



August 13, 2019

The Honorable Susan Wild
The Honorable Van Taylor
Committee on Ethics
United States House of Representatives
1015 Longworth House Office Building
Washington, DC 20515

Via e-mail to Ethics.Comments@mail.house.gov

Re: Additional input on regulating outside positions held by House Members, officers, and employees

Dear Rep. Wild and Rep. Taylor:

Thank you for your invitation to provide additional input regarding the Committee on Ethics' efforts to clarify the rules that should apply to outside positions held by House Members, officers, and employees. In submitting this supplemental comment, Citizens for Responsibility and Ethics in Washington ("CREW") again thanks the Committee for establishing this Working Group, obtaining input from the public and good government community as part of that study, and engaging in a public dialogue on these issues.

Within the framework of the four general principles identified in our original submission, we believe the Committee should be mindful of three additional considerations: First, while disclosure is a critical tool for identifying conflicts of interest, it is not a *remedy* for conflicts.

Second, any time a Member, officer, or employee has a position involving a fiduciary relationship with an outside entity, that relationship presents at least a potential conflict of interest. And third, the risk of an actual conflict and reputational damage to the House is heightened when the outside position a Member, officer, or employee holds is with a private for-profit entity.

I. Disclosure is not a Remedy

While CREW generally supports increased disclosure especially by Members of Congress and senior staff, it is important to recognize that disclosure is simply a tool by which conflicts of interest can be identified. Disclosure is a means to an end, rather than an end in itself. In fact, increasing disclosure of conflicts without creating a means to remedy them could have the perverse outcome of increasing public mistrust in government. As noted in our prior submission, the executive branch ethics program is focused on conflicts of interest and the appearance of conflicts of interest both “to ensure the integrity of governmental decision making and to promote public confidence by preventing conflicts of interest.” If the House adopts a “disclosure alone” approach to outside positions, neither of the concerns raised by conflicts of interest will be addressed in any meaningful way. This is why it is critical that the Committee consider, in addition to any increased disclosure of conflicts, a real remedy to ameliorate them.

The best remedy to address an actual or potential conflict of interest is to remove the conflict. Divesting of conflicting assets or resigning positions of influence functions both prophylactically

by ensuring that Members, officers, and employees do not have conflicts to begin with, and also serves as a powerful remedy when conflicts do arise. Divestment or resignation immediately removes any ongoing implication or question of undue influence which, as we have discussed, can be as dangerous to the integrity of government decision-making and public confidence in government as the original conflict itself.

Recusal is an alternative remedy the Committee could consider in its approach to outside positions, but this remedy has some limitations. If the House adopts a rule requiring that officers and employees must recuse from certain matters based on their outside positions, the Committee should also provide public guidance to House offices on protocols they should put in place to ensure compliance. Federal regulations (*see, e.g.*, 5 CFR 2634.804(b)(1)), as well as Office of Government Ethics (OGE) legal advisories provide some guidance on this front, but we recognize that OGE's rules may not be the ideal process for ensuring that the Committee is aware of and Members can enforce recusals among their staff. Regarding Members, the Committee has already acknowledged that the House rule on recusal or abstention from voting currently applies only "in rare instances" where a direct personal interest in a matter exists. Recusal is a problematic way to resolve conflicts of interest by Members because it undermines their constituents' right to representation in the House. The American public deserves elected Members of Congress that can fully participate in all aspects of their government service, including sitting on any committee and participating in every vote of the House. They also deserve representatives in Congress who conduct their work on behalf of their constituents without conflicts of interest. Recusal is a remedy that can work for officers and employees of the

House but is flawed, at best, when applied to Members. This is precisely why divestiture from conflicting assets or resignation from outside positions is the best way for Members to remedy conflicts while balancing the representational needs of their constituents.

II. Fiduciary Relationships with Outside Entities Create Potential Conflicts

We recognize that the Committee is wary of creating a blanket prohibition on Members, officers, and employees holding positions with outside entities that include a fiduciary relationship with the outside entity. However, the legal requirements stemming from such positions make the appearance (and likelihood) of a conflict so powerful that anything short of a blanket prohibition can create conflicts that are legally challenging for Members to navigate and deeply problematic for their constituents. These positions not only call into question the Member's (and their staff's) work on behalf of their constituents, but in some instances they may actually place Members, officers, and employees in a position where their obligations to the outside entity bar them from acting in the best interest of the public.

We understand that there may be specific instances where such a blanket prohibition need not apply. In these circumstances, some of which we discussed during the Working Group meeting, we believe the Committee should design clearly-articulated exceptions. These could include, for example, positions on quasi-governmental entities such as the Board of Regents of the Smithsonian Institution or the John F. Kennedy Center for the Performing Arts; and state or local non-profit organizations that have limited interaction with the federal government.

Likewise, during the Working Group meeting we briefly discussed whether the Committee should adopt a blanket prohibition on fundraising for non-political nonprofits. As stated during the public meeting, we believe that these arrangements should be carefully scrutinized, as they raise questions about whether wealthy special interests or others looking to buy influence could use these fundraisers as a mechanism to improperly access or influence the Member.

We also understand that there may be circumstances that pose less risk. Ultimately, we think the Committee should consider a blanket prohibition on any position with a nonprofit that requires fundraising, and similar to the blanket prohibition on fiduciary roles with outside entities, the Committee should craft limited but detailed exceptions where this prohibition would not apply. As discussed during the Working Group's public meeting, Members of Congress can use their public platform to do good by fundraising on behalf of civic organizations, but Members of Congress are elected to do the public good by representing their constituents' interests in Washington. That privilege comes with the responsibility to ensure their decisions are not susceptible to improper outside influence, and some limitations to preserve public integrity and faith in government are appropriate.

We would be happy to help the Committee draft narrowly-tailored exceptions to a blanket prohibition on fiduciary positions with outside entities and fundraising roles with non-political nonprofits.

III. For-Profit Entities Pose a Heightened Conflict of Interest Risk

We believe that Members of Congress should be prohibited from holding any paid or unpaid position in any private for-profit company, regardless of whether the position comes with a fiduciary or fundraising responsibility. As others, including Public Citizen, discussed during the Working Group's public meeting, these positions create heightened risks of conflicts of interest. The practical and reputational risks to the Member and the House are too great to mitigate any public or personal benefit arising from a Member holding such a position.

In particular, we share Public Citizen's concerns about Members holding positions with — and financial interests in — privately held or limited liability companies (LLCs). Many such companies are almost totally opaque about their own financial relationships. As a result, identifying potential conflicts that could arise for a Member who holds a position in one can be difficult, if not impossible. Not only does this opacity make preventing actual conflicts more difficult, it also greatly increases the risk of even a perceived conflict of interest.

We also recommend that the Committee consider whether senior staff members should be allowed to hold similar positions in private for-profit companies. While the reputational risk may be less for staff than Members, the potential for conflicts remains as high when people in positions to craft legislation or drive policy decisions are allowed to have interests in opaque

for-profit companies. This is an area where there is room for nuance and the Committee should consider developing different rules based on seniority of staff and proximity to policy-making.

IV. Conclusion

We would like to make one final recommendation: that the Committee consult with the non-partisan staff of the Office of Congressional Ethics in this process. OCE is another stakeholder that has useful expertise and perspective on these issues, and the Committee should consult with and consider requesting public comment from OCE's Staff Director.

In closing, we thank the Committee once again for the seriousness and spirit of bipartisanship with which it has addressed these pressing issues. As both Representatives Wild and Taylor noted during the Working Group's public meeting, this is an example of the way our government can and should function when everyone comes together for a common goal. We stand ready and willing to assist the Committee should you have any additional questions or concerns regarding these or other issues we have previously raised.

Sincerely,



Donald K. Sherman
Deputy Director
Citizens for Responsibility and Ethics in Washington

cc: Chairman Ted Deutch
Ranking Member Kenny Marchant