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OWNING STOCK WHILE MAKING LAW: AN AGENCY PROBLEM AND A FIDUCIARY SOLUTION

Donna M. Nagy*

INTRODUCTION

Whether the decision making occurs inside a corporate boardroom or on Capitol Hill, acts of governing precipitate agency problems. Agency theory rests on the conflicts of interest that exist when one party (an agent) has been entrusted with the discretion to make decisions that affect and bind another party (a principal).¹ Those conflicts arise in the corporate world, where shareholders entrust boards of directors to manage corporations. Those conflicts are also present in the political world, where citizens entrust politicians to manage the government. The fundamental challenges in each context lie in motivating agents to act in their principals' best interest and reducing the costs of monitoring.

Confronted with comparable agency problems, shareholders and citizens look to similar fixes. Elections, for example, motivate agents to specify ex ante how they plan to exercise their power and discretion. And, at least in theory, agents who fail to honor their promises or otherwise act unfaithfully decrease their chances of returning to service.² Fiduciary obligations provide another

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² For an often-cited study challenging this theory, see Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688 (2007) (evidencing that successful electoral challenges to incumbent directors are "quite rare" and concluding that "even when shareholder dissatisfaction with board actions and decisions is substantial, challengers face considerable
important mechanism for mitigating agency problems. This is seen in corporate law, which imposes fiduciary duties on corporate officials and allows the corporation (and sometimes its shareholders) to enforce those obligations in court. But while the idea of lawmakers as fiduciaries is hardly a new one, the implementation and enforcement of fiduciary principles—most particularly the fiduciary duty of loyalty—is frequently overlooked as a meaningful supplement for the imperfect and incomplete checks on agency problems provided by legislative elections.

This Article focuses on members of Congress and their widespread practice of holding personal investments in companies that are directly and substantially affected by their legislative impediments to replacing boards”). For analysis pertaining to lawmakers, see Stephen Ansolabehere & James M. Snyder, Jr., The Effects of Redistricting on Incumbents, 11 Election L.J. 490, 490 (2012) (observing that “[s]itting legislators, when they run for reelection, evidently enjoy substantial electoral advantages, which are manifest both in voters’ behavior and in aggregate rates of electoral competition and legislative turnover”).

3. See TAMAR FRANKEL, FIDUCIARY LAW 279 (2011) (emphasizing that private sector fiduciaries and public sector officials are governed by the same guiding principles, which are designed to “prevent misappropriation of entrustment and ensure a diligent and expert performance of services”); RICHARD W. PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE 2–4 (2009) (stating that “[p]ersons who choose elected officials are entrustors to whom officials owe fiduciary obligations” and observing that the principles of transparency and accountability in private law are equally essential to the public law regulating government officials). For law review articles recognizing that government officials are fiduciaries who operate under strict limitations when using government power and property, see, e.g., Kathleen Clark, Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory, 1996 U. ILL. L. REV. 57 (1996); Sung Hui Kim, The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption, 98 CORNELL L. REV. 845 (2013); Robert G. Natelson, The Constitution and the Public Trust, 52 BUFF. L. REV. 1077 (2004); D. Theodore Rave, Politicians as Fiduciaries, 126 HARV. L. REV. 671 (2013).

4. See Painter, supra note 3, at 5 (observing that corporate managers and government officials share “the power of incumbency,” and bemoaning that, “[i]n both contexts, poorly performing fiduciaries are often hard to get rid of”). For additional commentary highlighting the agency problems common to corporate and public governance, see, e.g., Claire Hill & Richard Painter, Compromised Fiduciaries: Conflicts of Interest in Government and Business, 95 MINN. L. REV. 1637 (2011) (analyzing the 2008 government bailout of financial institutions and encouraging greater attention to structural biases in future decision making concerning the economy); Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 STAN. L. REV. 643 (1998) (envisioning a greater role for courts in reviewing political arrangements that entrench incumbents and thwart challengers); Rave, supra note 3 (examining the practice of gerrymandering and proposing that redistricting plans be subject to either voter ratification or judicial review for “entire fairness”).
activity. Whether entirely accurate or not, congressional officials with investment portfolios chock-full of corporate stocks and bonds contribute to a corrosive belief that lawmakers can—and often do—place their personal financial interests ahead of the public they serve. This classic agency problem has been depicted in front-page news stories with jarring headlines. But despite the media attention and an all-time low in public approval ratings, members of Congress continue to own and actively trade securities totaling hundreds of millions of dollars in companies directly impacted by legislative actions. Beyond that, the membership of many congressional committees holds disproportionately large investments in the industries and companies subject to their oversight.

Such blatant conflicts of interest constitute standard congressional fare because the federal financial conflict statutes guarding against self-interested decision making by executive and judicial branch officials do not apply to Congress. To be sure, both the Senate and the House of Representatives have ethics rules that prohibit members from deriving personal financial gain from their congressional service. But long-standing interpretations of those rules allow lawmakers to work on and vote on legislation impacting their own personal investments provided they are not the sole beneficiaries of that legislation (or part of a highly circumscribed class of beneficiaries). This sole/limited beneficiary gloss insulates lawmakers from the fiduciary principles that would otherwise operate to restrict their personal investment practices. The federal government’s recent and unprecedented involvement with financial markets and private-sector businesses (such as banks, health care providers/insurers, and automobile manufacturers), and the sheer


6. See infra note 242 and accompanying text.
volume of stock that lawmakers own in publicly traded companies, render this insulation more troubling than ever before.

Change is not only desirable but also possible. The recently enacted Stop Trading on Congressional Knowledge ("STOCK") Act amends the federal securities laws to reflect a basic fiduciary principle: that all federal officials, including members of Congress, owe duties of trust and confidence to the federal government and its citizens with respect to material nonpublic information obtained in connection with their government service. The STOCK Act, which passed Congress with landslide votes of 96-3 in the Senate and 417-2 in the House, owes its statutory life to the public outcry that was generated by a 60 Minutes segment claiming that congressional insider trading was "perfectly legal." Heightened media attention to the overlap between lawmakers' investments and their legislative activity, coupled with the increased transparency stemming from the STOCK Act's requirements for the prompt reporting of securities transactions, could well ignite a comparable demand for financial conflict-of-interest reform. President Obama provided the opening salvo in his 2012 State of the Union Address when he called for new legislation that would reduce the "deficit of trust" between Washington, D.C. and the rest of the country by prohibiting "any elected official from owning stocks in industries they impact."

This Article proceeds in four parts. Part I introduces the fiduciary duty of loyalty and briefly explains how it guards against self-interested decision making by a corporation's directors. Part II examines the strict statutory schemes that regulate financial conflicts of interest in the executive and judicial branches. These two parts share common themes, and it is hardly a coincidence that many fundamental insights pertaining to ethics regulation in the executive branch stem from a study performed more than fifty years ago by the Association of the Bar of the City of New York.

8. See infra note 271 and accompanying text.
10. See infra text accompanying notes 236–42 (discussing recent studies and investigative reports).
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("NYCBA")\textsuperscript{12} under the direction of two persons now widely regarded as intellectual giants in the field of corporate law: American Law Institute President Emeritus Roswell Perkins, who supervised the ALI’s Principles of Corporate Governance Project,\textsuperscript{13} and the late Bayless Manning,\textsuperscript{14} a former Dean of Stanford Law School, famous for his pioneering scholarship on legal capital.\textsuperscript{15} In 1970, a successor committee published a follow-up study that focused on conflicts of interest and ethics standards in the legislative branch.\textsuperscript{16}

Part III shifts the focus to the legislative branch and evaluates the very different set of ethics rules and norms that Congress has traditionally applied—and continues to apply—to the financial investments held by its members and employees. Part III then analyzes the rationales put forth by lawmakers to justify the view that their financial conflicts are best deterred through public disclosure of personal investments and the discipline of the electoral process. It also provides a contemporary snapshot of lawmakers as stock market investors.

\begin{quote}


16. See Special Comm. on Cong. Ethics, Ass’n. of the Bar of the City of N.Y., Congress and the Public Trust, at x (1970) [hereinafter NYCBA 1970 Report]; see also infra text accompanying notes 275–84 (discussing the study’s observations and recommendations).
Part IV proposes a long overdue solution to the agency problem associated with the personal investment practices of lawmakers. Drawing from the fiduciary principles that apply to corporate directors and government officials in the executive and judicial branches, it argues for new limitations on the securities that lawmakers may hold during their congressional service. Specifically, and as a starting place, it dusts off and advances an NYCBA recommendation from 1970: that Congress prohibit its members (and their staffs) from holding securities in companies substantially affected by the work of any congressional committee on which they hold membership. But given the ensuing changes in both legislative activity and stock ownership by lawmakers, Congress should also explore the adoption of even stricter anticonflict restraints such as a statute or rule that would, subject to some narrow exceptions, prohibit members of Congress and senior staff officials from owning any securities other than government securities or shares in diversified mutual funds. Although a provision of this sort was advanced in the Senate and voted down as an amendment to the STOCK Act, there are very compelling reasons to try again.

I. CORPORATE DIRECTORS AND THE DUTY OF LOYALTY

A duty of loyalty promotes the main purpose of fiduciary law: "to prohibit fiduciaries from misappropriating or misusing entrusted property or power."\(^\text{17}\) Loyalty requires acting solely for the benefit of one's entrustor and never for any personal benefit. This sole-benefit edict is facilitated by a set of rules that prohibits certain actions outright "even though they are not necessarily injurious" to the entrustor.\(^\text{18}\) These prophylactic rules serve "to dampen the fiduciaries' temptations to misappropriate entrusted property or power, or to justify benefitting themselves, and establish a continuous reminder that entrusted property and power do not belong to the fiduciaries."\(^\text{19}\)

Rules that guard against self-interested decision making reflect two essential components of a fiduciary's duty of loyalty: a conflict component and an avoidance component.\(^\text{20}\) The conflict component, as Professor Kathleen Clark explains, "prohibits a fiduciary from placing herself in a position where her own interest conflicts with her duty toward the beneficiary."\(^\text{21}\) The avoidance component

\(^\text{17}\) Frankel, supra note 3, at 108.
\(^\text{18}\) Id.
\(^\text{19}\) Id.
\(^\text{21}\) Id.
“prohibits certain fiduciaries from delegating their duties to others or putting themselves in a position where, because of conflict or other concerns, they could not act on behalf of the beneficiary.”

Like fiduciary law more generally, corporate law has long been on guard against financial conflicts of interest that could compromise the duty of loyalty owed to a corporation by those who manage and direct its business. Indeed, the common law—at least at one time—allowed a corporation or its shareholders to void an “interested-director” transaction at will, regardless of the fairness or unfairness of the transaction. Courts applying this blanket rule of voidability grounded it in the conflict component of a fiduciary obligation. As Justice Field observed in Wardell v. Union Pacific Railroad Co.:24

It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. . . . Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits.25

Courts presented with financial conflicts that could taint director decision making were willing to presume harm to the corporation, even without any evidence to that effect, for a number of reasons. First, courts were highly skeptical that interested directors possessed the wherewithal to separate their own financial well-being from their corporate decision making. Moreover, courts assumed that in “a conflict between interest and duty . . . ‘in the majority of cases duty would be overborne in the struggle.’”26 Courts were also concerned about structural bias in the corporate boardroom—the very likely possibility that one or more directors with a conflict could exert subtle pressure on fellow directors. In this regard, courts questioned the ability of law “to accurately measure the influence of a trustee with his associates.”27

22. Id.
24. 103 U.S. 651 (1880).
25. Id. at 658.
26. Id. (quoting Marsh v. Whitmore, 88 U.S. 178, 183–84 (1874)).
Corporate law, however, rather quickly evolved to recognize the validity of interested-director transactions under certain sets of circumstances. The evolution began with courts placing a legal burden on the interested director to prove both that the transaction was entirely fair to the corporation (despite the presence of the conflict) and that the transaction had been approved by a fully informed and disinterested majority of board members. This judicial development was fueled by practicality more than anything else. Interested-director transactions were sometimes beneficial to the corporation, such as in instances where directors were willing to provide loans to corporations with dubious records of credit. And certain interested-director transactions, such as compensation decisions for board members and officers, are impossible to avoid entirely. The evolution continued when courts allowed directors to defend against breach of loyalty claims through a showing that an interested-director transaction was entirely fair to the corporation whether or not that transaction had been approved by a disinterested majority of the board.

Today, statutory provisions in the corporate law of every state have built on these judicial developments by specifying alternative mechanisms pursuant to which an interested-director transaction can be "sanitized." Section 144(a) of the Delaware General Corporation Law, for example, specifies three distinct ways by which an interested-director transaction can survive a litigation challenge: (1) approval in good faith, after full disclosure, by a majority of disinterested directors; (2) approval in good faith, after full disclosure, by a majority of disinterested shareholders; or (3) proof that the transaction was entirely fair to the corporation. The Model Business Corporation Act ("MBCA") has similar provisions on "Directors' Conflicting Interest Transactions." Thus, under these

28. See CLARK, supra note 23, at 160.
29. See STEPHEN A. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 308 (2002) (emphasizing practicality, but also recognizing that a per se rule of voidability "fails to give due deference to the principles of party autonomy and freedom of contract, which are important values both in themselves and because they promote efficient transactions").
30. See CLARK, supra note 23, at 185.
32. Marsh, supra note 23, at 43–44 (observing that from 1910 to 1960, there were a large number of cases which dealt with situations "where a majority of the board w[as] interested and which discuss them solely in terms of a review of the fairness of the transaction, without bothering to cite or discuss any of the previous decisions . . . enunciating the rule that there must be approval by a disinterested majority of the board").
33. DEL. CODE ANN. tit. 8, § 144 (2011).
34. Id. § 144(a)(1)–(3).
35. MODEL BUS. CORP. ACT §§ 8.60–.63 (2005).
statutory provisions, interested-director transactions can be valid and enforceable as long as they are either approved or fair. But because proving "entire fairness" to a court is both time consuming and expensive, boards typically take advance steps to ensure that interested directors make full disclosure about their conflicts and then recuse themselves from any decision to approve the transaction.\(^{36}\)

What is most important, given this Article's focus on lawmakers, is that in Delaware and every other state, interested-director transactions stand out as a fundamental exception to the business judgment rule that would otherwise apply to decisions made by corporate boards. The business judgment rule reflects a basic presumption that when directors make a decision, they do so "on an informed basis, in good faith, and in the honest belief that the action was taken in the best interests of the corporation."\(^{37}\) The rule thus serves to insulate most board decisions from litigation challenges by shareholders as well as second-guessing by courts. However, courts will not apply the business judgment rule—that is, courts will not automatically presume good faith and loyal decision making on the part of directors—if shareholders can offer evidence that one or more board members stood to gain personally from a corporate transaction.\(^{38}\)

Because courts will not presume that directors will necessarily resolve all conflicts in accordance with the corporation's best interests, interested-director transactions trigger the need for judicial review. When such a transaction has been approved by a majority of disinterested directors or shareholders, the extent of judicial scrutiny is minimal.\(^{39}\) The scrutiny centers on the nature of the process for approval, with the central focus on whether all relevant facts pertaining to the conflict were fully disclosed and whether the directors (or shareholders) who approved the transaction were in fact disinterested and acting in good faith.\(^{40}\) If a court determines that the processes for director approval or shareholder approval were satisfactory, the protection of the business judgment rule is effectively restored, and litigation will typically be dismissed unless another reason, independent of the

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38. See Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) ("When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith . . . .").
40. Id. at 913–14.
conflict, exists for challenging the transaction.\textsuperscript{41} In contrast, interested-director transactions that have not been sanitized by disinterested decision makers trigger a much higher degree of judicial scrutiny. Under the "entire fairness" test, courts will insist that the defendants bear the burden of proving that the challenged transaction was concluded at a fair price and involved fair dealing.\textsuperscript{42} Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained."\textsuperscript{43} A director's failure to disclose a conflict of interest is generally regarded as compelling evidence of unfair dealing.\textsuperscript{44}

Whether judicial scrutiny is minimal pursuant to a process-based safe harbor or rigorous under an entire fairness test, modern corporate law continues to view the possibility of personal gain from corporate transactions with suspicion. To be sure, the common law rule of automatic voidability has been replaced with statutory provisions that are far more tolerant of conflicts. But Delaware section 144 and the like simply reflect a legislative judgment that a corporation's disinterested directors or shareholders, after full disclosure of a conflict, constitute effective "reviewers."\textsuperscript{45} The need for impartial review in conflict-of-interest situations has never been questioned. Nor has there been a retreat from the loyalty-based rule that corporate directors must act solely for the benefit of the corporation and not for their own personal benefit.

II. FINANCIAL CONFLICTS AND FEDERAL OFFICIALS OUTSIDE OF CONGRESS

The design and structure of our federal government draws from the very same fiduciary principles that underlie corporate law. Federal officials—whether elected or appointed—are entrusted with political power, and they are thus expected to place the public's best interest ahead of their own self-interest. Indeed, as others have

\textsuperscript{41} See Benihana of Tokyo, Inc. v. Benihana, Inc., 906 A.2d 114, 120 (Del. 2006) (stating that "[a]fter approval by disinterested directors, courts review the interested transaction under the business judgment rule").
\textsuperscript{42} Weinberger, 457 A.2d at 711.
\textsuperscript{43} Id.
\textsuperscript{44} See generally \textsc{Model Bus. Corp. Act} § 8.60, cmt. 6(b) (2005) (observing that "[o]ne illustration of unfair dealing is the director's failure to disclose fully the director's interest . . . regarding the transaction"); see also HMG/Courtland Props., Inc. v. Gray, 749 A.2d 94, 116 (Del. Ch. 1999) (ruling that process was "anything but fair" when one director knew of another director's interest in the transaction, but neither disclosed that interest to their fellow directors).
\textsuperscript{45} See Hill & McDonnell, \textit{supra} note 31, at 921.
emphasized, the U.S. Constitution refers in multiple places to "public Trust" and to public offices being "of Trust." The Constitution also includes several provisions expressly designed to guard against self-interested decision making. Anticonflict measures were much on the minds of the framers because, as James Madison explained in The Federalist:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.

Congress built on this constitutional conception of a public office as a public trust across a wide range of federal ethics statutes, which employ a variety of mechanisms for keeping government officials "virtuous" (thereby, in corporate parlance, mitigating agency costs). Criminal anticorruption statutes, such as those that prohibit the receipt of bribes and illegal gratuities, are obvious examples. Other criminal statutes, often described generally as "conflicts of interest statutes," regulate such matters as a federal official's acceptance of gifts or the receipt of outside earned income, or they prohibit the representation of third parties before

46. FRANKEL, supra note 3, at 282 (quoting Natelson, supra note 3, at 1086).
47. U.S. CONST. art. VI, cl. 3.
48. Id. art. I, § 3, cl. 7; id. art. I, § 9, cl. 8; id. art. II, § 1, cl. 2.
49. See, e.g., id. art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."); id. art. I, § 6, cl. 2 (prohibiting members of Congress from being appointed to a federal office that was created or that received an increase in salary during their time in Congress); id. amend. XXVII (prohibiting a member of Congress from receiving an increase in salary until after he/she stands for reelection); see also Daniel L. Koffsky, Coming to Terms with Bureaucratic Ethics, 11 J. L. & POL. 235, 238–43 (1995) (discussing conflict-of-interest restrictions in the Constitution).
50. THE FEDERALIST NO. 57, at 327 (James Madison).
51. 18 U.S.C. § 201(b)(1)(a) (2006) (making it a crime for both the offeror and the public official to corruptly engage in a transfer of anything of value with the intent to influence any official act).
52. Id. § 201(c) (making it a crime to provide (or accept) a gratuity "for or because of" the official's performance of an official act "otherwise than as provided by law for the proper discharge of official duty").
54. See NYCBA 1960 REPORT, supra note 12, at ch. III.
Financial reporting statutes, which have their origins in the fiduciary obligation of disclosure, constitute another important example.\textsuperscript{58}

The Ethics in Government Act of 1978 ("EIGA")\textsuperscript{59} provides the statutory basis for the financial reporting duties of federal officials in all three branches of the government. Designed in large part to reveal and deter financial conflicts of interest, the EIGA requires hundreds of thousands of federal officials to file annual statements that disclose their income (other than earned income from U.S. government employment), financial holdings (asset values may be specified in certain dollar ranges in lieu of exact amounts), gifts, travel reimbursements, liabilities, and business affiliations.\textsuperscript{60}

Although low-level government employees are generally entitled to file their disclosure forms confidentially, the public has access (by request) to the financial disclosure statements submitted by thousands of other "public filers."\textsuperscript{61} Recent STOCK Act amendments to the EIGA promote even greater transparency and accountability by requiring the President, Vice President, any member of Congress, any candidate for Congress, and certain presidentially appointed, Senate-confirmed executive branch officials to promptly supplement their annual forms by reporting most new financial transactions over $1,000 no later than forty-five days after the purchase or sale (diversified mutual fund transactions are not covered).\textsuperscript{62} These reports shall be made available to the public on official House and Senate websites for the legislative branch and on the Office of Government Ethics website for the

\footnotesize{57. \textit{Id.} § 203. }  
59. \textit{Id.}.  
60. 5 U.S.C. app. §§ 101-02.  
61. \textit{See} Kathleen Clark, \textit{Ethics, Employees and Contractors: Financial Conflicts of Interest in and out of Government}, 62 ALA. L. REV. 961, 970 (2011) (observing that each year, the executive branch alone has approximately 25,000 employees who submit public disclosure forms and 300,000 additional employees who submit confidential disclosure forms). In addition to members of Congress, "public filers" in the legislative branch include "senior staff," a term used to denote an officer or employee whose annual base salary exceeds a specified level. \textit{See} JACK MASKELL, CONG. RESEARCH SERV., R42495, THE STOCK ACT, INSIDER TRADING, AND PUBLIC FINANCIAL REPORTING BY FEDERAL OFFICIALS 3 (2013), available at http://www.fas.org/sgp/crs/misc/R42495.pdf. Officers and employees earning an annual salary of approximately $120,000 or above were considered senior staff when the STOCK Act became law. \textit{See} 158 CONG. REC. S243 (Feb. 1, 2012) (statement by Sen. Sherrod Brown).  
Although their financial transaction reports will not be available online, all other public filers in the legislative and executive branches under the EIGA are required to adhere to the STOCK Act’s provisions for prompt reporting of personal financial transactions.

In addition to the EIGA’s disclosure requirements, federal officials in the executive and judicial branches are governed by a strict statutory framework that expressly prohibits these officials from participating or rendering decisions in matters that affect their own financial interests. Financial disclosure requirements thus facilitate the investigation and enforcement of financial conflict-of-interest laws. But, as we shall see in Part III, legislative branch officials generally function free from explicit, financial conflict-of-interest restraints. Instead, Congress presumes that a lawmaker is generally able to decide for him or herself what the duty of loyalty requires. Public financial disclosures under the EIGA and electoral accountability are thus the principal means of monitoring and deterring financial conflicts of interest on the part of lawmakers and most congressional employees.

A. Executive Branch Officials

Financial conflicts of interest that could possibly bias an executive branch official’s decision making are addressed most directly in 18 U.S.C. § 208, a broadly worded statute entitled “Acts Affecting a Personal Financial Interest.” Its basic precept, in the words of the NYCBA’s 1960 Report, is that a public official “should not act for the government where his private economic interests are involved.” Section 208 subjects to imprisonment or other penalties any “officer or employee of the Executive branch of the United States Government, or of any independent agency of the United States” who

participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or

63. Id. §§ 8(b), 11(b). But see Pub. L. No. 113-7, § 1, 127 Stat. 438, 438–39 (2013) (adjusting the STOCK Act’s online availability date to January 14, 2014 and rescinding the previous requirement that these databases be maintained in a manner allowing the public to “search, sort and download data contained in the reports”).
64. § 6(a), 126 Stat. at 293; § 1(a), 127 Stat. at 438 (permanently rescinding the STOCK Act’s previous requirement for Internet posting of transaction reports for most public filers in the legislative and executive branches of the government).
65. See infra Subparts II.A, II.B.
66. See infra Part III.
67. See NYCBA 1960 REPORT, supra note 12, at 198.
otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest . . . .

Although there is some disagreement as to whether the Constitution allows § 208's prohibition to reach the President and Vice President, government ethics scholars observe that the issue is not likely to be tested, "because presidents and vice presidents already conscientiously seek to comply with the conflicts of interest statutes regardless of whether the statutes apply." By criminalizing the mere possibility of actions involving divided loyalty on the part of executive branch officials, Congress ensured that these decision makers would take seriously the conflict component of their fiduciary obligation.

Officials in the executive branch have two clear alternatives: either recuse or divest whenever one's participation in a "particular matter" could implicate one's own financial self-interest, unless an exemption is available. As the Supreme Court emphasized in United States v. Mississippi Valley Generating Co.:

The statute is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption. The seriousness of this evil quite naturally led

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69. See Painter, supra note 3, at 59–61.
70. See supra text accompanying note 21.
71. Section 208 contains four principal exemptions: (1) if the official makes full disclosure of the financial interest and seeks an advance waiver from the agency head, who determines that the "interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;" (2) if the Office of Government Ethics has issued a regulation exempting the financial interest from the statute's application because it is "too remote or too inconsequential" to affect the integrity of government services; (3) if the official is serving in a temporary position on a federal advisory committee and a senior official opts to waive the conflict based on the need for that official's services; (4) if the financial interest involves a claim of a Native American birthright. 18 U.S.C. § 208(b).
Congress to adopt a statute whose breadth would be sufficient to cope with the evil.\textsuperscript{73}

Because it is aimed at executive branch decisions that simply "arouse suspicion," § 208 employs an objective standard for liability and requires no showing of actual corruption or bad faith intent. Courts have held that the statute's "to his knowledge" modifier applies only to the official's "financial interest" and not to the crime itself.\textsuperscript{74} Thus, as long as an executive branch official is aware of a financial holding covered by the statute, even an official's good faith participation in an agency matter can be subject to criminal prosecution.\textsuperscript{75} Chief Justice Earl Warren highlighted this objective standard when he observed that the statute is "directed not only at dishonor, but also at conduct that tempts dishonor. . . . [It] is more concerned with what might have happened in a given situation than with what actually happened."\textsuperscript{76}

Congress directed the U.S. Office of Government Ethics ("OGE") to interpret the statute and promulgate certain exemptions in executive branch-wide regulations.\textsuperscript{77} Pursuant to that authority, the OGE has construed the term "particular matter" to include "[any] judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation or arrest" as well as "matters which do not involve formal parties . . . [such as] legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons."\textsuperscript{78} Thus, a particular matter could include a Department of Agriculture regulation directed at companies that operate meat packing plants,\textsuperscript{79} or a prescription drug regulation by the Food and Drug Administration ("FDA") applicable to pharmaceutical companies.\textsuperscript{80} But it would not include Department of Labor changes to health and safety regulations pertaining to all

\textsuperscript{73} \textit{Id.} at 562 (referencing 18 U.S.C. § 434, the financial conflict statute that was the statutory predecessor to 18 U.S.C. § 208); \textit{accord} United States v. Gorman, 807 F.2d 1299, 1304 n.1 (6th Cir. 1986) (observing that \textit{Mississippi Valley} "remains applicable" because "the purpose of Section 208 is to strengthen its predecessor without changing any of its underlying policies") (internal quotes omitted).

\textsuperscript{74} \textit{See}, e.g., United States v. Hedges, 912 F.2d 1397, 1401 (11th Cir. 1990).

\textsuperscript{75} \textit{See} David R. Flickinger, \textit{Attracting the Best and the Brightest to Government Service: Requiring Scienter for Criminal Conflicts of Interest}, 25 \textit{GEO. J. LEGAL ETHICS} 519, 520 (2012) (acknowledging the objective standard of liability under prevailing precedents, but arguing that courts should instead impose a requirement of criminal intent).

\textsuperscript{76} \textit{Miss. Valley}, 364 U.S. at 549–50.

\textsuperscript{77} 18 U.S.C. § 208(d)(2).

\textsuperscript{78} 5 C.F.R. § 2640.103(a)(1) (2012).

\textsuperscript{79} \textit{Id.} ex. 3.

\textsuperscript{80} \textit{Id.} ex. 8.
U.S. employers, because such a change would affect virtually every publicly traded corporation in the nation, and thus it would be directed "to the interests of a large and diverse group of persons."81

The OGE has also clarified that the statutory proscription applies only if the particular matter would have a "direct and predictable effect" on the participating employee's financial interest.82 "Direct" is defined as "a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest"83 and "predictable" is defined as "a real, as opposed to a speculative, possibility that the matter will affect the financial interest."84 The regulations specifically contemplate that a "disqualifying financial interest might arise from ownership of certain financial instruments or investments, such as stock, bonds, mutual funds, or real estate."85 Certain securities held in qualified blind trusts, however, are not considered "financial interests."86 The OGE has also exempted holdings in diversified mutual funds and employee benefit plans as well as certain de minimis interests in publicly traded securities provided the market value of all personal holdings in the securities issuer does not exceed $15,000.87

The following scenario, included in OGE regulations, is illustrative of § 208's broad scope:

An employee is assigned to monitor XYZ Corporation's performance of a contract to provide computer maintenance services at the employee's agency. At the time the employee is first assigned these duties, he owns publicly traded stock in XYZ Corporation valued at less than $15,000. During the time the contract is being performed, however, the value of the employee's stock increases to $17,500. When the employee knows that the value of his stock exceeds $15,000, he must disqualify himself from any further participation in matters affecting XYZ Corporation or seek an individual waiver under 18 U.S.C. 208(b)(1). Alternatively, the employee may divest the portion of his XYZ stock that exceeds $15,000. This can be accomplished through a standing order with his broker to sell when the value of the stock exceeds $15,000.88

81. Id. ex. 4.
82. Id. § 2640.103(a)(3).
83. Id. § 2640.103(a)(3)(i).
84. Id. § 2640.103(a)(3)(ii).
85. Id. § 2640.103(b).
86. Id. § 2634.401(a).
87. Id. § 2640.201. The OGE's de minimis exception, however, serves as the default rule. Individual agencies may enact regulations specifying lower thresholds for its employees or eliminating the exception entirely.
88. Id. § 2640.202(a) ex. 3.
The example demonstrates that § 208 criminalizes the employee's participation in an XYZ matter even if his $2,500 in stock holdings above the de minimis amount was exceedingly unlikely to influence his monitoring of XYZ's computer services contract. When a violation of § 208 is discovered (whether through a supervisor's review of an official's financial disclosure filings or otherwise), the agency that employs that official will typically coordinate with its office of Inspector General to ensure that the matter is referred to the Public Integrity Section of the Department of Justice, which ultimately determines whether a prosecution is warranted.\textsuperscript{89}

Congress has likewise enacted legislation that reflects the avoidance component of an executive branch official's fiduciary obligation.\textsuperscript{90} Although there is not a single government-wide statute that requires an executive branch official to divest financial interests in circumstances where a § 208-prompted recusal would fundamentally interfere with his or her government responsibilities,\textsuperscript{91} there is a host of agency-specific statutes that prohibit officials from holding financial interests in certain entities. For example, the first Congress prohibited the Secretary of the Treasury and the Treasurer from investing in securities issued by the federal government or the states.\textsuperscript{92} Statutory prohibitions may also apply agency wide: Federal Communications Commission ("FCC") employees, for instance, are prohibited from holding financial interests in any company engaged in radio or wire communication.\textsuperscript{93} Particular congressional committees, often as a condition of Senate confirmation, may likewise restrict the financial holdings of certain executive branch officials. The Senate Armed Services Committee, for instance, prohibits presidential appointees to positions in the Department of Defense ("DOD") from owning stocks or bonds in the nearly 50,000 companies that have contracts with the Pentagon.\textsuperscript{94} Notably, Congress has amended the tax code to allow for the deferral of capital gains tax when a federal official sells assets to avoid conflicts of interest.\textsuperscript{95}

The avoidance component of an executive branch official's fiduciary obligation is further reflected in certain agency-specific


\textsuperscript{90} See Clark, supra note 3, at 90.

\textsuperscript{91} See id.

\textsuperscript{92} See Donna M. Nagy & Richard W. Painter, Selective Disclosure by Federal Officials and the Case for an FGD (Fairer Government Disclosure) Regime, 2012 Wis. L. Rev. 1285, 1297–98 & n.56 (discussing the insider trading scandal that prompted this statutory prohibition).


\textsuperscript{94} See Higham et al., supra note 5.

\textsuperscript{95} See Painter, supra note 3, at 42.
regulations. That is, individual agencies have broad authority to issue regulations prohibiting all or some employees from specific categories of financial investments “based on the agency’s determination that the acquisition or holding of such financial interest would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered.”\footnote{64} The FDA, for example, prohibits most of its employees from holding any financial interest in a “significantly regulated organization.”\footnote{65} Moreover, agencies may prohibit an individual employee from holding or acquiring financial interests that will “[r]equire the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired,”\footnote{66} or “adversely affect the efficient accomplishment of the agency's mission because another employee cannot be readily assigned.”\footnote{67}

Whether the “interest avoidance” is imposed by federal statute or by an administrative regulation, and whether it applies to a particular person or to persons across an entire agency, its objective is the same: to eliminate financial interests that could possibly tempt an executive branch official into subordinating the public interest to his or her own self-interest.\footnote{68} Consistent with the fiduciary principle, the protection of the integrity of government decision making is paramount.\footnote{69}B. Judicial Branch Officials

The primary judicial recusal statute, 28 U.S.C. § 455, embodies the conflict component of a fiduciary obligation. Pursuant to this statute, any U.S. justice, judge, or magistrate judge is required to disqualify himself or herself in any proceeding in which his or her “impartiality might be reasonably questioned.”\footnote{70} The statute further mandates recusal in any one of five specific circumstances. These circumstances include a judge’s financial interest, when such an official

\footnote{64}{5 C.F.R. § 2635.403(a) (2012).}
\footnote{65}{Id. § 5501.104. An organization is “significantly regulated” if the sales of products regulated by the FDA would “constitute ten percent or more of annual gross sales in the organization’s previous fiscal year.” Id. § 5501.104(c)(2).}
\footnote{66}{Id. § 2635.403(b)(1).}
\footnote{67}{Id. § 2635.403(b)(2).}
\footnote{68}{Id. § 2635.403(b)(2).}
\footnote{69}{See NYCBA 1970 REPORT, supra note 16, at 40–41.}
\footnote{70}{Id. at 41.}
knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.103

"Financial interest" is defined broadly to mean "ownership of a legal or equitable interest, however small, or a relationship as director, advisor or other active participant in the affairs of a party."104 But the term specifically excludes "[o]wnership in a mutual or common investment fund that holds securities . . . unless the judge participates in the management of the fund"105 as well as "[o]wnership of government securities . . . [unless] the outcome of the proceeding could substantially affect the value of the securities."106 The statute also makes clear that judges have a duty to inform themselves about their personal financial interests and the financial interests of their spouses and minor children residing in their household.107

The judicial recusal statute's reference to financial ownership interests "however small" forecloses any de minimis exception. State court judges typically operate under judicial codes that define financial interests to mean "more than a de minimis interest,"108 and as we have seen, OGE regulations include de minimis exceptions in connection with publicly traded securities held by officials in the executive branch.109 But § 455 imposes "a bright line rule [that] requires recusal based on ownership of even a single share of stock in a party"110 or in a company substantially affected by the subject matter in controversy.111 It also states explicitly that a judge's disqualification for a financial interest is not subject to waiver by the parties.112

Section 455 does, however, provide a limited mechanism by which judges may divest themselves of certain financial interests that would otherwise disqualify them from presiding over a proceeding. The relevant provision specifies that

[n]otwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to

104. Id. § 455(d)(4).
105. Id. § 455(d)(4)(i).
106. Id. § 455(d)(4)(iv).
107. Id. § 455(c).
109. See supra note 87 and accompanying text.
111. Id.
whom a matter has been assigned would be disqualified, after
substantial judicial time has been devoted to the matter,
because of the appearance or discovery, after the matter was
assigned to him or her, that he or she individually or as a
fiduciary, or his or her spouse or minor child residing in his or
her household, has a financial interest in a party (other than
an interest that could be substantially affected by the
outcome), disqualification is not required if the justice, judge,
magistrate judge, bankruptcy judge, spouse or minor child, as
the case may be, divests himself or herself of the interest that
provides the grounds for the disqualification. 113

Thus, a judge may avert the need for recusal—through divestiture—if she does not discover the financial interest until after she has
devoted significant time to the matter and if the financial interest at
issue could not be substantially affected by the matter’s outcome.

Congress enacted § 455 to ensure that judges assess for
themselves whether a conflict of interest requires them to decline an
assignment or to recuse themselves from a case that has already
been assigned. 114 The judiciary has also implemented institutional
safeguards to avoid financial conflicts, such as the random drawing
of assignments as well as an electronic conflicts screening system
that flags a judge’s previously reported financial interests that could
trigger the need for disqualification. 115 But in the absence of a
judge’s voluntary withdrawal, § 455 permits parties to move for
recusal. Moreover, judges who fail to recuse themselves when
circumstances warrant may be subject to a judicial conduct
complaint initiated by a litigant, a member of the public, or the chief
judge of the circuit. 116 In particularly egregious cases, judges could
be impeached. 117

113. Id. § 455(f). Notably, § 455(c)’s due diligence requirement for personal
and family member investments, see supra text accompanying note 107,
substantially reduces the likelihood of a “discovery” that would trigger this
divestiture alternative.
115. Id.
116. Id. at 665 (citing Judicial Conduct & Disability Act: Resources,
/JudicialConductDisability.aspx (last visited Sept. 4, 2013) (giving the codes
of conduct in each circuit)). The disqualification requirements set out in
28 U.S.C. § 455 are transcribed virtually verbatim into Canon 3C of the Code
117. See Geyh, supra note 102, at 27 (observing that Judge G. Thomas
Porteous, Jr. from the Eastern District of Louisiana was impeached, found
guilty by the Senate, and removed from office in 2010 based on his refusal to
disqualify himself from hearing a case in which a party was represented by a
lawyer from whom he had recently solicited—and years before received—money
to pay personal gambling and other debts).
III. FINANCIAL CONFLICTS AND THE LEGISLATIVE BRANCH

Like corporate directors and federal officials in the executive and judicial branches, members of Congress and their staffs serve as agents with fiduciary obligations to their principals. But while few would dispute that congressional officials owe a duty of loyalty to the federal government and the public, the prophylactic rules that guard against financial conflicts in corporations and in the other two branches of government have been regarded as unwarranted in the legislative branch. After addressing the principal rationales offered by lawmakers in defense of the status quo and examining some facts about lawmakers as stock market investors, this Part draws a very different conclusion.

A. Lawmakers as Fiduciaries

In both the U.S. Senate and the House of Representatives, rules and other official pronouncements proudly decree that a “public office is a public trust.” But as Jack Maskell emphasized in congressional hearings on the STOCK Act, this phrase is “more than merely an aphorism, because it denotes that Members of Congress who wield public power have a fiduciary responsibility to use that power in the interests of the general public who are supposed to be the beneficiaries of that trust.” The STOCK Act itself was premised on an existing fiduciary obligation of loyalty, and that premise is now embodied in the Act’s explicit dictate that all federal officials, including members of Congress, owe a duty “arising from a relationship of trust and confidence” to the federal government and its citizens with respect to material, nonpublic information obtained in connection with their government service.


120. See 158 CONG. REC. S1977–78 (daily ed. Mar. 22, 2012) (statement of Sen. Susan Collins) (describing “the affirmation of a duty arising from the relationship of trust and confidence” as the “heart” of the Act, and emphasizing that “this is not a new fiduciary duty, in the traditional sense, but the recognition of an existing duty”).

fiduciary obligations also have a strong constitutional underpinning, as we have already seen.\textsuperscript{122} The fiduciary duty of members of Congress toward the public manifests itself in a host of other federal statutes apart from the STOCK Act's insider trading provisions and the EIGA's financial reporting requirements.\textsuperscript{123} Some of these statutes, such as the conflict-of-interest statutes and the anticorruption statutes discussed previously, are tailored specifically toward conduct by lawmakers as a specific class or as part of a broader class of public officials.\textsuperscript{124} Congress, for example, subjects its members and employees to strict statutory limitations on the gifts that they can receive, the honoraria that they can be paid for speaking engagements, and the work-related contacts they may have with their former colleagues in the two-year period following their departure from service in Congress.\textsuperscript{125} Other federal statutes have broader application but can be used by prosecutors to charge official misconduct, such as the mail fraud\textsuperscript{126} and wire fraud statutes,\textsuperscript{127} which can encompass congressional breaches of loyalty in cases involving bribes and kickbacks (often referred to as "honest services fraud")\textsuperscript{128} as well as the misappropriation of property.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{122} See supra notes 47--50 and accompanying text. See also Natelson, supra note 3, at 1083--84 (observing that at the time of the federal constitutional convention, "most of the state constitutions already contained fiduciary language" and that during the public debate over the Constitution, "leading proponents of the new government repeatedly characterized officials as the people's servants, agents, guardians, or trustees"); Rave, supra note 3, at 708--13 (discussing constitutional history and political theory).
\item \textsuperscript{123} See supra notes 59--64 and accompanying text.
\item \textsuperscript{124} See supra notes 51--57 and accompanying text.
\item \textsuperscript{125} See Painter, supra note 3, at 146--52.
\item \textsuperscript{126} 18 U.S.C. § 1341 (2006) (prohibiting "schemes or artifices to defraud" through use of the mails).
\item \textsuperscript{127} Id. § 1343 (prohibiting "schemes or artifices to defraud" through use of electronic wires, radio, or television).
\item \textsuperscript{128} See Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 33 (2010) (written statement by Lanny A. Breuer, Assistant Attorney General, Criminal Division, Department of Justice) (stating that for decades, federal prosecutors have used the mail and wire fraud statutes to reach "schemes designed to deprive citizens of the honest services of public and private officials who owe them a fiduciary duty of loyalty"); see also Donna M. Nagy, Insider Trading, Congressional Officials, and Duties of Entrustment, 91 B.U. L. Rev. 1105, 1145--50 (2011) (discussing honest service fraud prosecutions involving several former Members of Congress, including Representatives William Jefferson, Randy Cunningham, Richard Renzi, and Robert Ney).
\item \textsuperscript{129} See Nagy, supra note 128, at 1149--50 (discussing mail fraud convictions involving former Representatives Charles Diggs and Dan Rostenkowski).
\end{itemize}
In addition to federal statutes, the fiduciary duty of lawmakers to the public is reflected in ethics rules adopted and enforced by the Senate and the House Ethics Committee, respectively, and in the commentary set out in each chamber's Ethics Manual. As the Constitution provides, congressional self discipline for "disorderly behavior" is administered by the member's own chamber. And as the Supreme Court recognized in In re Chapman, even the right to expel "extends to all cases where the offense is such as in the judgment of the [chamber] is inconsistent with the trust and duty of a member."

Congress's own perception of lawmakers as fiduciaries is shared by federal courts, including the Supreme Court, as the above quotation from Chapman reflects. The Court implicitly avowed a congressional duty of loyalty in Skilling v. United States when it observed that "[t]he existence of a fiduciary relationship . . . was beyond dispute" in several prior precedents, including a D.C. Circuit decision that had affirmed a former congressman's conviction for mail fraud. In United States v. Diggs, the court stated explicitly that the congressman's conduct "amounted to no less than a scheme to take illicit kick-backs" and that this scheme "defrauded the public of not only substantial sums of money but of his faithful and honest services."

The Second Circuit also applied a fiduciary theory in United States v. Podell, a decision which affirmed a grant of summary judgment to the government for "monies [the defendant] had received in breach of his fiduciary duty as a United

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130. See also House Ethics Manual, supra note 118; see Senate Ethics Manual, supra note 118.
131. U.S. Const. art. I, § 5, cl. 2 (providing that "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and with the Concurrence of two-thirds, expel a Member.").
132. 166 U.S. 661 (1897).
133. Id. at 669–70; see Nagy, supra note 128, at 1143 (observing that while Congress is often criticized for its reluctance to self-discipline its members—with the reluctance extending to even relatively mild sanctions involving denouncement or reprimand—there is no doubt that each chamber "has the authority to proscribe and sanction betrayals of the public trust"); see also Theresa A. Gabaldon, The Self-Regulation of Congressional Ethics: Substance and Structure, 48 ADMIN. L. REV. 39, 46 (1996) (observing that at least one senator has been censured for actions "derogat[ing] from the public trust expected of a senator" even though the conduct at issue had not violated "any specific law or rule in force at the time").
134. 130 S. Ct. 2896 (2010).
135. Id. at 2929–30 (citing United States v. Diggs, 613 F.2d 988, 998 (D.C. Cir. 1979)).
136. 613 F.2d 988 (D.C. Cir. 1979).
137. Id. at 998.
138. 572 F.2d 31 (2d Cir. 1978).
States Congressman." Relying on equitable principles rather than on an express statutory remedy for his violation of a conflict-of-interest statute, the court regarded the congressman's receipt of compensation and campaign contributions—for his appearances before several federal agencies on behalf of an airline—as ill-gotten gains that he held "in constructive trust for the government." Yet when we turn to the federal statutes and ethics rules that govern members and employees of Congress and we shift our focus specifically to financial conflicts of interest arising from personal investments, the fiduciary dictates that we would expect to see are nowhere to be found. Instead, except in the limited circumstances of earmarks, we mainly find commentary in ethics manuals setting forth rationalizations for the absence of such dictates. The dearth of ethics rules regulating personal investments (not to mention the total absence of a judicially enforceable statute) is particularly striking when compared to the strict financial conflict-of-interest restraints that Congress has placed on executive and judicial branch officials and the heightened scrutiny that state corporate law accords to interested-director transactions. Although limitations on the type of securities that lawmakers can own may discourage some persons from pursuing or continuing with congressional service, others may be even more drawn to serve in an institution that commits itself to higher standards of ethics and fiduciary principles.

B. Congressional Rules and Rationales Relating to Financial Conflicts

1. The Senate

Rule 37, paragraph 4 of the Senate Code of Official Conduct is the ethical provision that is said to prohibit senators from using their legislative power to advance their own personal financial interests. It states that

[n]o Member, officer, or employee shall knowingly use his official position to introduce or aid the progress or passage of legislation, a principal purpose of which is to further only his pecuniary interest, only the pecuniary interest of his

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139. Id. at 32.
140. Id. at 34–35. The court observed that the congressman previously had pleaded guilty to charges involving conspiracy to violate 18 U.S.C. § 203 as well as a substantive violation of that conflict-of-interest statute and had been sentenced to two years in prison, eighteen months of which had been suspended, for the conspiracy count and fined $5,000 on the conflict-of-interest count. Id. at 34. For additional analysis of the Podell decision, see House STOCK Act Hearing, supra note 119, at 57 (testimony by Jack Maskell).
141. See infra Subpart III.B.3.
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immediate family, or only the pecuniary interest of a limited class of persons or enterprises, when he, or his immediate family, or enterprises controlled by them, are members of the affected class.\(^\text{143}\)

The Senate Ethics Manual, which is published by the Senate Select Committee on Ethics (the "Ethics Committee"), expressly describes Rule 37(4)'s scope as "narrow."\(^\text{144}\) It also candidly acknowledges that "[l]egislation may have a significant financial effect on a senator because his holdings are involved."\(^\text{145}\) But as long as that legislation "has a broad, general impact on his state or the nation," Rule 37(4) would not prevent a senator from voting on the legislation or from playing an active role in advancing or blocking its passage.\(^\text{146}\)

The plain language of Rule 37(4)'s prohibition, which turns in large part on the lawmaker's motive, reveals why the rule is actually more akin to an anticorruption rule than an anticonflicts rule. To violate Rule 37(4), a senator would not only have to "know" that the legislation in question would advance his (or an immediate family member's) "pecuniary interest," but his action to "introduce or aid the process or passage" of that legislation also must have had as its "principal purpose" the furthering of "only" his or his family's pecuniary interest or "only" the pecuniary interests of a "limited class" in which he is a member. If his actions were intended to further several interests of equivalent importance, only one of which was self-serving, then the rule's "principal purpose" prong would not be met.

Rule 37(4) dates back to 1977, a few years after Watergate, when the Senate amended its Standing Rules to include a Code of Official Conduct. Senator Gaylord Nelson (D-Wis.) chaired the special committee (now referred to as the "Nelson Committee") that proposed the code. To illustrate the restrictive scope of this new prohibition, the Nelson Committee included in its report an example involving a dairy farmer from a state with dairy as a leading industry.\(^\text{147}\) In the Nelson Committee's view, this senator could

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\(^\text{143}\) Sen. Select Comm. on Ethics, 110th Cong., Senate Code of Official Conduct 16 (Comm. Print 2008). Senate Rule 37(1) provides more generally that "[a] Member, officer, or employee of the Senate shall not receive any compensation, nor shall he permit any compensation to accrue to his beneficial interest from any source, the receipt or accrual of which would occur by virtue of influence improperly exerted from his position as a Member, Officer, or employee." Id.

\(^\text{144}\) Senate Ethics Manual, supra note 118, at 69.

\(^\text{145}\) Id.

\(^\text{146}\) Id.

introduce, work for, and vote for the passage of a bill that would boost or maintain price supports for milk products, while "not fall[ing] under the strictures of this Rule." As the Nelson Committee explained:

The strong presumption would be that the Member was working for legislation because of the public interest and the needs of his constituents and that his own financial interest was only incidentally related. In the terminology of [Rule 37(4)], the dairy farmer would be part of a class affected by the legislation, but not a member of a "limited class." ... [A] class of people or enterprises sharing a particular economic interest (i.e. dairy farmers; shoemakers; disabled veterans) would not be a "limited class."

The Nelson Committee went on to emphasize that Rule 37(4)'s reference to "limited class" was intended to mean "the class of people affected by a private bill." Thus, while the dairy farm senator could push for the passage of price supports that benefit himself and his constituents, he could not introduce or work for the passage of legislation "to purchase a piece of land made up in part of a piece of his property and in part of pieces of his neighbors' property, in order to build a federal project there." Thus, as the Nelson Committee envisioned, the prohibition in Rule 37(4) "addresses itself to the rare case when the relationship between the legislator's private interest and the public interest is dramatically different from the ordinary situation."

Legislation that affects publicly traded companies, and thereby the value of a company's stock, is anything but a rare instance. Thus, the same analysis that applied to the dairy farmer would apply, for example, to a senator who owns a sizable amount of stock in AT&T. (In 2011, fifty-two members of Congress reported holdings in AT&T stock, at least six with holdings exceeding $100,000.) Despite stock investments that might create a conflict of interest, that senator could push for wireless network legislation strongly favoring large telecommunication providers because such companies

148. Id. at 42.

149. Id.

150. Id. (emphasis added).

151. Id.; see infra text accompanying notes 221–23 (comparing Senate Rule 37(4) with Standing Rule 44(6), which governs financial interests in the context of earmarks and limited tax benefits).

152. NELSON COMMITTEE REPORT, supra note 147 (emphasis added).

and their shareholders hardly constitute a "limited class."\textsuperscript{154} Even if that senator were acting for the "principal purpose" of increasing profits for AT&T (a motivation that would be next to impossible to show), the millions of shareholders in AT&T likely would not qualify as a "limited class."\textsuperscript{155} And the Senate Manual leaves no doubt that "[b]oth the 'principal purpose' and the 'limited class' test must be met before [Rule 37(4)] precludes a Senator's involvement in a legislative proposal."\textsuperscript{156} As such, Rule 37(4) plainly fails to capture many of the securities investments that could possibly tempt a senator toward self-interested decision making and away from his fiduciary obligations.

Indeed, if this senator's actions were held to fiduciary standards, the public would be freed from speculating about whether his personal stock holdings in AT&T had influenced his wireless network advocacy entirely, or substantially, or somewhat, or not at all. The conflict component of a fiduciary obligation would prohibit the senator from placing himself in a position in which he might be tempted to place his own pecuniary interests ahead of the public. Thus, in view of his sizeable stock holdings in AT&T, the senator would have no choice but to refrain from working on the wireless network legislation (and arguably from voting on it as well). Beyond that, the avoidance component would constrain the senator's ability to hold stocks that risked impairing his legislative responsibilities. Thus, a substantial investment in AT&T would be verboten if he were a member of the Senate Committee on Commerce, Science, & Transportation ("CS&T"), and particularly so if he served on the Communications, Technology, and the Internet Subcommittee. Arguably, any investment in the stock of AT&T would be impermissible under fiduciary principles given the size of that multinational corporation and the frequency with which it has interests before Congress.

Yet, the Senate's view that such fiduciary rules are unwarranted for lawmakers has not stopped it from imposing those

\textsuperscript{154} Cf. \textit{Senate Ethics Manual}, supra note 118, at 70 (observing that the Senate Ethics Committee had ruled in 1990 that "a Senator who owned shares in a company that owed cable stations could participate in legislation directly affecting cable companies"). The senator could also support legislation awarding a government contract to AT&T. Although 18 U.S.C. § 431 prohibits members of Congress from entering into or benefitting from contracts with the federal government, government contracts with "any incorporated company for the general benefit of such corporation" are exempt from this provision. 18 U.S.C. § 433 (2006).

\textsuperscript{155} See infra text accompanying note 179 (discussing precedent in House Ethics Manual involving appropriations for a project undertaken by a single defense contractor in which a member owned a small fraction of widely traded shares).

\textsuperscript{156} \textit{Senate Ethics Manual}, supra note 118, at 69.
rules on government officials in the executive and judicial branches. An attorney at the FCC could not work on a new regulation for wireless networks if she were to own a substantial amount of stock in AT&T (in fact, federal law would bar her from investing in any telecommunications firm), and a federal judge who owned stock in AT&T could not oversee a proceeding challenging an FCC broadband regulation. In the absence of their respective recusal, the FCC official could face criminal charges and the federal judge could be disciplined, even if their financial interests were exceedingly unlikely to influence their decision making and even if the officials sincerely believed that their actions could be completely fair and impartial.

Nor is the Senate's own presumption of virtuous decision making carried forward to its legislative staffers, at least with respect to staffers employed by Senate committees. In 1977, the Nelson Committee recommended and the Senate adopted Rule 37(7), which provides that

[a]n employee on the staff of a committee... shall divest himself of any substantial holdings which may be directly affected by the actions of the committee for which he works, unless the Select Committee, after consultation with the employee's supervisor, grants permission in writing to retain such holdings or the employee makes other arrangements acceptable to the Select Committee and the employee's supervisor to avoid participation in committee actions where there is a conflict of interest, or the appearance thereof.

In the view of the Nelson Committee, such disparate treatment was justified because

unlike Senators, committee staff are not publicly accountable, and despite public financial disclosure, their affairs are unlikely to get the same kind of scrutiny from the public and the press as Senators. At the same time, committee staff members hold responsible positions. For these reasons, the Committee believes that staff holdings should be treated with particular care.

158. See id.
159. Senate Rule 37, § 7, reprinted in Senate Ethics Manual, supra note 118, at 322. By its terms, the rule applies only to committee staff earning more than "$25,000 per annum and employed for more than ninety days in a calendar year." Id.
160. Nelson Committee Report, supra note 147, at 44.
Thus, absent special permission, a staffer employed by the CS&T Committee could not hold a sizeable amount of stock in AT&T, even if that staff member focused his own work entirely on oceans and fisheries and lacked any discretion over decisions concerning telecommunications. As such, Senate Rule 37(7) goes beyond what fiduciary analysis would require.

Recall the Supreme Court's observation of the "evil" to which statutory restraints on financial interests is directed. A legislative effort that increases a lawmaker's wealth by substantially affecting the value of a publicly traded company's stock would certainly seem to constitute an activity "which arouse[s] suspicions of malfeasance and corruption." Such an action thus "endangers the very fabric of a democratic society" by shattering the people's "faith in those who govern."

The Nelson Committee, however, was confident that the twin mechanisms of financial disclosure and electoral accountability were adequate safeguards against self-interested decision making by lawmakers. For that reason, then, the Committee resisted suggestions for elaborate schemes which would have required that Senators not serve on certain committees, or disqualify themselves from voting in every case when their holdings or investments could pose a conflict of interest. No Rule suggested to the Committee avoided conflicts without totally undermining the Senator's ability to represent the interests of his constituents. Consequently, the Committee concluded that financial disclosure of all holdings and possible conflicts was a preferable approach.

As we will see, among the Committee's "resisted suggestions" was one by the NYCBA for a congressional rule requiring lawmakers to "avoid all economic interests which may be specifically affected by legislation within the jurisdiction of [their] committee[s]."

The Senate Manual leaves no doubt that the Nelson Committee's expressed faith in financial disclosure and the electoral process continues right up to the present. A rule requiring recusal, as the Manual explains, would compromise the interests of the lawmaker's constituents because

[t]hose who elect Senators and Congressmen are entitled to have their elected representatives represent them by voting and fully participating in all aspects of the legislative process.

162. Id.
163. Id.
164. Nelson Committee Report, supra note 147, at 4; accord id. at 10.
This representation is carried out with the understanding that the votes cast by the Senators and Congressmen are predicated on their perceptions of the public interest and the public good, not on personal pecuniary interest.\textsuperscript{166}

The Manual also emphasizes that "even a selective divestiture of potentially conflicting assets is not required," in large part because public disclosure "provide[s] the information necessary to allow Members' constituencies to judge official conduct in light of possible financial conflicts with private holdings."\textsuperscript{167} These rationales for the differences across the three branches will be fully explored in the Subpart that follows.

Before turning to that analysis, a final observation can be made here. Senate Rule 37(4) and the ethical norms that stem from it reveal a striking contrast between the loyalty obligation that Congress envisions for itself and the duty of loyalty that operates in corporations. When personal financial interests are involved, political judgments by congressional officials are substantially more insulated from scrutiny than business judgments by corporate officials. Directors who stand to gain personally from a corporate transaction are denied any type of presumption, strong or otherwise, that their votes are, in the words of the Nelson Committee, "predicated on their perceptions... of the [corporation's] good, not on personal pecuniary interest."\textsuperscript{168} Thus, in this regard at least, corporate law takes fiduciary principles much more seriously.

2. The House of Representatives

Like the Senate, the ethics rules in the House are not tailored toward avoiding (let alone eliminating) financial interests that could possibly tempt lawmakers to favor their own pecuniary interests ahead of the public they serve. The principal guard against self-interested conduct by members of the House is Rule 23, paragraph 3 of the House Code of Official Conduct, which specifies that

[a] Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive compensation and may not permit compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress.\textsuperscript{169}

\textsuperscript{166} Senate Ethics Manual, supra note 118, at 69.
\textsuperscript{167} Id. at 124–25.
\textsuperscript{168} See supra note 147.
The commentary in the House Ethics Manual, which is compiled by the House Committee on Standards of Official Conduct (the “Standards Committee”), clarifies that this provision governs aspects of the “investments of House Members and employees.”170 And the manual expressly states that “all Members, officers, and employees are prohibited from improperly using their official positions for personal gain.”171 But after quoting the NYCBA’s astute observation that “[m]uch distrust of government flows from ambiguous circumstances where there is ground for suspicion that officials are promoting their own welfare rather than the public’s,”172 the Manual observes that

[a]s a general matter . . . Members and employees need not divest themselves of assets upon assuming their positions, nor must Members disqualify themselves from voting on issues that generally affect their personal financial interests. Instead, public financial disclosure provides a means of monitoring and deterring conflicts.173

That rather unambiguous message is followed by this statement: “[n]o federal statute, regulation, or rule of the House absolutely prohibits a member or House employee from holding assets that might conflict with or influence the performance of official duties.”174

In addition to House Rule 23(3), a representative’s financial conflicts must be evaluated under House Rule 3, which provides that “[e]very Member . . . shall vote on each question put, unless he has a direct personal or pecuniary interest in the event of such question.”175 Longstanding House precedents, however, emphasize that financial interests are disqualifying only when a member’s vote affects him or her directly as an individual and not merely as one of a class.176 The Manual provides the following examples:

Members holding stock in national banks have voted on legislation “providing a national currency and to establish free banking” since Members “do not have that interest separate

170. HOUSE ETHICS MANUAL, supra note 118, at 248.
171. Id. at 247.
173. Id. at 247.
174. Id. at 248.
175. HOUSE RULES, supra note 169, at 377 (Rule 3). The closest Senate analogue to House Rule 3 is Senate Rule 12(3), which provides that a senator “may decline to vote in committee or on the floor, on any matter when he believes that this voting on such a matter would be a conflict of interest.” See SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. Doc. 112-1, at 12, para. 3 (2011) [hereinafter SENATE RULES] (Rule 12).
176. HOUSE ETHICS MANUAL, supra note 118, at 235.
and distinct from a class, and, within the meaning of the rule, distinct from the public interest."... The Speaker would not rule that a Member owning stocks in breweries or distilleries should be disqualified in voting on the proposed amendment to the Constitution concerning prohibition of the manufacture and sale of liquor. Members who were stockholders in or had interests in import businesses voted on a tariff bill affecting the import business since "the bill before us affects a very large class.... The Chair would be surprised if there were not hundreds of thousands of American citizens who were stockholders in these companies...."

Although both the House and the Senate construe their respective rules to foreclose certain legislative activities that produce pecuniary benefits for a "limited class" in which a lawmaker is a member, House Rule 3 does not explicitly impose the same "principal purpose" qualifier that appears in Senate Rule 37(4). But it is possible that a qualifier grounded in a lawmaker's motivation applies to House Rule 3 implicitly. For example, with no reference at all to the lawmaker's reason(s) for supporting a bill, the Manual suggests that Rule 3's voting disqualification for a pecuniary interest "might apply if legislation affects only one specific business or property, rather than a class or group of businesses or properties." But in contravention, the Manual points to a more recent precedent where the Standards Committee found that a congressman's ownership of common stock in a defense contractor corporation (1,000 shares out of more than 4.5 million outstanding) was insufficient "to disqualify him from voting on' an appropriations bill authorizing funds for a project for which the corporation was under contract with the government to perform." The different conclusions contemplated by the Manual could perhaps have turned on the lawmaker's "principal purpose." An insubstantial number of shares in a widely traded corporation could negate an inference that

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177. Id. (second alteration in original) (quoting House precedents).
178. Id. (emphasis added) (citing, among other instances, a 1907 precedent suggesting that if a member's vote were to be challenged, the chair should hold that he lacked the right to vote on a bill specifically related to Central Pacific Railroad, in view of his ownership of stock in that railroad).
179. Id. at 237 (quoting IN THE MATTER OF A COMPLAINT AGAINST REP. ROBERT L.F. SIKES, H.R. REP. NO. 94-1364, at 15 (1976)). The Standards Committee found, however, that the congressman had wrongly used his official position for personal benefit on two other occasions: when he "persuaded the organizers of a privately held bank to sell him stock while he was using his congressional position to promote authorization for the establishment of the bank" and when he "sponsored legislation to remove restrictions on the development of property in which he had a personal financial interest." HOUSE ETHICS MANUAL, supra note 118, at 186. The congressman was ultimately reprimanded by the House. See id. at 249.
pecuniary gain was a principal purpose behind a decision to support (or disfavor) a bill.

The House Manual acknowledges that sponsoring legislation, committee participation, and contacting officials at executive agencies entail "a degree of advocacy above and beyond that in voting" and it observes that such activities require "added circumspection" on the part of members as to whether they may take such actions in view of their financial interests.\footnote{Id. at 237.} The Standards Committee advises members to consult with it for guidance whenever they are "considering taking such action on a matter that may affect [their] personal financial interests," and it references in particular the rules and standards that "prohibit the use of one's position for personal gain."\footnote{Id.} But ethics experts and government watchdog groups have been critical of the House Standards Committee (and the Senate Ethics Committee as well) for providing advisory opinions that typically "give support and justification to lawmakers who take actions that intersect with their personal financial holdings."\footnote{See Kindy, et al., supra note 5.} Ethics experts are also quick to point out the rarity of congressional self-discipline for legislative actions relating to personal financial interests.\footnote{See Insider Trading and Congressional Accountability: Hearing Before the S. Comm. on Homeland Sec. \& Gov't Affairs, 112th Cong. 9–10 (2011) [hereinafter Senate STOCK Act Hearing] (testimony of Melanie Sloan, Executive Director, Center for Responsible Ethics in Washington ("CREW")).}

As in the Senate, the House’s current rules and norms pertaining to financial investments are rooted in decisions that were made in 1977. In the House, the analogue to the Nelson Report was a report based on the recommendations of the House Commission on Administrative Review's Task Force on Financial Ethics, which was chaired by then-Congressman Lee Hamilton (D-Ind).\footnote{See HOUSE COMM’N ON ADMIN. REVIEW, FINANCIAL ETHICS, H. Doc. 95-73, at 9–10 (1977).} And like the Nelson Committee in the Senate, this House Commission considered various approaches to conflicts that would have required lawmakers "either to divest themselves of holdings which might cause potential conflicts of interest or be disqualified from voting on issues which affect their investments."\footnote{Id. at 9.} Finding "serious drawbacks" with such approaches, the Commission concluded that

[i]n the case of investment income, then, the Commission’s belief is that potential conflicts of interest are best deterred through disclosure and the discipline of the electoral process. Other approaches are flawed both in terms of their
reasonableness and practicality and threaten to impair rather
than to protect the relationship between the representative
and the represented.\textsuperscript{186}

The House Commission's strong preference for enhanced
financial disclosure in lieu of anticonflict restraints (which was
echoed by the Senate's Nelson Committee) materialized the
following year in the Ethics in Government Act of 1978. The EIGA
converted existing congressional rules on financial disclosure into
stricter and more encompassing statutory requirements.\textsuperscript{187} A
decade later, a House Bipartisan Task Force on Ethics concluded
that the EIGA was achieving its anticonflicts objective:

The task force believes, in light of the ten year history of the
disclosure law under the Ethics in Government Act, that
public financial disclosure, coupled with the discipline of the
electoral process, remains the best safeguard and the most
appropriate method to deter and monitor potential conflicts of
interest in the legislative branch.\textsuperscript{188}

Whether public disclosure and electoral discipline are adequate
safeguards against self-interested legislative activity (let alone "the
best") is a question that has received surprisingly little scrutiny
from legal scholars. One important exception is Professor Richard
Painter, who recognizes that congressional concerns about the effect
of recusal on the process of democratic representation are
legitimate. But he emphasizes the other important democratic
values that are at stake as well. He therefore advocates a balancing
test, of sorts:

Preserving a member's power to sponsor and vote on
legislation is important, but public confidence in the integrity
of government is also important. The effect on legislative
process from a handful of members in the House or Senate
recusing on a bill would in most cases be less harmful than a
public perception that members are participating in matters in
which they have significant financial interests. Congress
should be willing to abide by, at least in its own rules if not a
criminal statute, a standard that is more similar to that which
it imposes on the executive branch.\textsuperscript{189}

Disqualification, moreover, is hardly the only way fiduciaries
can fulfill their duty of loyalty to their entrustors. Indeed, if ethics

\textsuperscript{186} Id. at 9–10. The House Manual quotes the Commission's conclusion
\textsuperscript{187} See \textit{supra} notes 59–64 and accompanying text.
\textsuperscript{188} \textit{Bipartisan Task Force on Ethics, 101st Cong., Rep. on H.R. 3660, 22
(Comm. Print 1989)}.
\textsuperscript{189} \textit{Painter, supra} note 3, at 148.
rules and norms in Congress were to reflect the avoidance component of a fiduciary obligation, concerns about diminution of citizen voice and power would not even be implicated.

The House Manual, however, continues to depict the divestiture alternative to recusal as both "impractical" and "unreasonable."\(^{190}\) It elaborates:

Members of Congress enter public service owning assets and having private investment interests like other citizens. Members should not "be expected to fully strip themselves of worldly goods." Even a selective divestiture of potentially conflicting assets could raise problems for a legislator. Unlike many officials in the executive branch, who are concerned with administration and regulation in a narrow area, a Member of Congress must exercise judgment concerning legislation across the entire spectrum of business and economic endeavors. Requiring divestiture may also insulate legislators from the personal and economic interests held by their constituencies, or society in general, in governmental decisions and policy.\(^{191}\)

The "worldly goods" quote was drawn from the NYCBA's 1970 Report on congressional ethics, which included an unequivocal recommendation for a divestiture rule, akin to the rule now governing Senate Committee staffs.\(^{192}\)

Particularly in the context of today's lawmakers and their current financial investments, each of the concerns set out in the House Manual regarding conflict avoidance through divestiture rings hollow. Even a complete prohibition against holding stocks or bonds in individual companies would allow lawmakers to retain most other types of "worldly goods," including shares in diversified mutual funds. Moreover, while lawmakers necessarily function as generalists when casting floor votes on a bill, much discretionary decision making occurs at the committee level, where lawmakers function much more as specialists charged with overseeing particular industries.

Concerns about "insulating" members from constituent interests can be easily dismissed as well. A legislator from Wisconsin should be able to zealously represent the interests of dairy farmers without having his own personal wealth invested in livestock and farm equipment. But even if an argument based on the value of "merged" interests is valid in the context of some financial investments (the citizens of Texas may wish—and may well be entitled—to send oilmen to Washington), that argument loses traction with respect to a lawmaker's passive investments in securities issued by publicly

191. *Id.* at 250 (quoting NYCBA 1970 *REPORT*, *supra* note 16, at 40).
192. *See infra* Subpart IV.B.1.
traded corporations. Owning portfolios with hundreds of thousands of dollars invested in the stock of General Electric, J.P. Morgan, and other multinational companies brings the typical lawmaker no closer to the interests of his constituents than a portfolio with shares in mutual funds that invest in those very same companies.

The remaining argument set out in the House Manual against a divestment rule relates to the "discipline" that is said to be imposed by the electoral process. To be sure, the EIGA's statutory scheme for financial disclosure serves to inform the public about possibly conflicting interests. And stories in the media help voters understand and appreciate the possible connections between a particular lawmaker's investment holdings and his or her legislative activity.193 Yet, despite such transparency, the electoral process has not proven to be a particularly effective vehicle for controlling possibly self-serving legislative conduct, at least conduct which falls short of serious corruption (leaving aside the numerous lawmakers who have been reelected despite charges involving serious corruption).194 Officeholders in Congress clearly "have an advantage over anyone who challenges their authority."195

Not only is reliance on the electoral process to reduce conflicts an ineffective approach in practice, but it is also "deficient in principle."196 The beneficiaries of an individual lawmaker's duty of loyalty include not only those who voted for her but also the general public. A lawmaker's actions on a congressional committee and any leadership role she fulfills in the House or Senate impact the entire nation. As Professor Dennis Thompson, a leading political science scholar, points out:

Because legislative ethics provides . . . the preconditions for all legislative action, citizens rightly take an interest in the ethical conduct of all members, not only that of their own representatives. In this respect their concern about ethical conduct differs from their interest in any particular piece of legislation. Even on delegate conceptions of democratic representation, constituents in any state or district may quite properly instruct their representative to seek, through procedures of the representative assembly, standards to govern the ethical conduct of all representatives. That is part of the rationale for the disciplinary authority of the ethics

193. See generally supra note 5 (citing front-page news articles); see also infra text accompanying notes 232–42.
195. Id. at 5.
committees and ultimately for Congress's constitutional power of expulsion.\textsuperscript{197}

Thus, "letting members disclose and voters decide" is a defense of the status quo that is grounded in a "mistaken view of democratic representation."\textsuperscript{198}

Once again, an analogy to the corporate world is instructive. Under the corporate law of every state, directors are chosen by a vote of the corporation's shareholders. But corporate law does not look solely to elections to guard against agency problems such as conflicted decision making on the part of directors.\textsuperscript{199} Instead, the fiduciary duty of loyalty performs much of that work. As the Delaware Supreme Court emphasized in Guth v. Loft,\textsuperscript{200} "[t]he rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest."\textsuperscript{201} Section 144(a)(2) does provide a mechanism by which shareholders in Delaware may effectively waive the protections of the fiduciary obligation that is owed to the corporation.\textsuperscript{202} But section 144(a)(2) is a transaction-specific provision that requires a majority of disinterested shareholders to vote in good faith, after full disclosure of the interested director's conflict, in favor of the transaction. Even if all potential conflicts had been fully disclosed to shareholders in a proxy statement, a director's election (even by the vote of a majority of disinterested shareholders) would not serve to sanitize all interested-director transactions proposed in the future. Shareholder votes on each separate interested-director transaction would be necessary. And, in the absence of such a vote by shareholders, the fiduciary rule that requires undivided and unselfish loyalty to the corporation would not be deemed to have been waived.

3. The Special Case of Earmarks

Interestingly, in both the House and the Senate, financial conflicts of interest are subject to a special rule when the legislative activity at issue involves a congressional earmark, a limited tax benefit, or a limited tariff benefit (often referred to collectively as "earmarks").\textsuperscript{203} Made (in)famous by frequent references in the media to a $223 million "Bridge to Nowhere," earmarks are typically

\begin{itemize}
\item \textsuperscript{197} Id. at 138.
\item \textsuperscript{198} Id. at 137.
\item \textsuperscript{199} Rave, supra note 3, at 676–77.
\item \textsuperscript{200} 5 A.2d 503 (Del. 1939).
\item \textsuperscript{201} Id. at 510.
\item \textsuperscript{202} See supra text accompanying note 34; see also Del. Code Ann. tit. 8, § 144(a)(2) (2011).
\item \textsuperscript{203} See Rebecca M. Kysar, Listening to Congress: Earmark Rules and Statutory Interpretation, 94 Cornell L. Rev. 519, 521 & n.6 (2009).
\end{itemize}
defined as a targeted spending request by one, and sometimes two or more, members of Congress for a particular project or beneficiary.\textsuperscript{204} The earmark “is often inserted in the latter stages of a bill’s journey through Congress, generally in the accompanying committee report.”\textsuperscript{205}

Agency problems redound in the legislative process that results in earmarks. Even though taxpayers generally understand that the sum total of funds expended on targeted projects can usually be spent more efficiently in a manner that aligns more closely with national priorities, anticipated campaign contributions from lobbyists and the immediate beneficiaries of earmarks often sway lawmakers to sponsor them—even for projects located outside of their own state or district.\textsuperscript{206} While Congress is unlikely to enact a permanent ban on legislative earmarks, both chambers in recent years have instituted temporary moratoriums as part of a series of measures to control deficit spending.\textsuperscript{207}

The firestorm against earmarks began to ignite in the mid-2000s after investigatory reports in the media spotlighted wasteful spending in general and earmark abuses in particular.\textsuperscript{208} The public backlash, fueled with activism by CREW and other government watchdog groups, prompted Congress in 2007 to reform the earmark process by increasing transparency and accountability.\textsuperscript{209} Pursuant to these reforms, lawmakers who request earmarks are required to file written statements (easily accessible to the public) that disclose: the lawmaker’s name; the name and address of the intended recipient of an earmark (or the location of the intended activity if there is no intended recipient); the name of the beneficiary in the case of a limited tax or tariff benefit; the purpose of the earmark or limited tax or tariff benefit; and a certification that neither the

\textsuperscript{204} Painter, supra note 3, at 153 (observing that the proposed Gravina Island Bridge in Alaska was an earmark sponsored by Senator Ted Steven (R-AK)).

\textsuperscript{205} Id.

\textsuperscript{206} Id. at 155 (discussing press reports about a $10 million highway interchange project in Florida promoted by a congressman in Alaska).


\textsuperscript{209} See Kysar, supra note 203, at 534–35 (discussing the political factors that precipitated the adoption of earmark rules).
member nor certain related persons has a pecuniary interest in the earmark or limited tax or tariff benefit.\textsuperscript{210}

The certifications required under the earmark rules in both chambers appear similar at first blush, but there are differences that may be significant. House Rule 23, paragraph 17 of the House Code of Official Conduct requires

[a] Member... who requests a congressional earmark, a limited tax benefit, or a limited tariff benefit in any bill or joint resolution (or an accompanying report) or in any conference report on a bill or joint resolution (or an accompanying joint statement of managers)... [to] provide a written statement to the chair and ranking minority member of the committee of jurisdiction,... that... [certifies] that the Member... or spouse has no financial interest in such congressional earmark or limited tax or tariff benefit.\textsuperscript{211}

Committees with jurisdiction over a particular earmark or tax benefit request are responsible for determining whether Rule 23(17)'s heightened disclosure requirements (including the "no financial interest" certification) are triggered.\textsuperscript{212}

Whether a member of the House (and/or a spouse) has a "financial interest" in an earmark depends on his or her particular financial circumstances and the specific facts surrounding the request.\textsuperscript{213} But the House Manual observes that

[a]s a general matter, a financial interest would exist in an earmark when it would be reasonable to conclude that the provision would have a direct and foreseeable effect on the pecuniary interests of the Member or the Member's spouse. \textit{Such interests may be related to financial assets, liabilities, or other interests of the Member and spouse, such as investments in stocks, bonds, mutual funds, or real estate.}\textsuperscript{214}

An "effect is foreseeable if it is anticipated or predictable."\textsuperscript{215} The House Manual also quotes (presumably by analogy) the OGE regulation that defines the term "predictable" for purposes of the federal statute that criminalizes conflicts of interest for the executive branch.\textsuperscript{216} Direct and foreseeable effects on a House

\begin{itemize}
\item \textsuperscript{210} See \textit{HOUSE RULES}, supra note 169 at 942–43, para. 17 (Rule 23); \textit{SENATE RULES}, supra note 92 at 175, para. 6 (Rule 44).
\item \textsuperscript{211} \textit{Id.}
\item \textsuperscript{212} \textit{HOUSE ETHICS MANUAL}, supra note 118, at 238.
\item \textsuperscript{213} \textit{Id.}
\item \textsuperscript{214} \textit{Id.} at 239 (emphasis added).
\item \textsuperscript{215} \textit{Id.} at 239 n.108
\item \textsuperscript{216} \textit{Id.} at 239 (quoting 5 C.F.R. § 2640.103(a)(3)(ii) (2012)). Section 2640.103(a)(3)(ii) "define[s] the term ‘predictable’ as ‘real, as opposed to a speculative possibility that the matter will affect the financial interest.’" \textit{Id.}
member’s (or spouse’s) pecuniary interests are contrasted explicitly with financial interests that are "remote, inconsequential, or speculative." Two differing situations are depicted:

For example, if a Member proposed an earmark or tax or tariff benefit assisting a certain company, the Member generally would not be considered to have a financial interest in the provision by owning shares in a diversified mutual fund, employee benefit plan (e.g., the Thrift Savings Plan or similar state benefit plan), or pension plan that, in turn, holds stock in the company. However, a Member's direct ownership of stock, even a small number of shares in a widely held company, likely would constitute a financial interest under Rule 23.

The 2007 earmark reform in the House therefore appears to have altered the conventional financial conflict-of-interest analysis, at least to a certain extent. Consider, for example, a lawmaker who owns $50,000 of stock in Dynamic Defense Corp. ("DD Corp.") and is contemplating an earmark request directed at DD Corp. for several million dollars in funding to assist its development of a new type of body armor for the military. Before the reforms took effect, little would have prevented the lawmaker from requesting such an earmark, even if he had owned thousands of dollars in DD Corp. stock. Indeed, it is not at all clear that the request would have violated the House rule that proscribes personal gain from legislative activity, and even if the request were in fact improper, there is little chance that the lawmaker's conflict would have even been detected, let alone become the fodder for a congressional disciplinary proceeding. Now, however, with House Rule 23(17)'s certification requirement in place, that lawmaker would be unable to file a truthful statement that he had "no financial interest in such congressional earmark." Thus, Rule 23(17) would foreclose his earmark request (or require divestment) and, at least in this instance, eliminate the financial conflict of interest.

In the Senate, however, one can reasonably question whether the "special" financial conflict-of-interest rule that applies to earmarks alters the conventional analysis, even to a limited degree. The Senate adopted its version of an earmark certification rule as part of the Honest Leadership and Open Government Act of 2007. The Act added a new Rule 44, paragraph 6, to the Standing Rules of the Senate, which provides:

217. Id.
218. Id. (emphasis added).
219. See supra text accompanying note 169 (quoting House Rule 23(3)).
A Senator who requests a congressionally directed spending item, a limited tax benefit, or a limited tariff benefit in any bill or joint resolution (or an accompanying report) or in any conference report on a bill or joint resolution (or an accompanying joint statement of managers) shall provide a written statement to the chairman and ranking minority member of the committee of jurisdiction, . . . [that certifies] that neither the Senator nor the Senator's immediate family has a pecuniary interest in the item, consistent with requirements of paragraph 9.221

In the absence of the italicized language, Senate Rule 44(6) would closely resemble the "no financial interest" certification requirement in the House, except that it more broadly encompasses a lawmaker's immediate family members (a term which includes children and parents as well as a spouse). But paragraph 9 of Rule 44 provides:

No Member, officer, or employee of the Senate shall knowingly use his official position to introduce, request, or otherwise aid the progress or passage of congressionally directed spending items, limited tax benefits, or limited tariff benefits a principal purpose of which is to further only his pecuniary interest, only the pecuniary interest of his immediate family, or only the pecuniary interest of a limited class of persons or enterprises, when he or his immediate family, or enterprises controlled by them, are members of the affected class.222

The effect of paragraph 9 on paragraph 6 is not entirely clear. The "no pecuniary interest" certification requirement in Senate Rule 44(6) may, on one hand, be read to encompass only those earmarks that satisfy both a "principal purpose" test and a "limited class" test. As such, the Senate's "special" rule for earmarks would merely reflect the general prohibition that already exists under Senate Rule 37(4).223 On the other hand, the Senate may construe Rule 44(6)'s certification requirement without any such qualification from paragraph 9. And in that event, as in the House, a lawmaker with $50,000 of stock in DD Corp. would be foreclosed from requesting any earmark directed at DD Corp., notwithstanding his or her motivation.

C. Lawmakers as Investors

Except in the special case of earmarks (which are political hot potatoes, in their own right), the nearly forty-year-old view that financial conflicts are best deterred by public disclosure and the

221. Senate Rules, supra note 92 at 175, para. 6 (emphasis added) (Rule 44).
222. Id. para. 9 (Rule 44).
223. See supra note 143 and accompanying text.
discipline of the electoral process continues to dictate the ethical norms in Congress. Although all federal officials owe duties of trust and loyalty to the public, only congressional officials are left almost entirely on their own to decide for themselves what financial interests might be inconsistent with those duties.

But much has changed since 1977, when Congress last accorded the financial conflict issue extensive scrutiny. Among other changes, recent years have shown a much higher rate of personal wealth in Congress, substantially higher percentages of stock ownership among lawmakers, much more federal intervention in the economy and operations of private-sector businesses, and a heightened public awareness that lawmakers routinely profit from securities investments that intersect with their legislative activities.224

Most lawmakers in Congress are very wealthy, and the number of millionaires continues to rise.225 Public disclosure forms filed for 2010 revealed that 250 lawmakers had an estimated net worth of more than $1 million: 183 of 435 Representatives (42%) and 67 of 100 Senators (67%).226 These figures, however, substantially understate net worth because they do not reflect the value of personal or secondary residences that are not incoming producing and the EIGA’s disclosure instructions allow investments and other assets to be reported in dollar amount ranges. Less than twenty years ago, 51 Representatives (12%) and 26 Senators were millionaires (26%).227

Stock ownership by members of Congress has also soared over the last several decades.228 Academic researchers in one often-cited study examined disclosure reports from 650 members who served in the Senate and House between 2004 and 2008. They found that "422 [65%] reported holding a stock listed on the NYSE, NASDAQ or


228. See O’Harrow et al., supra note 5.
OWNING STOCK WHILE MAKING LAW

AMEX at some point during that period.”

To be sure, many lawmakers currently have investment portfolios comprised mostly of shares in diversified mutual funds and/or government securities, including U.S. treasuries and municipal bonds. A far smaller percentage of lawmakers hold their assets in qualified blind trusts—fewer than twenty lawmakers reported such trusts in 2010.

In addition to the sharp rise in stock ownership by lawmakers, recent years have brought congressional intervention in private sector businesses at unprecedented levels, with trillions of taxpayer dollars allocated for bank and auto company bailouts, health care reform, and economic stimulus projects. Legislative decisions thus have a much greater likelihood of affecting the economic bottom line of publicly traded corporations—triggering direct and foreseeable impacts on the value of stock holdings in lawmakers’ portfolios.


230. See O’Harrow et al., supra note 5, at A1, A4; Brody Mullins et al., Stock Law Leaves Congress Leeway, WALL ST. J., June 15, 2013, at A7 (reporting that in 2012, “[s]everal members of Congress moved to shield themselves from criticism by selling individual stocks and shifting to mutual funds”); see also Paul Kane & Carol D. Leonnig, Lawmakers Invested in Bailed-Out Firms, WASH. POST, June 11, 2009, at A4, available at http://articles.washingtonpost.com/2009-06-11/politics/36861221_1_lawmakers-stock-holdings-disclosure (reporting that then-Representative Barney Frank (D-Mass) “does not invest directly in stocks, instead concentrating largely on state and local bonds, with a small amount directed into mutual funds” and quoting Frank’s statement that “I get a steady 4.5 percent, and I help my state in the process. I’m a patriot, and I’m making money, too.”).


232. See O’Harrow et al., supra note 5, at A4; cf. Stephen M. Bainbridge, Insider Trading Inside the Beltway, 36 J. Corp. L. 281, 299 (2011) (observing that “the massive increase in federal involvement in financial markets and corporate governance as a result of the financial crisis of 2008 has made [insider trading] opportunities . . . even more widely available to government officials”).
Possible connections between the stock investments of a particular lawmaker and his or her legislative actions can be drawn fairly easily. For almost a decade, the Center for Responsive Politics ("CRP"), a nonprofit research group, has been transcribing the annual paper disclosure reports filed by lawmakers and providing that data on its website (www.opensecrets.org). A few clicks on a computer mouse can produce a list of the "most popular congressional investments," which in turn reveals not only the top fifty publicly traded corporations in which lawmakers are most heavily invested but also a specific value range of the investments for each identified lawmaker. Journalists, particularly the authors of the Washington Post's "Capitol Assets" series, have made full use of the CRP's data, systemically comparing particular lawmakers' stock investments with their legislative activity. The Washington Post has supplemented this extensive series of reports with an interactive database that allows users to (literally) connect the dots between congressional committee service and a lawmaker's stock investments.

Among other findings, these reports in the Washington Post reveal that

- between the years 2007 and 2010, 130 lawmakers or their families traded stock—totaling between $85 million and $218 million—in 323 companies registered to lobby on bills that came before their committees;
- roughly in that same time period, 73 lawmakers either "sponsored or co-sponsored legislation . . . that could benefit businesses or industries in which either they or their families are involved or invested;"
- nearly 30 key lawmakers—with health-industry stock holdings totaling between $11 million and $27 million—helped draft landmark health-care

233. See generally Most Popular Congressional Investments, 2011, OPENSECRETS.ORG, http://www.opensecrets.org/pfds/overview.php?type=P&year=2011 (last visited June 26, 2013) (indicating "the most common assets among all members of Congress who served during all or part of 2011, ranked by the number of members invested in them, with breakdowns by party").

234. See generally supra note 5 (citing seven front-page news articles).


236. Keating et al., supra note 5.

237. Kindy et al., supra note 5, at A11.
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legislation, and "[i]n the medical-device field alone, 108 lawmakers collectively own between $6 million and $14 million worth of stock;"

- during the financial crisis, at least 18 of the 60 members of the House Financial Services Committee held stock in firms that received federal bailout assistance;
- between 2004 and 2009, 19 of the 28 senators on the Senate Armed Services Committee held assets—totaling between $3.8 million and $10.2 million—in companies under contract with the Pentagon; and
- many House and Senate committees have memberships with “disproportionately large holdings in companies or industries they oversee . . . .”

Although the composite picture falls short of proving that lawmakers place their personal financial interests ahead of the public they serve, a large segment of the public has apparently taken away that disturbing message. And because antconflict measures are “more concerned with what might have happened in a given situation then what actually happened,” the public perception is the very problem that requires the cure.

The Washington Post’s “Capitol Assets” series also reveals important insights about lawmakers and their own views about the overlap between their stock investments and their legislative activity. Indeed, the lawmakers who were contacted in connection

238. Kane, supra note 5.
239. O’Harrow et al., supra note 5, at A6.
240. Kane & Leonnig, supra note 230.
242. O’Harrow & Keating, supra note 5 at A6 (reporting, among other examples, that: House Transportation and Infrastructure Committee members “as a group owned almost six times more holdings in transportation firms”; House Energy and Commerce Committee members had “heavier than average investments in companies such as Oracle, Nokia, AT&T and Verizon”; senators on the Environment and Public Works Committee “had almost three times the value of agribusiness holdings as their colleagues on other committees”; and senators on the Banking, Housing and Urban Affairs Committee “had on average almost twice the value of holdings in finance, insurance and real estate as that chamber as a whole”).
243. See infra notes 256–62 and accompanying text (quoting observations by several lawmakers).
with many of the reports frequently emphasized their full compliance with the Senate or House rules on financial investments as well as with the public disclosure provisions of the EIGA.\footnote{See Conflicting Standards, supra note 241 (showing responses from senators).} For example, when nineteen senators on the Senate Armed Services Committee were asked to comment on the propriety of their individual stock holdings in defense contractors, nearly a dozen of them responded through a spokesperson that he or she has always strictly adhered to all Senate rules about financial investments and fully disclosed all such investments.\footnote{See Higham et al., supra note 5, at A2; see also Conflicting Standards, supra note 241 (hyperlinking verbatim text of the spokespersons' responses).}

Lawmakers' views of their own investment decisions have prompted others to question whether the traditional means for deterring lawmakers' financial conflicts—public disclosure coupled with the electoral process—could actually be exacerbating the risk of self-interested legislative activity. Indeed, research in the field of behavioral economics shows that "[o]nce people disclose a potential conflict ... they often feel morally absolved—which can blind them to the possibility that they may still be biased."\footnote{See Jason Zweig, A Perk of Power: Trading in Companies You Oversee, WALL ST. J., Apr. 10, 2010, at B10, available at http://online.wsj.com/article/SB10001424052702304703104575174124009720464.html (citing Professor George Loewenstein, a behavioral economist at Carnegie Melon).} Moreover, because "[p]eople can be biased by surprisingly small incentives, ... even ... a congressman's [modest] portfolio ... could still influence his behavior in votes and hearings."\footnote{Id.}

Given lawmakers' status as fiduciaries and the accumulated knowledge about lawmakers as stock market investors, what explains the fact that nearly forty-year-old decisions continue to dictate current congressional norms with respect to financial conflicts of interest?

Apart from concerns about insulating lawmakers from the interests of their constituents,\footnote{See supra text accompanying note 191.} the other primary concern is that a divestment rule would alter incentives to serve in Congress. Although some have argued that a divestiture requirement could jeopardize our nation's ability to attract and retain talented politicians and staffers to Congress,\footnote{See Higham et al., supra note 5, at A2 (reporting the view by congressional experts that divestiture rules "would deter good candidates for office"). In 1961, the Senate Armed Services Committee discussed the possibility of extending its defense contractor divestiture rule for senior
even greater number of persons may be drawn to serve in an institution that has opted to take fiduciary principles more seriously. The question, of course, is an empirical one. But modern portfolio theory instructs that most investors who hold stocks and bonds in individual companies will not be able to achieve benchmark-beating returns. Although at one time researchers suggested that congressional officials had investment portfolios that substantially outperformed the overall stock market, a more recent study indicates otherwise, finding that the average lawmaker underperformed the market by between 2% and 3% annually. Ironically, then, a precommitment strategy that would tie lawmakers to the mast of passive index funds could actually increase lawmakers’ aggregate wealth. With a stock divestiture requirement in place for ten years, we might actually see even greater numbers of millionaires in Congress.

IV. ACHIEVING GREATER PARITY

As the foregoing reveals, the anticonflict rules that govern Congress’s members and employees are substantially less restrictive than the statutes and rules that apply to federal officials in the executive and judicial branches. Legislation (or Senate and House rules) limiting the type of securities that congressional officials may own would be an important first step toward greater parity. Because lawmakers are expected to work and vote on a multitude of issues that impact particular industries and often specific companies, the rigid recusal requirements that govern executive branch officials and judges are neither workable nor appropriate as Department of Defense officials to its own committee members. Although several senators spoke in favor of changing the double standard, other senators expressed opposition. Then-Senator Prescott Bush (R-Conn.) contended: “When you pass a law like that, you will have the greatest mass resignation that the world has ever seen . . . For heaven’s sake, if you want to bring together a lot of people that do not have any touch with reality in this country to make the laws, God help the United States, in my judgment.” (quoting hearing transcript). The question was never called to a vote. Id.

252. Congress could ease the financial burden on legislative branch officials by amending the tax code to allow for the deferral of any capital gains that result from securities sales that were subject to a divestiture rule. See supra text accompanying note 95.


255. See Eggers & Hainmueller, supra note 229, at 536.
a standard solution for lawmakers. Rules requiring securities divestment, on the other hand, would be both workable and appropriate. Indeed, federal agency officials often operate under strict divestiture requirements that are expressly designed to thwart public perceptions of personal financial gain from agency actions, programs, or policies.

A. Additional Reasons for Change

There are several reasons why the timing is particularly apt for conflicts-of-interest reform in the legislative branch that would begin with limitations on securities investments. First and foremost, a divestiture requirement would combat the troubling perception that congressional officials can—and routinely do—place their own financial well-being ahead of the best interests of the public they serve. Although lawmakers clearly take issue with that perception’s accuracy, they have been candid in acknowledging its widespread persistence. Indeed, lawmakers know all too well that “Americans rate Members of Congress at or near the bottom of the list when it comes to perceived honesty and ethical standards;”256 that “[m]ost Americans think that everything done in the financial crisis was done to help specific institutions and specific people;”257 and that there is “a sense that elites in Washington are using their positions to get ahead financially.”258 Lawmakers likewise appreciate that “the public opinion of Congress [is] so bad . . . because Congress has been so bad,”259 that “there is a breakdown of trust,”260 and that “the American people . . . deserve the right to know that their lawmakers’ only interest is in what is best for the country, not what is best for their own financial interests.”261 As Senator Joseph Lieberman emphasized at the start of the Senate Hearing on the STOCK Act, if the “law seems to allow Members of Congress to take advantage of their public position for personal gain, the trust that needs to exist between the American people and our government will be further eroded.”262

256. Senate STOCK Act Hearing, supra note 183, at 3 (statement of Ranking Member Susan Collins).
261. Id. at 5 (testimony by Sen. Kirsten Gillibrand).
262. Id. at 1 (opening statement of Chairman Joseph Lieberman). See also Frank Newport, Congress Begins 2013 with 14% Approval, Politics, GALLUP (Jan. 11, 2013), http://www.gallup.com/poll/159812/congress-begins-
Legislative branch reforms that would place limitations on securities ownership would also save countless hours of government time. Some of this time involves work by the members and staffers on the Standards and Ethics Committees in the Senate and House, who respond each year to literally thousands of requests from lawmakers seeking legal advice on a range of activities, "including their work on legislation that might pose a conflict." Moreover, in the wake of the STOCK Act, individual members and senior staff must now file transaction reports within forty-five days of a securities purchase or sale. These reports are likely being reviewed by the staff of the Securities and Exchange Commission, if not regularly, at least sporadically. Far fewer advisory ethics opinions would need to be rendered and far fewer transaction forms would need to be filed and reviewed if members and employees of Congress were generally prohibited from owning any securities other than government securities or shares in diversified mutual funds.

Even more important than the time savings, legislative branch reform would substantially facilitate compliance with the STOCK Act's substantive restrictions. Although the insider trading prohibitions arising under the federal securities laws extend only to actions with "corrupt intent," an anti-conflict restraint that essentially prohibits stock trading outright would be an important guard against inadvertent trading while in possession of material nonpublic government information. Lawmakers and staffers have access to a wide array of material nonpublic information pertaining to specific industries and the general economy, and managing to avoid trading while aware of such information is a difficult endeavor. Indeed, a lawmaker who sells stock in a company

263. See Kindy et al., supra note 5 (reporting that between 2007 and 2011, "lawyers for the two committees issued at least 2,800 written opinions to lawmakers, sent 6,500 e-mails containing advice and provided guidance over the phone 40,000 times, according to records kept by the two committees").

264. See MASKELL, supra note 61, at 1 ("The act ... requires public reporting within 30 days of receipt of a notice of a covered financial transaction (but in no event more than 45 days after such [a] transaction.").


266. For news reports raising questions about suspiciously timed securities trading, see, e.g., Kimberly Kindy et al., Lawmakers Reworked Financial Portfolios After Talks with Fed, Treasury Officials, WASH. POST, June 25, 2012, at A7 (reporting that at least "34 members of Congress recast their financial portfolios following phone calls or meetings with high-ranking Treasury
precisely to avoid the appearance of self-interested decision making could actually be creating a problem for herself under federal insider trading law if she were aware of material nonpublic information at the time of that sale.\(^{267}\)

Limitations on the ownership of stock in individual companies would likewise bolster the STOCK Act's initial public offering ("IPO") provision, which prohibits federal officials from purchasing securities in an IPO "in any manner other than is available to members of the public generally."\(^{268}\) Because the investor demand for shares in an IPO usually exceeds the supply, underwriter allocations often preference institutional investors and wealthy individual investors with connections to Wall Street.\(^{269}\) Distinguishing between the typical allocation process and illegal preferential treatment extended to lawmakers will be quite a challenge, to say the least.

Finally, heightened restrictions on lawmakers' securities holdings could pave the way for further conflict-of-interest reform in connection with other financial investments. Standards and ethics committees in the House and the Senate might, for example, be more inclined to forsake longstanding interpretations of existing rules by issuing new guidance that would recommend conflict avoidance relating to other types of investments. New limitations on securities ownership could also spark additional rulemaking efforts. For instance, the "no financial interest" certification now required to accompany a lawmaker's earmark request could be expanded to encompass anticipated property appreciation if the location of a proposed public works project is next to or within a few miles of residential, commercial, or investment property owned by the lawmaker or a spouse.\(^{270}\)

Department and Federal Reserve officials during the economic crisis"; Brody Mullins et al., Congress Staffers Gain from Trading in Stocks, WALL ST. J., Oct. 11, 2010, at A1 (reporting the newspaper's "analysis of more than 3,000 disclosure forms covering trading activity by Capitol Hill staffers for 2008 and 2009").

\(^{267}\) See Nagy, supra note 128, at 1129 (discussing the "awareness" standard set out in SEC Rule 10b5-1).


\(^{270}\) See David S. Fallis et al., Congressional Earmarks Sometimes Used to Fund Projects Near Lawmakers' Properties, WASH. POST., Feb. 6, 2012, at A1, available at http://articles.washingtonpost.com/2012-02-06/politics/35442262_1
B. Specific Proposals

As reflected in the rare bipartisan momentum that fueled the STOCK Act’s passage (by near unanimous votes of 96-3 in the Senate and 417-2 in the House), congressional ethics reform is a legislative priority around which liberals, moderates, and conservatives can and should unite. It is also a priority strongly supported by President Obama, who has urged Congress on at least two occasions to “limit any elected official from owning stocks in industries that they have the power to impact.” The subsections that follow set forth two specific proposals for limiting the securities investments that may be held by members and employees during their public service in Congress.

1. Investment Limitations Based on Committee Service

As a “Congress of committees, not individuals,” financial conflicts-of-interest reform should begin with investment limitations tied to a lawmaker’s committee membership. Although Congress chose not to travel down this path when the NYCBA proposed it in 1970, today’s lawmakers may be more amenable to change in light of the groundwork already laid by the STOCK Act and the additional empirical evidence now available regarding the investment practices of Congress’s members.

In the course of its three-year study of the legislative branch, the NYCBA’s Special Committee on Congressional Ethics interviewed 120 Senators and Representatives. The interviews and other data convinced the Committee that “the typical Member of Congress is susceptible to conflicts of interest because of the close relationships with industry leaders that he or she maintains through committee service.”


274. See supra notes 235–42 and accompanying text (detailing investigative findings by the Washington Post).

Congress has financial interests with some potential for clouding his independence of judgment on legislation," and that most of these conflicts were “avoidable” because they were neither inherent (they did not involve a status such as a homeowner, parent, or veteran), politically dictated (they did not involve, for example, a “farmer elected from an agricultural district”), nor personally necessary (they did not involve “small, closely held family enterprises”). The Committee’s basic thesis was “that an avoidable conflict of interest should normally be avoided [and] . . . if not avoided, it should be disclosed to the Member’s colleagues and to the public and perhaps should result in disqualification from voting or committee service.”

The Committee grounded its strong preference for “interest avoidance by selective investment” in the fiduciary duty of loyalty. After emphasizing the risk of impaired judgment that arises whenever there is a temptation to serve personal interests, the Committee opined:

The quality of specific results is immaterial. . . . Like other fiduciaries, such as guardians, executors, lawyers, and agents, the public trustee has a duty to avoid private interests which cause even a risk that he will not be motivated solely by the interests of the beneficiaries of his trust. Properly conceived, conflict-of-interest regulation does not condemn bad actions so much as it erects a system designed to protect a decision-making process. It is preventive and prophylactic. Its aim is not detection and punishment of evil, but providing safeguards which lessen the risk of the undesirable action.

The Committee further observed that “[t]he fiduciary concept makes it unnecessary for our recommendations to be supported by evidence that identifiable harm to the public has resulted” from such avoidable financial conflicts.

Along with its general thesis of interest avoidance, the Committee advanced several specific recommendations. These included:

**Recommendation 2B** – Each Member of Congress should make every reasonable effort to utilize available investment alternatives which minimize instances in which it may appear

276. *Id.* at 51.
277. *Id.* at 44-46.
278. *Id.* at 47.
279. See *id.* at 61-63.
280. *Id.* at 39.
281. *Id.* at 52.
that his official decisions may be influenced by personal economic interests. 282

Recommendation 2D — Each house should adopt the following rule: “When a Member is appointed to a committee, he should, if reasonably possible, avoid all economic interests which may be specifically affected by legislation within the jurisdiction of his committee.” 283

Recommendation 2E — Each house of Congress should adopt the following rule: “It shall be the duty of each committee to establish rules governing financial interests of its members and employees in matters coming before the committee.” 284

To be sure, the NYCBA’s general thesis and specific “interest avoidance” recommendations both influenced and impacted some of Congress’s members and employees. Indeed, although it is difficult to measure with any precision, it is quite likely that many lawmakers and staffers took Recommendation 2B to heart; many lawmakers have investment portfolios that avoid corporate stocks altogether and others have placed their securities holdings into qualified blind trusts. 285 In addition, Recommendation 2D found its way in the committee staff divestment rule that is now set out in Senate Rule 37(7). 286

Yet overall, the vast majority of lawmakers have pretty much eschewed “interest avoidance” as a principal method for controlling financial conflicts, at least with respect to stock investments in individual companies. 287 But, even more avoidable and all the more troubling are those securities investments in companies within an industry over which a lawmaker’s committee has jurisdiction. 288 Here the parallels between committee members and executive branch officials are striking: lawmakers on committees such as Armed Services, Banking, Financial Services, and Telecommunications are wrestling with the very same policy issues confronting the officials at the Pentagon, Treasury, SEC, and FCC. Greater parity could be achieved with a federal statute (or new House and Senate rules) that would restrict members and their senior staffs from owning securities in companies with business that

282. Id. at 63.
283. Id. at 68.
284. Id. at 71.
285. See supra notes 230–31 and accompanying text.
286. See supra note 159 and accompanying text.
287. See supra notes 228–29 and accompanying text.
288. See O’Harrow Jr. & Keating, supra note 5 (observing that lawmakers “try to get on the committees in which they have a vested interest,” which places them “in a better position of influencing the performance of their investments . . . or at least appearing to have that ability” (quoting Steve Ellis, vice president of Taxpayers for Common Sense)).
is directly and foreseeably affected by the work of any committee on which the lawmaker holds membership.

2. Investment Limitations Applied More Broadly

In early 2012, as the STOCK Act bill was headed toward passage in the Senate, nearly two-dozen senators sought to build on the bill’s core insider trading and transaction reporting provisions. The result was a bevy of proposed “good-government” amendments. Expressing his concern that the bill’s chances for passage were being jeopardized, Senator Lieberman invoked a Dr. Seuss metaphor: “We don’t want this bill, which does so many important things, to be so loaded up that it falls by the wayside like Thidwick’s antlers.” To prevent that from happening, the Senate passed an order providing for an up-or-down vote on most of the proposed amendments, but requiring a sixty-vote threshold and limiting debate to two minutes equally divided between those members in favor and those opposed.

In the course of the Senate’s consideration of the twenty-two amendments that were then pending on the STOCK Act bill, Senators Sherrod Brown (D-OH) and Jeff Merkley (D-OR) advanced a proposal that would have placed a broad limitation on securities investments by members and certain employees of the Senate.

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289. See 158 Cong. Rec. S1979 (daily ed. Mar. 22, 2012) (statement of Sen. Joseph Lieberman) (noting that the legislation being sent to the President contained “several provisions that were added in the Senate or House to strengthen the bill”).

290. See 158 Cong. Rec. S1980 (daily ed. Mar. 22, 2012) (statement of Sen. Joseph Lieberman) (noting that there had been twenty amendments to the STOCK Act). Most of the proposed amendments, however, were voted down, including Toomey amendment No. 1472 to permanently ban earmarks; Paul amendment No. 1490 to require former lawmakers to forfeit federal retirement benefits if they work as a lobbyist or engage in lobbying activities; and DeMint amendment No. 1488 to express the sense of the Senate for a joint resolution proposing an amendment to the Constitution that would impose term limitations on lawmakers. See 158 Cong. Rec. S290–310 (daily ed. Feb. 2, 2012).

291. 158 Cong. Rec. S148 (daily ed. Jan. 30, 2012) (statement of Sen. Joseph Lieberman). As Senator Lieberman recounted, Thidwick the Big-Hearted Moose told the story of animals in a forest who were warmly welcomed to take up residence in a moose’s antlers “until finally there is too much there and his antlers fall off and they all fall to the ground.” Id.


293. See id. at S290–91 (listing pending amendments).

Their amendment was termed the “Putting the People’s Interests First Act of 2012,” and Senator Brown’s advocacy was necessarily brief:

Mr. President, the amendment Senator Merkley and I have proposed would require all Senators and their senior staff to sell individual stocks that create conflicts or to place their investments in blind trusts. You can still invest in broad-based mutual funds. You can keep your ownership interest in your family farm or small business.

If you are setting up a blind trust, you can instruct the trustee to hold on to your stock in your family company.

Current Senate ethics rules require committee staff making more than $25,000 a year to “divest [themselves] of any substantial holdings which may be directly affected by the actions of the committee for which [they work].”

All Senate Merkley and I are saying is, Members of the Senate should hold ourselves to the same standard we already require of our committee staff and executive branch employees.

As Senator Merkley said, baseball players cannot bet on their games. We should not be able to hold stock in individual companies and then vote on issues that affect our holdings.

Two members spoke in opposition. Senator Pat Toomey (R-Penn.) disagreed with the “fundamental premise of this amendment.” He also expressed a specific concern with the amendment’s reach, stating:

I read the definition of the securities that would be covered and as the securities attorneys have advised us on this—we would be required to divest ourselves even of our investment in a small family-owned business, a business that, perhaps, has absolutely no market whatsoever for the equity, and we would, nevertheless, be forced to sell that where there is no buyer.

I think that is a very unreasonable standard, so I would urge a “no” vote on this amendment.

The second opponent was Senator Lieberman, who expressed the view that a new divestment requirement would be unnecessary in
light of the STOCK Act’s requirement for prompt (no later than forty-five days) reporting of securities purchases and sales:

This amendment would take Congress from where we have always been and are going to be after this law passes. In pursuit of disclosure and transparency, sunshine is the best guarantee of integrity. This would be the first time I am aware of that in the legislative branch we would require divestment of personal holdings. For that reason, I oppose the amendment.

Remember, in the underlying bill we have increased the public’s access to information about our holdings and our transactions. Ultimately, that knowledge ought to be enough to guarantee the public or to energize the public to make sure we are following the highest ethical norms. Divestment, in my opinion, is a step too far.298

The proposed “Putting People First Act” was defeated by a Senate vote of 26-73.299 But that loss should not seal the proposal’s fate. Although its details and definitions could be refined after additional consideration, the proposed legislation’s general prohibition had a commendable simplicity:

A covered person shall be prohibited from holding and shall divest themselves of any covered investment that is directly, reasonably, and foreseeably affected by the official actions of such covered person, to avoid any conflict of interest, or the appearance thereof. Any divestiture shall occur within a reasonable period of time.300

The term “covered person” included members and senior staff of the Senate (whose annual base pay exceeded $120,000) as well as their spouses and dependents.301 And the term “covered investment” was defined expansively to mean “investment in securities in any company, any comparable economic interest acquired through synthetic means such as the use of derivatives, or short selling any publicly traded securities.”302 But the general prohibition applied neither to broad-based investments (such as shares in diversified mutual funds) nor to a spouse’s investments in the securities of the company in which the spouse is employed. The proposed legislation also permitted the Senate Ethics Committee to authorize covered persons, “on a case-by-case basis,” to place their securities holdings

301. Id.
302. Id.
in a qualified blind trust.\textsuperscript{303} In the event of a covered person's violation of the general prohibition, the Senate Ethics Committee was required to notify the United States Attorney for the District of Columbia, and knowing violations could warrant a fine of no more than $50,000.\textsuperscript{304}

A federal statute (or new House or Senate rules) along the lines proposed for the STOCK Act would be an effective reminder to Congress's members and employees that they serve in a fiduciary capacity. And while a prophylactic measure such as this would hardly solve every agency problem in politics, it would be a substantial step in the right direction.

CONCLUSION

Congress has long viewed its members' personal financial stake in legislative decisions as an extraneous factor that can—except in rare cases—be set aside for the good of the public. Yet federal law does not leave government officials in the other two branches completely to the nature of their better angels. Nor does state corporate law leave interested directors entirely on their own to wrestle away financial conflicts in the course of their business judgments. Although all fiduciaries are supposed to act solely for the benefit of their entrustors and never for the benefit of themselves, prophylactic rules are necessary to ensure that fiduciaries do, in fact, act loyally. Congress imposes stringent financial conflict-of-interest restraints on executive and judicial officers and employees, and it should regulate itself with a similar fidelity to fiduciary principles.

\textsuperscript{303} See supra note 231 (discussing qualified blind trusts).
\textsuperscript{304} 158 CONG. REC. S243 (daily ed. Feb. 1, 2012).