



Political Law Alert

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Reminder of STOCK Act Implications When Gathering Political Intelligence

In light of recent news reports on stock trades made by certain senators after they received intelligence briefings on the COVID-19 crisis, we want to remind you of the provisions of the Stop Trading on Congressional Knowledge Act (STOCK Act) and how it may implicate gathering and acting on political intelligence.

The STOCK Act was passed in 2012 after a “60 Minutes” segment exposed financial and health care stock trades that were made by congressional members during the time of the previous decade’s financial crisis and the passage of the Affordable Care Act. The STOCK Act confirmed that congressional members and staff, as well as executive and judicial branch officials, owe a duty with respect to material, nonpublic information derived from the person’s position with the federal government under the insider trading provisions in Section 10(b) of the Securities Exchange Act of 1934 and related SEC Rule 10b-5. Simply put, trading securities based on nonpublic, material information held by such federal officials could be viewed as illegal insider trading in the same way as if one were to trade on similar inside information regarding a corporation. Thus, the STOCK Act could have implications for officials who trade on the basis of such information.

The STOCK Act also may have implications for companies gathering and acting on political intelligence. Indeed, while political intelligence takes on particular importance during a time of crisis, it also raises STOCK Act risks. In particular, a company could have “tippee” liability if it trades on material, nonpublic political intelligence, or “tipper” liability if it shares such intelligence with others.

Given the unique nature of the information that public officials possess and the fact that a public official’s job duties include interacting with constituents (including companies, lobbyists and consultants) on policy matters, applying a Rule 10b-5 tippee analysis can raise difficult questions. For example, it may not be easy for a company to determine whether information it receives from a public official regarding pending legislation or policy matters is disseminated widely enough to be considered “public,” and thus not the basis for an insider trading claim.

As a practical matter, the Department of Justice has found it difficult to bring STOCK Act cases concerning information that congressional members have regarding legislative actions. However, members and staff are not immune from such prosecutions, and issues may arise depending on the specificity and importance of the information shared. Moreover, the risk increases when it comes to information regarding specific executive branch actions.

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