

Ads Aren't Stocks: The AMERICA Act's Dangerous False Analogies

May 2023

tldr

Background: The Advertising Middlemen Endangering Rigorous Internet Competition Accountability (AMERICA) Act, recently introduced by Sen. Mike Lee (R-Utah), would bar companies that own a digital-advertising exchange with more than \$20 billion in annual ad revenue from also providing services to buyers and sellers of ads, or from selling advertising space themselves. The bill also would impose fiduciary-like duties on those who buy and sell online ads for others

However... While advocates of the legislation claim the changes they seek are based on analogous rules used in the regulation of securities markets, such analogies are based on fundamental misunderstandings of how securities regulation works and why it exists. The requirement for “physical separation,” which could force the breakup of vertically integrated digital-advertising platforms like Google, does not exist in securities law; many stockbrokers also own exchanges where stocks are traded. Moreover, rules that stock trades be executed at the best-available price are imposed precisely because vertical integration is common. Ultimately, stocks are regulated in the way that they are because of the central role they play in the savings and investments of everyday Americans. Advertising, while important, does not serve that role.

KEY TAKEAWAYS

NO 'PHYSICAL SEPARATION' RULE IN STOCKS

In a [press release](#) announcing the introduction of the AMERICA Act, Matt Stoller of the American Economic Liberties Project expressed a sentiment common among proponents of the legislation, that just as “no one would accept Goldman Sachs running the New York Stock Exchange,” Congress should not “let corporations run all sides of a transaction in online ad markets.”

Sen. Lee likewise [has said](#) of his bill that its “restrictions and requirements mirror those imposed on electronic trading in the financial sector.”

The problem with these analogies is that there actually is no requirement in securities law that prohibits brokers from owning exchanges on which stocks are traded. Goldman Sachs does not own the NYSE, but it does own a [different stock exchange](#) (called SigmaX2) where the same stocks are bought and sold. In fact, [about half](#) of all stock trades are made on trading venues (i.e., exchanges by a different name) owned by brokers.

Thus, while the AMERICA Act would ban Google from acting as a broker on its own ad exchange, securities law—on which the law is purportedly founded—permits exactly this same conduct.

THE BEST-INTERESTS STANDARD MAY BE IMPOSSIBLE TO ENFORCE IN AD TECH

The AMERICA Act would also create a legal duty to act in a client's best interest when helping them buy or sell ads. This is similar to rules in securities law, but one of the reasons such duties exist in stock markets is precisely *because* brokers may own exchanges and otherwise act on behalf of clients when there are real or potential conflicts of interest.

While stockbrokers do have [a duty](#) to execute trades at the best price, there is some discretion baked into the system, especially since price is not the only factor customers care about. A recent [empirical study](#) found that only about 43% of trades were made at the "best" price, because of the impact of various discounts and other factors paid by exchanges.

As difficult as it is to enforce a best-interests rule in stock markets, establishing something akin to it in online display advertising would be a monumental task. While a stock has one price for every potential investor at any time, and it has some intrinsic value, online advertisements have many more degrees of interest. In online display-ad auctions, the price is set for a particular viewer at a particular location at a particular time. These multiple factors, and the lack of any objective valuation, makes determining the "best" price, or even a reasonable price, far more complex.

The AMERICA ACT proposes that the best-interests rule would be enforced by the U.S. Justice Department and state attorneys general, but this is a massive underestimate of the bureaucracy needed to establish and enforce such rules.

ADS AREN'T STOCKS

Plenty of markets involve vertical integration with conflicts of interest, but do not require

physical separation or impose fiduciary duties. For instance, auction houses provide a venue where buyers and sellers come together to bid on art and antiquities, while also providing services and advice to buyers and sellers, as well as sometimes bidding on items themselves.

The AMERICA Act takes a belt-and-suspenders approach that offers more supposed protection for advertisers and ad buyers than stock traders, even though the potential mischief and consequences are greater in the securities world. Ordinary Americans have their savings and their futures bet in the stock markets, not in ad markets, which are merely places where business-to-business services are bought and sold. There is no investment or speculation in ad markets.

Ultimately, the stock market is regulated as it is because of the profound social importance of accurate stock prices, not because of overriding concerns about conflicts of interests in general. Stocks are regulated as they are because they are stocks. Ads are not stocks, and thus, regulating them like stocks makes no sense.

For a more extensive treatment of this issue, see the ICLE white paper "[Ads Aren't Stocks, or How Bad Analogies Make Bad Law](#)," as well as other ICLE research on the law & economics of digital advertising [here](#) and [here](#).

CONTACT US



M. Todd Henderson
ICLE Academic Affiliate
University of Chicago Law School

ICLE



International Center
for Law & Economics