



July 11, 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: Regulation on outside positions held by House Members, officers, and employees

Dear Rep. Wild and Rep. Taylor:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully submits this comment in response to the Statement of the Chairman and Ranking Member of the Committee on Ethics Regarding the Establishment of a Working Group (“Statement”)¹ issued on June 26, 2019. In that statement, the Chairman and Ranking Member announced the creation of a working group of the Committee on Ethics (“Committee”) in response to a provision in House Resolution 6. That provision created a new clause in the House’s Code of Conduct prohibiting House Members, officers and employees from “serv[ing] as an officer or director of any public company” effective January 1, 2020.² The new clause also requires that “[n]ot later than December 31, 2019, the Committee on Ethics shall develop regulations addressing other types of prohibited service or positions that could lead to conflicts of interest.”

CREW applauds the Committee on Ethics for establishing the working group to study this issue, and for obtaining input from the public as a critical part of that study. As a

¹ See <https://ethics.house.gov/press-release/statement-chairman-and-ranking-member-committee-ethics-regarding-establishment-worki-0>.

² H. Res. 6, sec. 102(ii).

nonpartisan, nonprofit government ethics watchdog committed to protecting the public from conflicts of interest, which can affect government officials at all levels of all branches of government, CREW appreciates the opportunity to provide its recommendations to the Committee. As a former counsel to the Committee under the leadership of Chair Zoe Lofgren and Ranking Member Jo Bonner, I welcome this opportunity to help advise the Committee on how to prevent actual and perceived conflicts of interest and to improve advice to and compliance by House Members, officers and employees. The Committee plays a critical role in ensuring that the American people have faith that the House of Representatives abides by the highest standards of ethical conduct. It was an honor to further this work as a member of the Committee staff, and now to have input in these ongoing efforts.

Consistent with the provisions of House Resolution 6 and the Committee’s Statement seeking comment, CREW’s recommendations do not address positions of “officer or director of any public company.” The Statement suggested two specific topics commenters might address: “how commenters recommend the Committee approach regulation of outside positions generally, and which outside positions are more likely to create an actual or perceived conflict of interest and why.” We address each of these topics in turn.

I. Recommendations for the Regulation’s General Approach to Outside Positions

CREW recommends four general principles to guide the Committee’s approach to regulation of outside positions:

1. The core goal is to prevent conflicts of interest before they arise.
2. Not all conflicts of interest are financial.

3. The perception of a conflict of interest can be as harmful as its existence.
4. Government officials in different positions need different ethics rules.

To illustrate these principles, it can be helpful to look to the approaches of the Committee's coordinate branches of government, each of which have developed thoughtful, and necessarily different, rules to guide the conduct of the public officials in their branch. Some of the specific rules they contain will of course not be appropriate for the regulation the Committee ultimately adopts, because the legislative branch officials to be covered by this regulation are differently situated in important ways. For example, the officials involved are sometimes not permanent employees or temporary appointees like many officials in the executive branch, nor are they lifetime appointees like many officials in the judicial branch. However, the common features of these different codes reflect the importance of these general principles.

1. The core goal is to prevent conflicts of interest before they arise

The regulations promulgated by the Office of Government Ethics ("OGE") to implement the ethics program for the executive branch explain that "[t]he primary mission of the executive branch ethics program is to prevent conflicts of interest."³ They further explain that this "mission is focused both on conflicts of interest and the appearance of conflicts of interest"⁴ and that these goals serve a dual function: "to ensure the integrity of governmental decision making and to promote public confidence by preventing conflicts of interest."⁵

³ 5 C.F.R. § 2638.101(a).

⁴ 5 C.F.R. § 2638.101(b).

⁵ 5 C.F.R. § 2638.101(c).

Similarly, the Code of Conduct for United States Judges (“Judicial Code”), promulgated by the Judicial Conference of the United States, asks federal judges to take a preventative approach to managing conflicts, providing that a judge should not engage in “business relationships with lawyers or other persons likely to come before the court on which the judge serves”⁶ and should, as soon as reasonably possible, “divest investments and other financial interests that might require frequent disqualification.”⁷

2. Not all conflicts of interest are financial

Although financial interests may come most readily to mind, other potential conflicts can also present risks. As OGE’s regulation notes, conflicts of interest can “stem from financial interests; business or personal relationships; misuses of official position, official time, or public resources; and the receipt of gifts.”⁸ Executive branch agencies have addressed these risks in ways specific to the roles of the officials in question. For example, the Department of Justice highlights two categories of conflicts policies that are relevant to its employees: financial conflicts and personal conflicts.⁹ Personal conflicts include the executive branch wide impartiality rules, which prohibit participation in a particular matter with specific parties where one of the parties is: “[s]omeone with whom an employee has or is seeking employment, or a business, contractual or other financial relationship; [a] relative with whom an employee has a close relationship; [a] present or prospective employer of a spouse, parent or child; or [a]n

⁶ Code of Conduct for United States Judges, Canon 4(D)(1).

⁷ Code of Conduct for United States Judges, Canon 4(D)(3).

⁸ 5 C.F.R. § 2638.101(b).

⁹ See <https://www.justice.gov/jmd/conflicts>.

organization which an employee now serves or has served, as an employee or in another capacity, within the past year.”¹⁰

The Department of Justice has also, however, identified other relationships that could give rise to conflicts requiring employees to be disqualified: a “political relationship,” which it defines as “a close identification with an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof”¹¹ and a “personal relationship,” which it defines as “a close and substantial connection of the type normally viewed as likely to induce partiality.”¹²

The Judicial Code observes that while judges may be part of “a nonprofit civic, charitable, educational, religious, or social organization,” some limits on that participation are necessary.¹³ For example, judges may not be legal advisors to such organizations, should not provide investment advice to them, and should not personally participate in fundraising for them except for soliciting donations from the judge’s own family and from those fellow judges “over whom the judge does not exercise supervisory or appellate authority.”¹⁴

3. The perception of a conflict of interest can be as harmful as its existence

OGE’s regulation emphasizes that preventing conflicts of interest serves both of its twin aims – “to ensure the integrity of governmental decision making and to promote public

¹⁰ *Id.*

¹¹ 28 C.F.R § 45.2(c)(1).

¹² 28 C.F.R § 45.2(c)(2).

¹³ Code of Conduct for United States Judges, Canon 4(B).

¹⁴ Code of Conduct for United States Judges, Canon 4(B) and (C).

confidence.”¹⁵ Similarly, the Judicial Code provides that “[a] judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.” In the Judicial Conference’s commentary on this canon, it notes that judges’ “[a]dherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.”

4. Government officials in different positions may need different ethics rules

A final observation about the ethics programs for the executive and judicial branches derives less from any of their individual provisions and more from their structure. In each set of rules, baseline obligations are applicable to all government officials to whom the rules apply, but some rules are customized to address the specific risks of conflicts of interest that different officials face. In the case of the executive branch, some provisions – like the Standards of Conduct – apply broadly to employees in the executive branch, while other provisions – like the Department of Justice’s political and personal conflict regulations – apply only to certain employees. Similarly, the Judicial Code applies only to full-time judges of United States courts; a separate, but similar, code governs the conduct of non-judge employees of the judiciary.¹⁶ CREW encourages the Committee to consider a similar approach if it concludes that the conflict risks of different types of officials merit different rules; for example, we believe the Committee should consider that Members are differently situated than staff, and also that among staff there

¹⁵ 5 C.F.R. § 2638.101(c)

¹⁶ Code of Conduct for Judicial Employees, *available at* https://www.uscourts.gov/sites/default/files/code_of_conduct_for_judicial_employees_effective_march_12_2019_0.pdf.

are relevant distinctions, including: staff paid at a senior rate versus those paid at a non-senior rate, and staff who work for a committee or a leadership office versus those who work in a Member's personal office.

II. Recommendations for Outside Positions the Regulation Should Address

CREW has identified three types of outside positions it believes the Committee should carefully consider addressing in its regulation:

1. Director, officer or substantial shareholder of a closely-held company

As the Committee knows well, closely-held companies (including family companies) in which Members of Congress continue to have a role while in office have frequently appeared in matters the Committee investigates.¹⁷ Conflicts of interest may arise out of these companies' interactions with the government, but also out of their non-governmental business dealings, including their major creditors, investors, and customers. Preventing these conflicts may be particularly difficult in these cases, because legal protections afforded by state laws often shield such entities from making information about their creditors, investors and customers publicly available, unlike their publicly-traded counterparts. CREW suggests that the Committee give

¹⁷ See, e.g., Report of the Committee on Ethics, In the Matter of Allegations Relating to Representative Roger Williams, Aug. 1, 2017 (involving a private firm of which the Member was the lone shareholder); Report of the Office of Congressional Ethics, Review No. 15-6530, available at https://ethics.house.gov/sites/ethics.house.gov/files/Rep.%20Grayson%20Report%20and%20Findings_0.pdf (involving a hedge fund and multiple law firms operated by Rep. Alan Grayson); Report of the Committee on Ethics, In the Matter of Allegations Relating to Representative Phil Gingrey, Dec. 11, 2014 (involving a community bank on which the Member served as a compensated member of the board of directors).

priority to addressing the range of potential conflicts of interest that can arise from Members' continued involvement with these companies.

2. Director or officer of a nonprofit civic, charitable, educational, religious, or social organization

Positions with nonprofit organizations can lead to conflicts or the appearance of conflicts, whether or not financial in nature, particularly if the organization has frequent occasion to interact with Congress (for example, via lobbying). CREW suggests that the Committee consider limits on holding positions with nonprofits that engage in more than a de minimis amount of lobbying to avoid the appearance of a conflict of interest.

3. Positions that involve fundraising for a non-political outside organization

Regardless of the type of organization, CREW suggests that the Committee consider whether specific limits on positions that involve fundraising on behalf of a (non-political) outside organization for categories of House members, officers and employees would be appropriate. Such positions present a particularly high risk of improper influence, and almost certainly present appearance issues that Members, at a minimum, should avoid.

Conclusion

CREW applauds the Committee for creating the working group and appreciates the opportunity to provide input as the working group begins its consideration. Revising the rules

that apply to outside positions will provide House Members, officers, and employees with clear guidance on how to avoid actual and perceived conflicts of interests, improve how Ethics Committee staff can educate on compliance and investigate potential abuses, and ensure greater accountability for the entire chamber. We stand ready to work with the Committee in any way we can as it develops the new regulation.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D.K. Sherman', with a long horizontal flourish extending to the right.

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

cc: Chairman Ted Deutch
Ranking Member Kenny Marchant