenced by the adoption of statutes specifically targeting Congress, the common law—designed to prosecute corporate insiders—is ill-fitting for members of Congress and their subordinates.<sup>323</sup> Members of Congress do not fit within the purview of the classical theory because

319. Ban Congressional Stock Trading Act, S. 3494, 117th Cong. § 202(a), (c) (2022).

320. Banning Insider Trading in Congress Act, S. 3504, 117th Cong. § 202(a) (2022).

321. Ban Conflicted Trading Act, H.R. 1579, 117th Cong. § 2 (2021).

322. STOCK Act 2.0, S. 3612, 117th Cong. § 5 (2022).

323. *Supra* Section II.B.

they do not work for the companies or securities issuers who pass on the information to them.<sup>324</sup> Even the secondary prong, which envelopes temporary insiders, does not apply to members of Congress because there is no contract nor compensation between the parties.<sup>325</sup>

Shifting the focus to the source of the information, the misappropriation theory could be shoehorned to find liability, but ultimately it presents larger questions of the bounds of fiduciary duty and the nature of the relationship.<sup>326</sup> The relationship between members of Congress and their committees does not align neatly with the straightforwardness of O'Hagan's duty to his law firm.<sup>327</sup>

## 2. *The Rules Specifically Designed for Members of Congress and Their Staff are Simultaneously Under- and Over-Inclusive*

The STOCK Act provided a general ban on private profitmaking, which included members and employees of Congress.<sup>328</sup> The strong language of the STOCK Act should have halted Congressional insider trading; however, enforcement and disclosure issues obfuscated its efficacy.<sup>329</sup> The reliance on self-regulation and reporting periods proved to be ineffectual as Members of Congress simply ignored the timelines and were largely not penalized.<sup>330</sup> The incentive for compliance was heavily hindered by the miniscule penalty associated with untimely or non-existent reporting.<sup>331</sup> The STOCK Act reduced the number of financial transactions made by members of Congress, which indirectly decreased opportunities for insider trading.<sup>332</sup>

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324. *See supra* Section II.B.1.

325. *See id.*

326. *See supra* Section II.B.2.

327. *See id.*

328. Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, § 4(b), 126 Stat. 291 (2012).

329. Greve, *supra* note 144.

330. *Id.*

331. Press Release, Rep. Katie Porter, *supra* note 176.

332. *The Misguided Rush to Ban Congress's Stock Trades*, *supra* note 300.

B. CONGRESSIONAL BLACKOUT PERIODS WOULD FILL IN THE LIABILITY GAPS LEFT BY INSIDER TRADING COMMON LAW

1. *Congressional Blackout Periods Avoid Difficult Duty Questions that Burden the Classical Theory and Misappropriation Theory*

Congressional blackout periods provide an alternative to application of the classical theory or misappropriation theory by focusing on the timing of trades rather than conducting a legal analysis of duty.<sup>333</sup> Instead of basing insider trading liability on the nature of the relationship and the duty associated with the relationship, congressional blackout periods set aside complex questions of duties owed to amorphous groups—such as the entire Congress or the general public—by placing an emphasis on when trades are executed, simplifying how to determine liability.<sup>334</sup> Moreover, congressional blackout periods do not require unraveling the complex interests and agenda of a bipartisan committee, which can present conflicting obligations.<sup>335</sup> Congressional blackout periods can also be universally applied to all staff members and Members of Congress.<sup>336</sup> Committees can tailor the length of their blackout periods depending on the subject matter they confront in the same way that publicly traded companies use blackout periods to circumscribe major financial disclosure events.<sup>337</sup>

2. *Congressional Blackout Periods Solve the Scope and Coverage Problems of the Proposed Bills*

The proposed bills are extreme in their total ban on stock trading, failing to account for the differences between stocks and the responsibilities of a particular member of Congress or their staff.<sup>338</sup> Additionally, the bills include other parties, such as spouses and dependents, based on their relationship to the member of Congress.<sup>339</sup> The negative externalities of this over-inclusivity outweigh the benefits of

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333. See *supra* Section I.D.6.

334. Schneider, *supra* note 126.

335. SCHNEIDER, *supra* note 189.

336. Harmon, *supra* note 122.

337. Guay et al., *supra* note 117.

338. See *supra* Table 1: A Breakdown of the Proposed Bills on Insider Trading.

339. See *The Misguided Rush to Ban Congress's Stock Trades*, *supra* note 300.

extending the prohibition.<sup>340</sup> Alongside an improper extension of the covered parties is an oversight in how Congressional staffers are treated.<sup>341</sup> Many of the bills do not include staffers, implying only the regulations in the STOCK Act govern staffers with regard to trading.<sup>342</sup> This under-inclusivity of staffers fails to recognize the relationship between members of Congress and their teams.<sup>343</sup>

### C. HOW A CONGRESSIONAL BLACKOUT PERIOD WOULD OPERATE

Congressional blackout periods would be placed around closed session hearings and other major legislative actions if needed.<sup>344</sup> Upon determination that a hearing or meeting will be nonpublic, the blackout period would be added to the calendar several days before the hearing and continue until the information becomes public.<sup>345</sup> The congressional blackout period could last 3 to 5 days before the hearing and be enacted before the invitations are sent out to the parties. Analogous to blackout periods that bookend quarterly earnings reports, Congressional blackout periods could surround national security briefings or global health issues.<sup>346</sup>

The basis for compensation of members of Congress and corporate leaders differs enough to quell the problem of a blackout period that lasts too long. In certain instances, it is conceivable that the information shared at a highly secretive hearing may take an extended period to reach the public or media sources, effectually creating a ban on trading due to the length of the blackout period. An extended period of no trading impacts the compensation of corporate executives.<sup>347</sup> However, unlike corporate executives, Congress is only compensated through salaries, not stocks and options.<sup>348</sup> Because stock trading is an additional income to Congress, or even a passive income, this concern is less prevalent for them.<sup>349</sup>

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340. *Id.*

341. *See supra* Section II.C.2.

342. *See supra* Table 1: A Breakdown of the Proposed Bills on Insider Trading.

343. *Id.*

344. Hall et al., *supra* note 123.

345. *Committee Calendar*, *supra* note 197.

346. *About the Committee*, *supra* note 200.

347. *So, You Have Company Stock Trading Restrictions: Blackout Periods & 10b5-1 Plans*, *supra* note 120.

348. *Id.*

349. *Id.*

Congress would need to inform financial regulators of closed session hearing dates and the occurrence and length of the congressional blackout periods.<sup>350</sup> The SEC would then be able to monitor Congress's trading activities around these dates.<sup>351</sup> Because this disclosure relies in part on Congress taking action, this could create similar problems of self-regulation as the STOCK Act, however, the Congressional calendar already lists when sessions are nonpublic.<sup>352</sup> Furthermore, the SEC and the Financial Industry Regulatory Authority (FINRA) have comprehensive experience in insider trading enforcement surrounding blackout periods.<sup>353</sup> Both regulators have experience with many types of companies, schedules, and events, which gives them the requisite knowledge to handle Congressional scheduling issues.<sup>354</sup> Regulators would then be able to independently verify the occurrence of the events and track the blackout periods.<sup>355</sup>

#### D. A HEARING DATE CHANGE COULD DECOUPLE THE BLACKOUT PERIOD FROM WHEN THE HEARING OCCURRED

Date changes present timing issues with blackout periods. If the dates of closed hearings shift without the bookended blackout periods also moving accordingly, then the blackout period becomes useless. However, this issue can be avoided through granting schedule access to regulators. Additionally, longer or more liberal blackout periods could be applied to circumvent these issues. For example, if the date of a closed hearing is likely to shift three to five days in either direction, then the corresponding blackout period could be increased by 5 days on both ends.<sup>356</sup> Information uptake and asymmetry concerns drive the length of corporate blackout periods.<sup>357</sup>

Hearings that move up the calendar and create retroactive blackout periods present a challenge to regulators as well. Corporations have already confronted and resolved many of the issues surrounding blackout

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350. Sebastian, *supra* note 137.

351. *Id.*

352. *Closed Hearings*, *supra* note 198.

353. Sebastian, *supra* note 137.

354. *Id.*

355. *Id.*

356. Guay et al., *supra* note 117.

357. *Id.* at 5.



periods, thus the lessons learned can be transferred to Congressional blackout periods.<sup>358</sup>

### CONCLUSION

Insider trading allegations and the lack of enforcement of disclosure violations weaken the public trust in government.<sup>359</sup> The use of material, nonpublic information by lawmakers for private profit casts serious doubt on the impartiality of legislation.<sup>360</sup> The common law has grappled with insider trading and the difficulties presented by establishing a fiduciary duty, but the common law does not adequately cover members of Congress and their subordinates. The STOCK Act admirably promulgated a general ban on profiteering, but its lack of enforcement has led to abuses without repercussions.<sup>361</sup> Proposed bills have been circulated throughout both chambers of Congress with stricter rules and expansions of application to persons who are only related to members of Congress.<sup>362</sup> However, these bills overreach by advocating for complete bans on the trading of individual stocks. Furthermore, the proposed bills do not take advantage of the extant systems used to monitor insider trading.<sup>363</sup> These bans apply a broad-stroke approach to a nuanced issue. Adopting corporate blackout periods to surround closed session hearings and other significant nonpublic legislative events, would provide a feasible and trackable mechanism to curtail congressional insider trading. These congressional blackout periods and any subsequent trading violations would be monitored by the SEC.<sup>364</sup> This process would remove the affirmative obligation of members and employees of Congress to self-regulate via filing reports and substitutes reliable financial industry regulators into the role of enforcement.<sup>365</sup>

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358. Bettis et al., *supra* note 116, at 191.

359. *See supra* Introduction.

360. *Id.*

361. Levinthal, *supra* note 2.

362. *See supra* Introduction.

363. Picardo, *supra* note 34.

364. *Id.*

365. Sebastian, *supra* note 137.