



MEMORANDUM

February 6, 2012

Subject: Summary of the Provisions of the STOCK Act, S. 2038, 112th Congress, as Passed by the Senate

From: Jack Maskell
Legislative Attorney
American Law Division

This memorandum provides a brief narrative of provisions of the STOCK Act, S. 2038, 112th Congress, grouped by topic, as passed by the Senate on February 2, 2012.

INSIDER TRADING

Congress

S. 2038, as passed by the Senate, expressly affirms the fact that there is no exemption for Members and employees of Congress from the so-called “insider trading” rules and regulations derived from federal securities law,¹ and the laws regarding trading on commodities.² The bill further confirms explicitly that there exists a duty of “trust and confidence” towards the United States and its citizens by Members and employees of Congress with respect to material, nonpublic information that may come to Members or employees in the course of performing their official duties.³

The legislation instructs the Senate and House Ethics Committees to issue interpretative guidance clarifying that Members and staff are not allowed to use nonpublic information derived from their official positions “as a means for making a private profit.”⁴

¹ S. 2038, Section 4(a). Current federal law regarding “fraud and manipulation” of securities markets, from which the insider trading rules are derived, have never contained an exemption or exclusion for Members of Congress. See 15 U.S.C. §§ 78j(b), 78t-1(a),(b), 78u-1, and 78ff(a), and Securities and Exchange Commission Regulations, at 17 C.F.R. § 240.10b5-1 and 2. Note generally, Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 BOSTON UNIV. L.R. 1105 (2011).

² S. 2038, Section 5.

³ S. 2038, Section 4(b). For the judicial recognition of an existing “fiduciary” duty of a Member of Congress towards the public, see, e.g., *United States v. Podell*, 572 F.2d 31, 32 (2d Cir. 1978). For congressional recognition, see Standing Orders of the Senate, §87, *Senate Manual*, S. Doc. 107-1, at 118-119 (2002); House Committee on Ethics, *House Ethics Manual*, 110th Cong., 2d Sess. at 2 (2008).

⁴ S. 2038, Section 3.

Executive and Judicial Branches

The bill extends the explicit restatement of the insider trading prohibitions to all executive branch and judicial branch officers and employees.⁵ The executive branch supervisory ethics office — the Office of Government Ethics (OGE), as well as the ethics office for the judiciary — the Judicial Conference of the United States, are instructed to provide ethical standards and guidelines against the use of nonpublic, confidential information gained from one’s employment for personal profit.⁶ In the executive branch, it would appear that the existing language of current ethical standards in regulations prohibiting that precise conduct would suffice.⁷

PROMPT DISCLOSURE OF SECURITIES TRANSACTIONS

Section 6 of the Senate-passed bill establishes a requirement for more prompt reporting of certain “transactions” in income-producing assets (that is, the purchase or sale of such things as stocks and bonds of \$1,000 or more in value) for certain classes of public filers under the requirements of the Ethics in Government Act of 1978. Under the new legislation, those who would have to file a report within 30 days of such a reportable transaction would be:

1. Members of Congress.
2. Officers and employees of the House and Senate.⁸
3. The President.
4. The Vice President.
5. Presidentially appointed and Senate confirmed (PAS) officials other than Foreign Service Officers below the rank of Ambassador, those in the uniformed services paid at a rate at or below an O-6, and special government employees.
6. Noncareer Senior Executive Service (or equivalent) personnel, except that the Director of the Office of Government Ethics may make appropriate exceptions.
7. The Director of the Office of Government Ethics.
8. Any regular civilian employee in the Executive Office of the President who holds a commission or appointment from the President.

The 30-day disclosures will not apply to transactions in a “widely held investment fund” (such as in a mutual fund, regulated investment company, pension or deferred compensation plan or other investment

⁵ S. 2038, Section 9(b)(1) and (2). In addition to the fact that there are in existing law no express exemptions for Members of Congress, there are also no such exemptions in current law for federal employees generally. The recent case of *United States v. Cheng Yi Liang*, Criminal No. DKC-11-0530, Plea Agreement of August 18, 2011 (D.Md. 2011), indicates the applicability of such existing insider trading restrictions to executive branch employees.

⁶ S. 2038, Section 9(a)(1) and (2).

⁷ See now 5 C.F.R. § §§ 2635.702, 2635.703. Note also the so-called “Trades Secrets Act,” 18 U.S.C. § 1905.

⁸ The legislation in Section 6 uses the term “officer or employee of Congress,” and the term “employee of Congress” is then defined for purposes of this Act in Section 2 to mean an employee of the House or an employee of the Senate.

fund) if the fund is publicly traded, the assets in the fund are widely diversified, and the reporting official exercises no control over the financial interests held by the fund.⁹

Two amendments added in floor debate in the Senate with regard to the requirement for 30-day reporting of transactions relating to the executive branch of government may be a source of interpretive difficulty. One amendment, adding Section 11 to the Act, requires that the President shall ensure that financial disclosure forms filed by those officers and employees subject to the 30-day reporting requirement of Section 6 of the Act are made available to the public on the appropriate websites of agencies in the executive branch.¹⁰ The other amendment, adding Section 12 to the Act, provides that each agency in the executive branch “shall comply with the provisions of sections (*sic*) 6 with respect to any of such agency, department or independent agency’s officers and employees that are subject to the disclosure provisions under the Ethics in Government Act of 1978.”¹¹ It is possible that by specifically referring to “section 6” of the Act, which limits the 30-day requirement to report transactions to only eight specific categories of officials, that the requirement of Section 12 is similarly restricted to only those officers and employees required to file 30-day reports of transactions under the referenced Section 6, and thus restates in a somewhat similar fashion the provisions of Section 11 that each agency must develop a mechanism to publicly report such transactions for those officers and employees. However, there is an obvious ambiguity with respect to such amendment made by Section 12 which might, in the alternative, be interpreted to apply to “any” officer or employee in the entire executive branch who must file financial disclosure reports “under the Ethics in Government Act.” This interpretation might necessitate such reporting from tens of thousands of federal employees, if applicable to every officer or employee who files a public financial disclosure report (see Section 101 of the Ethics in Government Act of 1978, 5 U.S.C. app. § 101), or potentially hundreds of thousands of employees, if it were interpreted to extend to those rank-and-file employees on the General Schedule who are required to file confidential reports under Section 107 of the Ethics in Government Act of 1978 (see now 5 U.S.C. app. § 107). There would, of course, be inconsistencies if interpreted in the latter manner, as the new Section 12(a) would supersede Section 6 with regard to those who must report transactions in 30 days even though it incorporates and cites specifically to Section 6, and would require public reporting of transactions by those rank-and-file employees whose disclosure reports are currently required by law to be kept confidential. If, however, it is interpreted to be restricted and cabined by the categories in Section 6, the amendment is arguably largely superfluous, and repetitive of Section 11(1).

FINANCIAL DISCLOSURE

Electronic Filing and Availability - Congress

The Senate-passed legislation would require that the annual public financial disclosure reports that are filed by Members of Congress, Senate and House staff, and officers of the House and Senate, will have to be made by way of electronic filings,¹² and would be available to the public within 30 days of filing on the official websites of the House and Senate.¹³ The Clerk of the House and Secretary of the Senate are required under the legislation to develop an electronic filing system for such disclosure reports, as well as

⁹ S. 2038, Section 14.

¹⁰ S. 2038, Section 11(1).

¹¹ S. 2038, Section 12(a).

¹² S. 2038, Section 8(b)(1),(4).

¹³ S. 2038, Section 8. It should be noted that the financial disclosure reports for Members of the House of Representatives are already required to be posted on the public Internet site of the Clerk of the House in a searchable, sortable, and downloadable format. P.L. 110-81, Section 304, 121 Stat. 752-753 (2007), see now 2 U.S.C. § 104e(a)(2).

for the new expedited 30-day transaction reports, which would allow the public access (without a logon requirement unless a report is to be downloaded) to search, sort, and download the data.

Electronic Filing and Availability – Executive Branch

Two provisions of S. 2038, as added by amendments, appear to address the electronic filing of financial disclosure reports by the executive branch. Section 11(2) of the Senate bill requires the President, within two years after the enactment of the provision, to “develop systems to enable electronic filing and public access, as required by section 8(b), to the financial disclosure forms of such individuals.” It is not precisely clear to whom this requirement applies, as Section 8(b) of the Act references the financial disclosure reports “filed by Members of Congress, officers of the House and Senate, candidates for Congress, and employees of the Senate and House of Representatives” The first paragraph of Section 11 references those individuals who must file the expedited 30-day reports on transactions (S. 2038, Section 11(1)), and it is possible that the second paragraph of that Section, by referencing “such individuals,” is intended to require electronic filing of the annual public financial disclosure reports only for those categories of individuals subject to the 30-day transactional reporting requirement.

Section 12(b) of S. 2038 provides that within 2 years of the passage of the provision, “each agency or department” in the executive branch “shall comply with the provisions of section 8” other than for members of the uniformed service compensated at a pay grade of 0-6 or less. In a similar manner as the amendment in Section 11(2), this section specifically refers to implementing Section 8 of the Act which covers only congressional filers of the disclosure reports. However, because this section expressly exempts uniformed service individuals below a particular pay grade, it might be inferred that the section’s intent was to apply similar Internet reporting requirements for public filers in the executive branch of government as were established for congressional filers in Section 8 of the Act.

Mortgage Disclosures

Under current provisions of financial disclosure law, covered officers and employees of the federal government must file information in their annual reports concerning “liabilities” owed in excess of \$10,000, but such provisions of law provide an exception so that officials need not file such information with regard to mortgages on their personal residences.¹⁴ The provisions of S. 2038 would limit that exception so that it would not apply to, and would thus require the reporting of information on mortgages on one’s personal residences by Members of Congress, the President and Vice President, and presidential nominees who must receive Senate confirmation (other than Foreign Service officers below the rank of ambassador and members of the uniformed services at or below pay grade 0-6).¹⁵

FORFEITURE OF FEDERAL PENSIONS

The provisions of the STOCK Act, as amended, would change the pension forfeiture provisions of federal law applicable to Members of Congress in two ways. First, it would expand the time frame under which the conviction for certain offenses would result in a Member of Congress forfeiting all of his or her creditable service as a Member for federal pension purposes. Currently, such forfeiture occurs only if the Member has committed one of the several corruption offenses listed in the pension law while a Member of Congress. Under the STOCK Act, such forfeiture would occur if the Member committed one of the several corruption offenses while a Member of Congress, while the President, the Vice President, or as an

¹⁴ 5 U.S.C. app. § 102(a)(4)(A).

¹⁵ S. 2038, Section 13.

elected official of a state or local government.¹⁶ Secondly, the STOCK Act adds several other federal criminal laws relating generally to public corruption or elections, for which final conviction would result in losing one's creditable service as a Member of Congress for federal pension purposes.

BONUSES TO EXECUTIVES OF FANNIE MAE AND FREDDIE MAC

The STOCK Act would prohibit the receipt of bonuses by "senior executives" at the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation during any period of conservatorship for those entities after the passage of this Act.¹⁷

DISCLOSURE OF POLITICAL INTELLIGENCE ACTIVITIES

S. 2038, at Section 17, would institute a registration and reporting requirement, under the current reporting and registration regime for "lobbyists," to apply to individuals and firms that engage in "political intelligence contacts," that is, those who for compensation receive information from covered government officials, such as Members of Congress and staff, when such information is about federal legislation, rules, or regulations and is intended to be used in analyzing securities or commodities or informing investment decisions. If private individuals receive information from Members or staff of Congress, or from executive branch officials, about legislation or government rules and regulations, and use such information for their or their client's investment decisions, then such persons who meet the threshold requirements of the law would have to register under the provisions of the Lobbying Disclosure Act of 1995 and file detailed quarterly reports with the Secretary of the Senate and Clerk of the House on income, expenditures, and activities.

Section 7 of S. 2038 requires the Comptroller General, in consultation with the Congressional Research Service, to provide within one year of the enactment of the law a report on "the role of political intelligence in the financial markets," including the possible effect of the sale of political intelligence on financial markets, the legal and ethical issues that may be raised by the sale of political intelligence, and to what extent such information is actually non-public information.¹⁸

CRIMINAL CODE AMENDMENTS

Title II of S. 2038 makes significant changes and expands the breadth and applicability of several laws governing prosecution for federal corruption offenses. There is a separate CRS Report discussing the implications of the changes to the criminal code made by similar provisions.¹⁹

One of the amendments in this Title, it may be noted, would appear to criminalize and make a felony violations of the House or Senate gift rules for gifts received over a particular amount, by criminalizing so-called "status" gifts given to public officials.²⁰ Under current law, gifts and things of value received by a public official come under the bribery and illegal gratuities provisions of federal law only when such gifts or things of value are connected in some way to an official act of the public official. That is, when a

¹⁶ S. 2038, Section 15(a)(1) and (2), amending 5 U.S.C. § 8332(a)(2)(A) (Civil Service Retirement System)[CSRS] and 5 U.S.C. § 8411(l)(2) (Federal Employee Retirement System)[FERS].

¹⁷ S. 2038, Section 16.

¹⁸ S. 2038, Section 7.

¹⁹ See CRS Report R42016, *Prosecution of Public Corruption: An Overview of Amendments Under H.R. 2572 and Title II of the STOCK Act*, by Charles Doyle.

²⁰ S. 2038, Section 205(b).

gift or thing of value is received corruptly “in return” for being influenced in performing an official act, such conduct may constitute a bribe²¹; and when such gift or thing of value is received “for or because of” an official act, such conduct may constitute receiving an “illegal gratuity.”²² However, when a gift is given to someone who is a public official, and there is *no* connection to any particular official act performed or to be performed by the official, such gifts are currently regulated and governed by gift rules and regulations, and are not bribes or illegal gratuities.²³ Under this legislation, however, any gift or thing of value received by a public official because of his or her official position, that is, so-called “status” gifts — given because of one’s status as a public official — would be an illegal gratuity and constitute a felony when it is over the proscribed amount and the receipt of the gift or thing of value is contrary to House or Senate ethics rules (or executive branch standards of conduct regulations for executive branch officials).²⁴

²¹ 18 U.S.C. § 201(b)(2)(A).

²² 18 U.S.C. §201(c)(1)(B). There needs to be no specific or implied bargain or agreement to perform an official act for an “illegal gratuity,” and the thing of value could be given even after an official act, such as in appreciation for or as a reward for the act. *United States v. Brewster*, 506 F.2d 62, 81-82 (D.C. Cir. 1974), quoting from earlier Supreme Court decision in *United States v. Brewster*, 408 U.S. 501, 527 (1972).

²³ *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-405 (1999).

²⁴ The proposed amendment to the bribery law exempts from illegal gratuities things of value and gifts received as provided by “rule or regulation,” which includes “a Federal regulation or a rule of the House of Representatives or the Senate, including those rules and regulations governing the acceptance of gifts and campaign contributions.” Violations of the proposed “status gift” provision would constitute a felony and would also trigger the loss of one’s congressional pension. 5 U.S.C. § 8332(o)(1) - (6) [CSRS], and 5 U.S.C. § 8411(l)(1)-(6) [FERS].
