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The Hon. Susan Wild
The Hon. Van Taylor
U.S. House of Representatives
Committee on Ethics
1015 Longworth House Office Building
Washington, D.C. 20515

Submitted Electronically

Public Citizen Comments on Conflicts of Interest Rulemaking Pursuant to H.Res. 6

In reaction to allegations and the indictment of Rep. Chris Collins (R-NY) for insider trading, the U.S. House of Representatives approved a new clause in the Code of Conduct as part of H.Res. 6 prohibiting members from serving as an officer or director of any public company, including in an uncompensated capacity. The rule largely follows a similar ethics rule established in 1991 in the Senate, except that the House rule does not include the Senate's "grandfather" exemption that allows senators to retain their positions on a board if they served continuously for at least two years prior to election. Both the House and Senate rules allow members to sit on the board of directors of private companies and non-profit entities without compensation.¹

¹ Senate Rule XXXVII(6); House Rule XXIII(19) (effective Jan. 1, 2020).

H.Res. 6 also directed the House Ethics Committee to “develop regulations addressing other types of prohibited service or positions that could lead to conflicts of interest” no later than December 31, 2019. That is the subject of this rulemaking.

Public Citizen offers several recommendations to address potentially troubling conflicts of interest for members of Congress posed by service or positions outside of government. These include:

- Extend the ban on serving on a board of directors of a company beyond public corporations to include private corporations as well;
- Prohibit similar service as an officer or director of Limited Liability Companies (LLCs) that pose a potential conflict of interest with official duties;
- Establish recusal requirements for members who serve as an officer or director of a non-profit corporation; and
- Require that members and senior staff avoid individual stock ownership in entities they oversee from their official committee positions.

A. Prohibit Serving on the Board of Directors of a Private Company

Public Citizen applauds the actions of the 116th Congress to ban lawmakers from serving as an officer or director of a public company, a rule change championed by Reps. Tom Reed (R-NY) and Kathleen Rice (D-NY). Since the rule change was proposed, Public Citizen has advocated that the rule be expanded to prohibit service as an officer or director of private companies in addition to the existing ban regarding public companies.

Service on behalf of either a publicly traded or privately-owned company poses the same troubling potential for conflicts of interest. As a director of any company, private or public,

conflicts of interest for a lawmaker arise on at least two fronts. First, a member of Congress' primary responsibility is the interests of the public and their constituents. But the primary responsibility of a board member of a corporation is a fiduciary one, to maximize profit for shareholders. These competing roles pose an inherent conflict of interest.

Second, a company director has access to inside information about company performance and company needs and opportunities. This inside information may and, as current scandals suggest, have been used on occasion by lawmakers both for insider trading on the stock market and more egregiously to influence official actions that affect the bottom line of the company. Rep. Collins is now on trial for insider trading with information gleaned from his service on a corporate board. An Office of Congressional Ethics (OCE) investigation, triggered by a complaint from Public Citizen, also found "substantial reason to believe" that Collins "took official actions or requested official actions that would assist" the company that he served, Innate Immunotherapeutics, Inc.² These official actions included promoting legislation that would directly benefit the company, such as the 21st Century Cures Act as well as legislative proposals to change U.S. Food and Drug Administration rules on testing new medications.

The emphasis on public corporations in the Senate and House rules is in large part associated with stock trading activity and the potential to use insider information. However, the conflicts of interest that arise with serving as an officer or director of any company, public or private, go far beyond the stock market since the member may be in a position to directly influence policy that improves a company's bottom line.

² Office of Congressional Ethics, OCE Referral Regarding Rep. Chris Collins (Oct. 12, 2017), available at: <https://oce.house.gov/reports/investigations/oce-referral-regarding-rep-chris-collins>

Therefore, we urge the House to use this rulemaking to extend the ban on serving as an officer or director of a public company to private companies as well.

B. The Unique and Troubling Case of LLCs

A Limited Liability Company (LLC) is a unique form of a business entity. It is a commercial structure that combines the potential for pass-through taxation similar to a partnership or a sole proprietorship while enjoying the limited liability afforded a corporation.³ The owners of an LLC are “members” whose rights and responsibilities are articulated in an operating agreement, laid out in a charter filed usually with state officials. This charter may or may not establish a board of directors, but the operations of the LLC are nevertheless managed and overseen by its members.

Ownership of LLCs are particularly prevalent among members of Congress, much more so than serving as an officer or director of a private or public company. In fact, several members of Congress are members of multiple LLCs.

According to preliminary research conducted by Justin Glawe, an independent journalist, and Talmon Smith, Glawe’s editor at the *New York Times* for a research project on this issue, at least 60 members of Congress are associated with more than 100 for-profit companies, particularly LLCs.⁴

³ Cornell Law School, “Limited Liability Company (LLC),” available at: https://www.law.cornell.edu/wex/limited_liability_company_%28llc%29

⁴ Justin Glawe and Talmon Smith, *New York Times* (forthcoming).

These for-profit entities may well pose the exact same conflict of interest concerns as other private and public companies. Members of LLCs often will have an inherent interest to maximize profits; are provided access to inside information of the company's operations and interests; and, as lawmakers, could influence their bottom lines through official actions.

To make matters worse, LLCs often function without the same level of transparency as other corporations. While members of Congress must disclose any LLC on which they serve as a member, business partners are rarely disclosed, allowing for extensive business relationships to take place behind closed doors.

Serving as a "member" of an LLC with any authority to direct or control the business interest should be treated under congressional conflict of interest rules the same as serving as an officer or director of a private or public company and not allowed, except under circumstances that do not pose potential conflicts of interest. Some LLCs, for example, are formed merely to provide legal protection for managing a home or other personal property. Other LLCs qualify as "excepted investment funds" under the Ethics in Government Act. These types of arrangements should be exempt from conflict of interest rules. However, many LLCs are formed and run as regular for-profit business operations, which should be subject to the conflict of interest rules.

Furthermore, cases in which it is deemed appropriate for a member of Congress to operate an LLC, the member should be required to disclose additional information about the business, including the identities of other "members" of the LLC.

C. Recusal Requirements for Serving as an Officer or Director of a Non-Profit Entity

Though not as problematic as serving as an officer or director of a for-profit public or private corporation or LLC, a lawmaker directing a non-profit 501(c) organization may also trigger conflict of interest concerns. Most non-profit organizations associated with members of Congress serve useful and unbiased civic functions. They provide an opportunity for members to get involved with citizens and give back to the community.

But not all.

Some non-profit organizations receive public grants or government contracts from Congress or executive branch agencies. Some of these organizations even employ immediate family members of lawmakers.⁵ Other non-profit organizations, known as “dark money” groups, conduct extensive electioneering activity designed to influence the election or defeat of candidates for Congress. In these cases in which there is a clear and present conflict of interest between the non-profit organization and the self-interest of the lawmaker, Congress should at the very least require recusal by lawmakers that serve as officers or directors of such organizations from taking any official actions that directly and substantially benefit the non-profit.

⁵ Scott Higham, Kimberly Kindy and David Fallis, *Capitol Assets: Some Legislators Send Millions to Groups Connected to Their Relatives*, WASHINGTON POST (Feb. 7, 2012), available at: https://www.washingtonpost.com/politics/congress/capitol-assets-some-legislators-send-millions-to-groups-connected-to-their-relatives/2012/01/10/gIQAvrzdXQ_story.html?utm_term=.eb3522ea5771

D. Restrict Stock Ownership by Senior Staff and Members of Congress

When Public Citizen [asked for an investigation](#) of possible insider trading by Rep. Collins and then-Rep. Tom Price (R-Ga.), it raised the question of whether the Stop Trading on Congressional Knowledge (STOCK) Act has had any impact on members' stock trading activity at all. It was expected that the disclosure system would reduce stock-trading activity by Congress, especially in industries that members directly oversee, because the conflict of interest would now fall under public scrutiny. But the Collins scandal defied these expectations.

As a result, Public Citizen conducted a study on the impact of the STOCK Act on stock trading activity of senators. The Stock Act has indeed had a dramatic impact on stock-trading activity by senators, reducing both the overall volume of stock trades and the transaction value of those trades. Remarkably, the number of stock transactions three years before and after passage of the Stock Act has fallen by 68 percent. Furthermore, the monetary value of those stock trades has also fallen by 66 percent — an extraordinary achievement.⁶

But there is bad news as well. Of the senators who remain active in the stock market, they have a high propensity for trading stocks in businesses they directly oversee from their committees. From these perches, members of Congress often are privy to information that could directly affect the value of stocks, posing a serious conflict of interest when trading in those markets.

⁶ CRAIG HOLMAN AND GIZELA THOMAS, THE IMPACT OF THE STOCK ACT ON TRADING ACTIVITY BY U.S. SENATORS, 2005-2015 (June 22, 2017), available at: https://www.citizen.org/wp-content/uploads/migration/case_documents/2017_stock_act_report.pdf

Politico found a similarly disturbing trend in both chambers of Congress. Politico identified about 30 percent of members of the House and Senate who are currently active in the stock market. Several of these members play in investments in sectors over which they have some direct legislative responsibility — in some cases, even sponsoring legislation that could have a direct bearing on their stock investments.⁷

Senior congressional staff also tend to be very active in the stock market. A Politico review found that some senior aides regularly buy and sell stocks that present potential conflicts of interests with their work. Some staffers even trade in companies that lobby them and the committees on which they serve. In all, about 450 senior staff have played in the stock market since 2015.⁸

One option is to ban individual stock ownership by members of Congress altogether, as proposed by Sens. Elizabeth Warren (D-Mass.), Sherrod Brown (D-Ohio) and Jeff Merkley (D-Oregon).⁹ Another option would be to follow the lead of the executive branch and restrict stock ownership when it overlaps with the official duties of the officeholder. Since senior executive branch officials are required to divest themselves of any stocks and other properties that pose a direct conflict of interest with their official duties, at the very least, the same ethics standard should apply to Congress — both to members and senior staff. A member of the House Armed Services Committee, for example, should not be actively buying or selling stocks in the defense industry.

⁷ Maggie Severns, *Reckless Stock Trading Leaves Congress Rife with Conflicts*, POLITICO (May 14, 2017), available at: <https://www.politico.com/story/2017/05/14/congress-stock-trading-conflict-of-interest-rules-238033>

⁸ Maggie Severns, “Congressional Aides Risk Conflicts with Stock Trades,” Politico (Sep. 25, 2017), available at: <https://www.politico.com/story/2017/09/25/congress-aides-stock-market-trades-investments-analysis-242692>

⁹ S. 3357, Anti-Corruption and Public Integrity Act (Warren); S. 1393, Ban Conflicted Trading Act (Merkley, Brown).

Legislation passed by Congress subsequent to the STOCK Act eliminated the "searchable, sortable and downloadable" disclosure requirement of stock-trading activity, which makes the job of compiling this information far more difficult than it need be for watchdog organizations and the news media. In order to ensure compliance with the STOCK Act, it is imperative that Congress reestablish its searchable, sortable and downloadable disclosure system for stock trades by members and senior staff. No doubt the limited disclosure system still in place has contributed to the decline in congressional stock-trading activity. But the ongoing conflicts of interest in the stock market by some members of Congress and their staff call for a much more robust online disclosure system.

Public Citizen welcomes this rulemaking as a means to address serious congressional conflicts of interest associated with service or positions outside government. The new 116th Congress has already undertaken substantial measures to rein in conflicts of interest and has shown an inspiring openness to take even further steps. We offer the above recommendations for your consideration and urge you to include them in your rulemaking.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig Holman". The signature is fluid and cursive, with the first name "Craig" and last name "Holman" clearly distinguishable.

Craig Holman, Ph.D.
Government affairs lobbyist
Public Citizen's Congress Watch division
215 Pennsylvania Avenue SE
Washington, D.C. 20003
cholman@citizen.org