COVINGTON

COVINGTON & BURLING LLP

E-ALERT | Election and Political Law

February 13, 2012

A BRIEF PRIMER ON THE HOUSE AND SENATE VERSIONS OF THE STOCK ACT

On February 2, 2012, by a vote of 96-3, the Senate passed the Stop Trading on Congressional Knowledge Act or "STOCK Act." A week later, the House passed its own version of the STOCK Act by an even greater margin, 417-2. The bills will now be sent to conference. While these bills focus on insider trading by officials in the three branches of the Federal government, they are also significant for a series of other important ethics and public-corruption oriented provisions.

PROVISIONS COMMON TO THE HOUSE AND SENATE BILLS

Insider Trading. At the heart of both bills is a provision "affirming" that Members and employees of Congress, executive branch employees, and judicial officers are covered by the insider trading prohibitions of the securities laws.[1] Specifically, both bills address a perceived "gap" in insider trading laws, which generally only apply to insiders at public companies that trade on material non-public information about the company or other persons that trade based on information obtained from insiders. If adopted, these bills will extend the general prohibition on such trades to Member of Congress and the other persons specified by the legislation. The legislation also extends comparable insider trading provisions applicable to trades of commodities and other instruments.

Prompt Disclosure of Securities Transactions. To aid enforcement of this insider trading provision, Members and employees of Congress, and certain senior executive branch officials, would be required promptly to disclose any personal transactions involving stocks, bonds, commodities futures, or other securities. There is an exception for "widely held investment funds" such as mutual funds and pensions. Under the House bill, the reports must be filed 30 days after learning of the transaction but in no case more than 45 days after the transaction; under the Senate bill, the reports must be filed 30 days after the transaction.

Public Disclosure of Financial Disclosure Forms. Both versions of the Act also focus on public disclosure. The financial disclosure forms filed by Members and employees of Congress and by executive branch officials must be posted online within 30 days. In addition, within 18 months of the date of enactment, the Senate and House are required to develop an online electronic filing system for financial disclosure reports. The reports must be publicly accessible in a searchable and sortable format. The executive branch is also required to set up a similar online disclosure system for executive branch disclosure reports.

Disclosure Of Mortgages. Both bills require Members of Congress, candidates for Congress, and certain senior executive branch officials, appointees, and nominees to disclose details about their home mortgages on their financial disclosure forms.

Commissioning a "Political Intelligence" Report. Both versions require the Comptroller General, in consultation with the Congressional Research Service, to submit a report, within one year, to three House and Senate committees "on the role of political intelligence in the financial markets." Among

[1] The House version also extends the coverage of these laws to judicial branch employees.

other things, the report is to look at whether Congress should impose disclosure requirements on those who communicate with legislative and executive branch officials in order to obtain information to be used in informing a client's investment decisions.

Freddie Mac and Fannie Mae Executive Bonuses. Under both versions, senior executives at Freddie Mac and Fannie Mae would be prohibited from receiving bonuses while those enterprises are under conservatorship.

Limiting Retirement Benefits for Those Convicted of Certain Crimes. Both versions restrict the ability of Members to receive benefits through the civil service retirement system or the federal employees retirement system if they have been convicted of certain crimes that occurred when the person was a Member *or* an elected official at the State or local level.

Influencing Employment Decisions. The bills make it unlawful for an executive branch employee to take or withhold from taking official actions as a means of influencing an employment decision. Previously, this provision applied only to the legislative branch.

KEY DIFFERENCES

The House and Senate bills differ in five major respects:

Provisions Found Only in the Senate Bill

- **"Political Intelligence Consultant" Registration and Reporting.** Under the Lobbying Disclosure Act ("LDA") as it now stands, an organization need not register with the Secretary of the Senate and Clerk of the House unless it employs an individual who (i) makes more than one federal "lobbying contact" for a client (the "client" could be the organization itself) and (ii) devotes 20% or more of his or her time for that client in a three-month period to federal lobbying activities. The Senate bill would change that. If the Senate bill becomes law, some organizations would be required to register even if an employee makes just one contact and spends no time otherwise engaged in lobbying activities. As long as the information derived from the employee's contact "is intended for use in analyzing securities or commodities markets, or in informing investment decisions," the organization would have to register and file regular reports. Moreover, the employer and the employee -- called a "political intelligence consultant" -- would also have to file the same semiannual reports disclosing politically-related contributions that registrants and lobbyists must now file. Both the employer and the employee would also be required to certify in these reports that they have not given any gifts in violation of the House and Senate gift rules.

  The effect of these changes would be quite significant for the business community. Hedge funds, private equity funds, and investment advisers (many of which are not currently registered under the LDA) might now be required either to register or to alter their business practices to avoid the need for registration. If, for example, a hedge fund calls a congressional committee staffer to gather information about the status of a bill that relates to the fund's investment decisions, the fund may need to register. This would be so even if the fund was not otherwise engaged in lobbying. Even a casual conversation with a congressional staffer at a reception could in some circumstances trigger firm-wide registration, as it might be very difficult to demonstrate that the hedge fund employee had no intent to use the information obtained for investment purposes.

  Moreover, the reach of the law, if enacted, would likely extend far beyond the financial services sector. For example, a company that seeks to gather information from covered federal officials regarding the likely congressional or regulatory reaction to a proposed merger or acquisition might be required to register. At a minimum, to comply with these new provisions, many companies that make investment decisions will have to institute compliance programs and provide regular training to a broad swath of employees.

- **Changes to Public Corruption Prosecutions.** The Senate bill also makes a series of changes to federal public corruption laws. These changes include the following:
  - Increasing the number of venues for public corruption and other criminal prosecutions.
  - Expanding the reach of the laws related to theft or bribery concerning programs receiving federal financial assistance.
  - Making it easier for the government to prosecute bribery offenses. The Senate bill broadens the bribery law's definition of "official act" to include "any act within the range of official duty." It also defines bribery to include giving government officials things valued at $1,000 or more if the gifts are given because of an government official's "official position," even if the gift is not tied to an "official action."
  - Increasing the maximum penalties for certain public corruption related offenses.
  - Creating a new crime called "undisclosed self-dealing by public officials." This crime occurs when a public official (i) conceals or falsifies material information that is required to be disclosed by law or regulation and (ii) performs an official act for the purpose of furthering the financial interest of the official, his spouse, his child, his business partner, his business, or someone who has provided that official a gift.

Provisions Found Only in the House Bill

- **Participation in IPOs.** The House bill provides that certain senior executive branch officials, Members and employees of Congress, and judicial officers and employees may not purchase securities in an IPO other than in a manner that is available to members of the public generally.
- **Influencing Employment Decisions.** The House bill makes it unlawful for an executive branch employee to take or withhold official actions as a means of influencing an employment decision. Previously, this provision applied only to Members and employees of Congress.
- **Disclosure of Employment Negotiations.** The House bill requires that those who file financial disclosures reports disclose the name of private entities with which they are negotiating future employment or compensation. This disclosure must be made to the person's supervising ethics office within three days of beginning those negotiations.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our election and political law practice group:

Robert Kelner	202.662.5503	rkelner@cov.com
Bob Lenhard	202.662.5940	rlenhard@cov.com
Zack Parks	202.662.5208	zparks@cov.com
Keir Gumbs	202.662.5500	kgumbs@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

© 2012 Covington & Burling LLP, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. All rights reserved.