

# **S. 1871 – STOCK Act: Stop Trading on Congressional Knowledge Act of 2011**

## **Guide to Chairman’s Mark**



### **Sen. Scott Brown**

“I was shocked when *60 Minutes* exposed Congress’ unfair trading advantage. At a time when the American people’s trust in Congress is close to an all-time low, it is more important than ever that members of Congress affirm that we live by the same rules as everyone else.”

### **A Longstanding Problem**

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#### **Allegations of an unfair trading advantage for members of Congress are not new:**

In 1966 Law Professor Henry G. Manne, wrote a book about insider trading by government officials. The Wall Street Journal has also repeatedly covered the issue. Notably, according to a study by economist Alan J. Ziobrowski, between 1993 and 1998, the common stock investment portfolios of U.S. Senators beat the market by 12% a year, on average. In contrast, the common stock investment portfolios of U.S. households as a whole underperformed the market on average by 1.4% a year during the same period. Corporate insiders investing in their own company’s stock only beat the market by about 6% a year on average during that period. Most recently, in November 2011, Peter Schweizer’s book documented various members of Congress’ trading decisions in relation to the decisions that were being made in Congress.

### **An Indefensible Privilege**

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#### **Scholars disagree on whether members of Congress owe a clear fiduciary duty to Congress:**

Some scholars argue that current laws already apply to members of Congress and see no need for the STOCK Act. Most scholars argue that members of Congress are not covered by insider trading law because members of Congress have no duty that prevents members from trading on material nonpublic information. The mere existence of this debate is enough to show that we need the STOCK Act to clearly define an affirmative duty on members of Congress to the American public pertaining to confidential nonpublic information. Not defining this duty will leave a “gap” of uncertainty that invites abuse and contributes to breakdown of trust among the American people.

### **S. 1871 & The Chairman’s Mark Pass the Watchdog Test**

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#### **The STOCK Act has been endorsed by a broad spectrum of good government organizations:**

- Center for Responsibility and Ethics in Washington
- Common Cause
- Consumer Watchdog
- Democracy 21
- Public Citizen
- Sunlight Foundation
- U.S. PIRG

## **Timeline to Change**

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After watching the 60 Minutes piece and realizing the Senate had yet to act despite action in the House of Representatives as far back as 2006 Senator Brown realized something must be done to restore the public's trust in Washington.

- On November 15, 2011, Senator Brown introduced the STOCK Act in the Senate the first legislation aimed at addressing the issue of insider trading by members of Washington.
- Senator Brown then requested a Hearing to examine the extent of the problem and possible solutions.
- On November 30, 2011, Senator Brown introduced a Senate Resolution to resolve any legal ambiguity, to clearly define that members of the Senate may not use their position for personal gain.
- On December 1, 2011, Senator Brown testified as to the need for the STOCK Act and questioned witnesses about solutions to the problem.
- On December 9, 2011, the Chairman's mark is released. The Chairman's mark is based upon the work of Senator Brown who worked in a bipartisan manner to develop and gain the support engendered in the Chairman's mark based on the expert testimony at the hearing.
- On December 14, 2011, the Committee on Homeland Security and Governmental Affairs is expected to pass the Chairman's mark in a bipartisan vote which will signal to the rest of the Senate and the American people that the Senate is committed to taking action to regain the trust of the American people.

## **Differences between Brown bill (S. 1871) and the Chairman's Mark**

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Recognizing that the STOCK Act was needed, Senator Lieberman has decided to introduce a Chairman's Mark during the markup on December 14, 2011.

- The Chairman's Mark adopts the intent of Senator Brown's original bill to create a clear, unambiguous statement that affirms that members and staff of Congress are covered by insider trading law.
- Taking a different approach from Senator Brown's original bill, instead of defining insider trading terms of art and creating a lengthy prohibition against insider trading, the Chairman's Mark creates a general prohibition for members and employees of Congress against using nonpublic information obtained through their employment for their personal benefit.
- Instead of relying on a separate bill and Senate Resolution, the Chairman's Mark directs the Senate Select Committee on Ethics and the House Committee on Standards of Official Conduct to develop ethics rules in conformance with the general prohibition. This avoids the need to pass a bill and Senate Resolution, without being subject to the heightened 67 vote requirement for passage.
- While Senator Brown's original bill required the disclosure of any securities or commodities future transaction over \$1000 within 90 days of the transaction, the Chairman's Mark requires disclosure within 30 days for any transaction. An amendment will also be introduced during the markup that would require these disclosures to be made available online within 30 days.
- Finally, where Senator Brown's original bill required political intelligence firms to register with the House and Senate like lobbyists currently do, the Chairman's Mark directs the Comptroller General in cooperation with the Congressional Research Service to submit a report on intelligence activities to the Committee on Homeland Security and Governmental Affairs of the Senate within 12 months of enactment of the bill.

## **Begich/Tester/Lieberman**

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- In addition, the Chairman's Mark requires the disclosure of any securities or commodities future transaction within 30 days of the transaction. An amendment by Senators Begich and Tester will also be introduced during markup that would require these disclosures to be made available online in a searchable format within 30 days.

“Though a few academics argue that existing laws and ethics codes could be interpreted to prohibit congressional insider trading, the fact of the matter is that neither congressional ethics officers, the SEC nor the Department of Justice have applied and enforced the laws against insider trading to Congress. It is widely assumed that members and staff are exempt, and that is why legislation making it clear that insider trading is illegal for all is absolutely necessary.” – **Public Citizen (Ralph Nader’s Organization)**

In commenting on the Chairman’s Mark:

“The STOCK Act is strong legislation that clearly and unambiguously makes congressional insider trading illegal, directs the senate ethics committee to clarify also that insider trading by members and staff will not be tolerated, and provides near real-time disclosure of congressional trading activity every 30 days to help ensure effective enforcement against insider trading.” – **Public Citizen (Ralph Nader’s Organization)**

### **Experts state need for STOCK Act**

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During the December 1, 2011 Committee on Homeland Security and Governmental Affairs hearing:

Melanie Sloan, Executive Director of Citizens for Responsibility and Ethics in Washington, testified:

“[I]t’s imperative that Congress pass a STOCK Act soon. Members of Congress need to demonstrate to America that you take our concerns about your ethics seriously.”

Donald C. Langevoort, a renowned securities litigation professor at Georgetown University Law Center testified:

“The risk is even greater now that the issue has captured Congress’ and the public’s attention, leading to hearings such as these. A refusal on the part of Congress to act in the face of this interest might well be interpreted by the courts as an additional reason for judicial restraint.”

Similarly, John C. Coffee, Jr., Professor of Columbia Law School and expert on insider trading law testified:

“There are substantial ambiguities in the judge-made law on insider trading that would make it difficult to enforce the existing prohibition against Members of Congress in some settings. Although the Supreme Court could resolve these ambiguities in favor of liability, there is little certainty that they will, and public enforcers may hesitate in enforcing the law to its full extent in the interim. Hence, I believe there are good arguments for Congress to act to fill this possible loophole.”

And Robert Khuzami, Director, Division of Enforcement, U.S. Securities and Exchange Commission testified before the House on December 6, 2011 that:

“From a pure enforcement perspective, I think the simplest and cleanest way would be to declare that such a duty exists, that members have a duty not to use information gained in the course of their congressional service for private gain or personal gain. With that duty, insider trading cases could then be brought...”