



April 18, 2022

The Honorable Zoe Lofgren  
Chairperson, Committee on House Administration  
House of Representatives  
1309 Longworth House Office Building  
Washington, DC 20515

The Honorable Rodney Davis  
Ranking Member, Committee on House Administration  
House of Representatives  
1216 Longworth House Office Building  
Washington, DC 20515

Dear Chairperson Lofgren and Ranking Member Davis:

Thank you again for affording the Project On Government Oversight (POGO) the opportunity to testify today, and thank you for holding a hearing on the important issue of congressional stock trading. As laid out in POGO's testimony, we urge Congress to act immediately to ban members, their immediate families, and their senior staffs from trading stocks.<sup>1</sup> But understanding that transformational reforms take time in Congress, we also wanted to take this opportunity to lay out what POGO would encourage Congress to consider next — a much stricter ban that applies to Congress and across government.

A law with government-wide applicability should permit officials to invest in diversified mutual funds (including diversified exchange-traded funds) and Treasury bonds, but should prohibit most other investments. The law should apply to all elected and politically appointed officials in the federal government's three branches, as well as to a limited number of career officials in specified top executive positions.<sup>2</sup> Consistent with existing practice for presidential appointees to Senate-confirmed positions in the executive branch, divestiture would be required within 90 days of an individual commencing service in a covered position.<sup>3</sup>

Several narrow exceptions could apply. The law could exempt personal residences; interests in a spouse's employer; family farms; defined benefit pension plans in any employer; diversified

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<sup>1</sup> POGO has called for passage of a congressional stock trading ban that merges the best elements of the TRUST in Congress Act (H.R. 336), the Ban Congressional Stock Trading Act (S. 3494), and the Bipartisan Ban on Congressional Stock Ownership Act of 2022 (H.R. 6678; S. 3631).

<sup>2</sup> We do not recommend including all public financial disclosure filers in these new restrictions, as that population includes medical doctors and others who have no supervisory authority. *See* 5 U.S.C. app. § 101(f)(3).

<sup>3</sup> 5 C.F.R. § 2634.802(b).

mutual funds held in any employer-sponsored retirement plans; any other type of diversified investment funds held in an employer-sponsored fund, provided that the plan is managed by an independent trustee; any holding of a federal, state, or local government retirement plan, provided that the holding is not an interest in an individual company; and qualified tuition plans (529 plans). Cash equivalents, such as money market mutual funds or certificates of deposit, could also be exempted from the prohibition on ownership. The prohibition would not cover automobiles, artwork, and other personal property.

There should be specific provisions addressing divestitures to prevent covered officials from gaming the system. The law should provide that a sale in exchange for a note, such as an I.O.U. note, does not qualify as a divestiture. Likewise, a sale or gift to a “discretionary trust” should not qualify as a divestiture if the employee, their spouse, or their minor child is an eligible recipient.<sup>4</sup> In the case of any sale to a relative or a trust for the benefit of a relative, the law should require the employee to make full public disclosure of the terms of the sale, including sale price, method and timing of payment, and all other terms or conditions. The law should also include a public disclosure requirement for employees who ever reacquire the asset by gift, purchase, inheritance, or other means, even if they do so after leaving the government. Finally, the law could grant slightly longer deadlines, such as 180 days instead of 90 days, to divest private investment funds; however, the divestiture requirement should not be extended further or lifted merely because an employee has outstanding capital commitments (because, after all, the employee made the choice to go into government).

Exceptions for certain family trusts can be granted to avoid forfeiture of an investment portfolio, but only in the case of executive branch officials who are subject to the conflict of interest law 18 U.S.C. § 208, which includes a recusal framework to manage the potential conflict. Officials in the legislative and judicial branches are not subject to the recusal requirement under the criminal conflict of interest law; therefore, there is no way to manage any conflicts of interest created by a family trust and should not be exempted for those officials.<sup>5</sup>

This family trust exception should be extremely narrow to address only trusts that are truly beyond the control of the employee. Therefore, the exception should apply only when all of the following conditions are met:

1. The trust is irrevocable.
2. The grantor of the trust is not the employee, their spouse, their minor child, or a trust for the benefit of any such person.

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<sup>4</sup> The Office of Government Ethics defined the term “discretionary trust” in a legal advisory. Office of Government Ethics, “Discretionary Trusts,” Legal Advisory DO-08-024, August 6, 2008, [https://www.oge.gov/Web/oge.nsf/Legal%20Docs/F24E8762B7CBAFCE852585BA005BECCA/\\$FILE/DO-08-024.pdf?open](https://www.oge.gov/Web/oge.nsf/Legal%20Docs/F24E8762B7CBAFCE852585BA005BECCA/$FILE/DO-08-024.pdf?open).

<sup>5</sup> If Congress wanted to create an exception for certain family trusts, it could require that members recuse from any deliberations or votes on legislation affecting interests held in those family trusts. While that would deprive their constituents of a voice in Congress, their constituents would have the option of voting for a candidate who has not chosen to be sidelined by conflicts of interest. Any such recusal requirement should commence at the beginning of a new term, so that constituents have the option to vote out any members who refuse to put the public’s interest first. Alternatively, Congress could, at least, restrict members from committee assignments likely to give rise to conflicts of interest related to their personal financial interests.

3. No property or money has been contributed to the trust by the employee, their spouse, or their minor child.
4. No property or money has been contributed to the trust by another trust that would not meet the standard established in this section.
5. The trust was established either:
  - a. prior to this law becoming applicable to the employee; or
  - b. upon, or incident to, the death of a person.
6. Neither the employee nor their spouse or minor child has any control over the holdings of the trust or power to replace the trustee.
7. The employee or their spouse has submitted a written request to the trustee that covered investments be divested and has received either a negative response or no response at all.

For any permissible trades, such as purchases and sales of diversified mutual funds or the exercise of stock options in a spouse's employer, the official should be subject to a requirement to file an irrevocable notice of the trade not less than 45 days before the trade. The notice should be released publicly online on the 46th day after filing. All covered officials, including judges, should also be subject to the requirement to file a periodic transaction report. The law could also impose a blackout period on trading by Members of Congress, their spouses, and their minor children while Congress is in session, excluding pro forma sessions.

Several reforms are needed specifically for judicial branch officials. Judges and Supreme Court justices should be required to file public statements articulating their reasons for recusing or declining to recuse from cases. They should be subject to an absolute ban on any outside earned income or royalties, including from book sales and teaching. They should also be subject to the criminal conflict of interest law 18 U.S.C. § 208. Moreover, the Supreme Court should be required to adopt a code of ethical conduct.

Transparency and enforcement with respect to all requirements applicable to top government officials should be greatly enhanced. All covered executive branch officials, including White House appointees, and senior congressional staffers should be required to sign ethics agreements identifying the steps they will take to avoid conflicts of interest. The supervising ethics offices for all three branches should be required to put in writing and to post online all of the following records pertaining to covered officials: ethics agreements, certifications of ethics agreement compliance, requests for certificates of divestiture, certificates of divestiture, screening arrangements, qualified blind trust agreements, qualified blind trustee notices of sales, advance notices of trades, financial disclosure reports (including periodic transaction reports),<sup>6</sup> ethics waivers, written notices of the acceptance of gifts that are given by prohibited sources or because of one's official position,<sup>7</sup> and all ethics-related approvals and authorizations.<sup>8</sup> To ensure that

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<sup>6</sup> We are not advocating that the disclosures of all 26,000 public filers in the executive branch be posted online, only those filed by elected officials, political appointees, and senior congressional staffers.

<sup>7</sup> The Office of Government Ethics has defined the term "prohibited source" at 5 C.F.R. § 2635.203, and we would add lobbyists to this definition. We would not, however, require disclosure of gifts from a spouse, relative, or fiancée.

<sup>8</sup> POGO also has a proposal for a database of executive branch ethics records that we would be happy to share on request.

officials remain willing to seek ethics advice however, Congress should not require the online posting of records of individual advice and counseling provided by ethics officials.

The executive branch ethics program should be enhanced by granting full branch-wide investigative authority to an office that must conduct investigations at the request of the director of the Office of Government Ethics (OGE). The investigative office should be one that already has both investigative authority and an adequately resourced, experienced staff to conduct meaningful investigations. One option would be to create an executive branch-wide inspector general with ordinary investigative and audit responsibility over all executive branch programs and officials (excluding the president and the vice president) that are not currently subject to the jurisdiction of an inspector general, with supplemental ethics jurisdiction over the rest of the executive branch (again, excluding the president and vice president) upon request of OGE's director.<sup>9</sup> Another option might be to assign this investigative authority to the Special Counsel of the U.S. Office of Special Counsel.

Whoever receives the investigative authority, however, the authority should only be to investigate and write a factual report; it should not include authority to recommend a decision. Having two different offices opine on whether a violation occurred could weaken enforcement if the two offices were to disagree, and only OGE possesses the necessary expertise to consider the application of government ethics laws and regulations. Finally, Congress should rescind subsection (f) of OGE's organic statute, which unreasonably hampers the office's ability to enforce government ethics requirements.<sup>10</sup> In its place, Congress should substitute language authorizing the office to request an investigation, consider an employee's written or oral response, and either drop the matter or prosecute the employee before the Merit Systems Protection Board (MSPB), which should have the authority to impose penalties.

The MSPB should have the authority to impose stiff penalties on political appointees in the executive branch, and its decisions should be subject only to limited judicial review. Penalties for noncompliance with a requirement to divest an asset could include either total forfeiture of the asset or a significant percentage of the value of the asset, as well as a civil monetary penalty. For other violations, penalties would include only civil monetary penalties proportional to the seriousness of a violation of OGE's regulations. A decision by the MSPB could be appealed to the Court of Appeals for the Federal Circuit. As is currently the case for appeals from final decisions of the MSPB, however, the court should conduct only a limited review circumscribed by statute.<sup>11</sup>

These recommended reforms would greatly strengthen the government ethics program. We emphasize again, however, that pursuing these reforms should occur after Congress moves quickly to enact a congressional stock trading ban.

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<sup>9</sup> The Campaign Legal Center made a similar proposal with which we agree, except that POGO believes the investigator should have no authority to decline to conduct an investigation upon receipt of a request of the Director. Walter Shaub, "Policy Proposals on Ethics," Campaign Legal Center, November 9, 2017, <https://campaignlegal.org/document/walter-shaub-policy-proposals-ethics>.

<sup>10</sup> 5 U.S.C. app. § 402.

<sup>11</sup> 5 U.S.C. § 7703.

Thank you again for the opportunity to provide POGO's perspective on this important issue. My colleagues and I remain ready and willing to assist in your efforts however we can.

Sincerely,

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Director of Public Policy

Walter Shaub  
Senior Ethics Fellow