



Testimony of Liz Hempowicz, Director of Public Policy
Project On Government Oversight
Before the U.S. House of Representatives Committee on House Administration
On “Examining Stock Trading Reforms for Congress”
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Chairperson Lofgren, Ranking Member Davis, and Members of the Committee, thank you for inviting me to testify on behalf of the Project On Government Oversight (POGO) today, and thank you for holding a hearing on the important issue of congressional stock trading. POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

As of this writing, there are 123 Members of Congress cosponsoring legislation to restrict the owning and trading of stocks by Members of Congress.¹ That number continues to increase each week. It is gratifying to see so much bipartisan interest and support for strengthening congressional ethics. Because the American people have spoken out on this, it is not a partisan issue: Members of Congress from across the political spectrum see the need for change.

In fact, a strong majority of voters from both major political parties support a congressional stock trading ban. A Fox News poll recently found 70% of those it surveyed favored “[b]anning current members of Congress and their immediate family and staff from trading stocks.”²

POGO urges Congress to do the right thing and put the public’s interests ahead of its own. We encourage you to ban Members of Congress, their immediate families, and their senior staffs

¹ TRUST in Congress Act, H.R. 336, 117th Cong., (2021), <https://www.congress.gov/bill/117th-congress/house-bill/336/cosponsors>; Ban Conflicted Trading Act, S. 564, 117th Cong., (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/564/cosponsors>; Ban Conflicted Trading Act, H.R. 1579, 117th Cong., (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1579/cosponsors>; Ban Congressional Stock Trading Act, S. 3494, 117th Cong., (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/3494/cosponsors>; Bipartisan Ban on Congressional Stock Ownership Act of 2022, H.R. 6678, 117th Cong., (2022), <https://www.congress.gov/bill/117th-congress/house-bill/6678/cosponsors>; Bipartisan Ban on Congressional Stock Ownership Act of 2022, S. 3631, 117th Cong., (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/3631/cosponsors>; Ethics Reform Act, S. 3550, 117th Cong., (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/3550/cosponsors>; STOCK Act 2.0, S. 3612, 117th Cong., (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/3612/cosponsors>; STOCK Act 2.0, H.R. 6694, 117th Cong., (2022), <https://www.congress.gov/bill/117th-congress/house-bill/6694>; Banning Insider Trading in Congress Act, S. 3504, 117th Cong., (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/3504/cosponsors>; Banning Insider Trading in Congress Act, H.R. 6490, 117th Cong., (2022), <https://www.congress.gov/bill/117th-congress/house-bill/6490>.

² Fox News, “Fox News Poll,” January 23, 2022, https://static.foxnews.com/foxnews.com/content/uploads/2022/01/Fox_January-16-19-2022_Complete_National_Topline_January-23-Release.pdf.

from trading stocks. Specifically, POGO calls 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).³ POGO has a recommendation for a much stricter ban that applies more broadly across government, but we emphasize that Congress should act now on the pending bills and take up our stricter recommendation immediately afterward. Congress must not waste the momentum that has gathered behind the current effort to ban congressional stock trading by making the perfect the enemy of the good.

Restricting trades and, ideally, ownership of certain financial interests by Members of Congress, their spouses, and their minor children would — for the first time — create a government ethics program in Congress that puts public duty over private convenience. That is the kind of ethics program America deserves.

A Problem Too Long Ignored

In an opinion on government ethics issues, the Supreme Court cited the ancient maxim that “no man may serve two masters,” which it found “especially pertinent if one of the masters happens to be economic self-interest.”⁴ The court was writing about the executive branch conflict of interest law in that decision, but the maxim holds equally true for Congress.

Unfortunately, some Members of Congress have, thus far, declined to stop serving their economic self-interest. The result has been disastrous for public faith in the institution of Congress.⁵ We are here today in large part because Congress has drawn the wrong kind of attention to its Members with trades and conflicts of interest that have, quite understandably, alarmed the public. Even when elected officials have not engaged in criminal insider trading, the appearance of an overlap between their official and personal interests has been enough to undermine the public’s trust in the first branch of government.

The public’s perception didn’t come out of nowhere. A deluge of eye-opening press coverage has demonstrated a congressional stock trading problem that rages from seemingly benign missed public disclosure deadlines to criminal insider trading.⁶ In a recent article, *Insider*

³ TRUST in Congress Act, H.R. 336; Ban Congressional Stock Trading Act, S. 3494; Bipartisan Ban on Congressional Stock Ownership Act of 2022, H.R. 6678; Bipartisan Ban on Congressional Stock Ownership Act of 2022, S. 3631 [See note 1].

⁴ *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961), <https://supreme.justia.com/cases/federal/us/364/520/>.

⁵ Megan Brenan, “Americans’ Trust in Government Remains Low,” Gallup, September 30, 2021, <https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx>.

⁶ United States Attorney’s Office, Southern District of New York, “Former Congressman Collins Sentenced For Insider Trading Scheme And Lying to Federal Law Enforcement Agents,” January 17, 2020, <https://www.justice.gov/usao-sdny/pr/former-congressman-christopher-collins-sentenced-insider-trading-scheme-and-lying>; Kevin Breuninger, Dan Mangan, and Tucker Higgins, “Ex-New York congressman Chris Collins sentenced to 26 months for insider-trading tip to son,” CNBC, January 17 2020, <https://www.cnbc.com/2020/01/17/chris-collins-sentenced-to-26-months-for-insider-trading-tip.html>. Former Representative Collins was freed after serving less than three months of his sentence only because he received a presidential pardon. See Robert J. McCarthy, “Pardoned by Trump, a contrite Collins returns home a changed man,” *The Buffalo News*, December 24, 2020, <https://buffalonews.com/news/pardoned-by-trump-a-contrite-collins-returns->

reported on STOCK Act violations by no fewer than 57 Members of Congress.⁷ The same publication highlighted the lack of transparency regarding enforcement or compliance with the law, noting that Members and senior staffers have violated the law hundreds of times and only inconsistently incur minor penalties.⁸

I encourage Members of this committee to read this reporting. But instead of summarizing individual examples of real or perceived conflicts of interest, I want to reaffirm that the reason we're having this conversation today isn't because of any one instance. We're here because the barrage of these different examples across both chambers and parties has given the public an overwhelming perception that Congress is engaged in corrupt behavior when Members are allowed to freely trade individual stocks.

There are entire online communities dedicated to tracking congressional stock sales — not to hold Members accountable, but because some members of Congress outperform the market and an enterprising few want in on the action.⁹ It's no wonder the polling reflects an overwhelming desire for change.

Despite the public pressure, some Members of Congress have been outright dismissive about the possibility of restricting stock trades. In December, Speaker Pelosi brushed off a question about banning Members of Congress from trading stocks, saying “We are a free-market economy. They should be able to participate in that.”¹⁰ House Majority Leader Steny Hoyer (D-MD) echoed the sentiment a month later, suggesting that Members of Congress should be treated the same as members of the public who lack access to nonpublic information and do not wield governmental power. His position is that “members ought not to be in a different situation that

[home-a-changed-man/article_4a914ae4-4608-11eb-9974-0715d91f7b6b.html](https://www.washingtonpost.com/home-a-changed-man/article_4a914ae4-4608-11eb-9974-0715d91f7b6b.html) (last updated December 25, 2020); Robert Faturechi & Derek Willis, “Senator Dumped Up to \$1.7 Million of Stock After Reassuring Public About Coronavirus Preparedness,” *ProPublica*, March 19, 2020, <https://www.propublica.org/article/senator-dumped-up-to-1-7-million-of-stock-after-reassuring-public-about-coronavirus-preparedness>; Katelyn Burns, “Sen. Kelly Loeffler sold at least \$18 million more in stocks before the coronavirus crash than previously reported,” *Vox*, April 2, 2020, <https://www.vox.com/policy-and-politics/2020/4/1/21202900/kelly-loeffler-stock-sales-coronavirus-pandemic>; Tobias Hoonhout, “Dem Rep. Sells off Stock Purchase amid Coronavirus Outbreak after Being Confronted,” *National Review*, March 25, 2020 <https://news.yahoo.com/dem-rep-sells-off-stock-141014443.html>; Ryan Nicol, “Brian Mast ends 2021 with second-best stock record in Congress, with help from ‘unusual’ trade,” *Florida Politics*, January 18, 2022, <https://floridapolitics.com/archives/487252-brian-mast-ends-2021-with-second-best-stock-record-in-congress-with-help-from-unusual-trade/>; “Congressional Trading in 2021,” *Unusual Whales*, January 10, 2022, https://blog.unusualwhales.com/unusual_blog/post/congressional-trading-2021/.

⁷ Dave Levinthal, “57 members of Congress have violated a law designed to stop insider trading and prevent conflicts-of-interest,” *Insider*, February 15, 2022, <https://www.businessinsider.com/congress-stock-act-violations-senate-house-trading-2021-9> (last updated March 3, 2022).

⁸ Camila DeChalus, Kimberly Leonard, and Dave Levinthal, “Congress and top Capitol Hill staff have violated the STOCK Act hundreds of times. But the consequences are minimal, inconsistent, and not recorded publicly,” *Insider*, December 15, 2021, <https://www.businessinsider.com/congress-stock-act-violations-penalties-consequences-2021-12>.

⁹ Tim Mak, “TikTokers Are Trading Stocks By Copying What Members Of Congress Do,” *NPR*, September 21, 2021, <https://www.npr.org/2021/09/21/1039313011/tiktokers-are-trading-stocks-by-watching-what-members-of-congress-do>; See also “CongressStockWatcher,” *Reddit*, <https://www.reddit.com/r/CongressStockWatcher/> and “Congressional Trading in 2021,” *Unusual Whales* [See note 6].

¹⁰ Brian Slodysko, “Pelosi defends lawmaker stock trades, citing ‘free market,’” *Associated Press*, December 15, 2021, <https://apnews.com/article/business-nancy-pelosi-congress-8685e82eb6d6e5b42413417f3d5d6775>.

they would otherwise be if they weren't members of Congress."¹¹ Senator Tommy Tuberville (R-AL) colorfully expressed his opposition to a stock trading ban: "I think it's ridiculous. They might as well start sending robots up here." He added, "I think it would really cut back on the amount of people that would want to come up here and serve."¹² Representative Elaine Luria (D-VA) also voiced strong opposition to a stock ban, saying that, despite overwhelming public support for restrictions, "this whole concept is bullshit."¹³

Their outlook is not a new one. In 1962, Congress exempted itself from a new conflict of interest law that applied to executive branch employees, their spouses, their minor children, their general partners, and their prospective employers.¹⁴ But Members of Congress wield far greater power than nearly all of the 2.1 million federal workers who are subject to the federal conflict of interest law. Even so, the lowest entry-level federal employee is subject to stricter ethics restrictions than the powerful Speaker or Minority Leader of the House of Representatives or the Senate's leadership.¹⁵

Think about that: Elected officials whom the people have entrusted with the power to send Americans to die in wars, tax businesses, respond to crises, and regulate our very lives are subject to far lower standards than entry-level workers in the executive branch. Any service to the nation is noble work but scheduling appointments and making photocopies is far less likely to create conflicts of interest than serving in Congress.

Congress has asked other government officials to make financial sacrifices for public service, but has exempted its Members from this requirement for over half a century.¹⁶ The Senate routinely reviews ethics agreements of presidential nominees to executive branch positions that compel extensive divestitures to ensure compliance with the conflict of interest law.¹⁷ Yet Members of Congress are not subject to that law, despite the fact that they typically serve longer than these presidential appointees.

Former director of the U.S. Office of Government Ethics Walter Shaub and I recently wrote about this topic in an opinion piece for the *Washington Post*. There, we noted that others have tried to water down the notion of a stock trading ban by introducing bills that are too weak to produce meaningful change.¹⁸ Some have introduced bills that fail to cover spouses and minor

¹¹ Mike Lillis, "Joining Pelosi, Hoyer says lawmakers should be free to trade stocks," *The Hill*, January 19, 2022, <https://thehill.com/homenews/house/590428-joining-pelosi-hoyer-says-lawmakers-should-be-free-to-trade-stocks>.

¹² Eric Garcia, "Repeat STOCK Act violator Sen Tommy Tuberville calls trading ban for Congress 'ridiculous,'" *The Independent*, February 9, 2022, <https://finance.yahoo.com/news/repeat-stock-act-violator-sen-193143693.html>.

¹³ Bryan Metzger, "Rep. Elaine Luria slams proposals to ban stock trading by lawmakers: 'This whole concept is bullshit,'" *Insider*, February 10, 2022, <https://www.businessinsider.com/elaine-luria-opposes-stock-trade-ban-lawmakers-2022-2>.

¹⁴ 18 U.S.C. § 208 (2021), <https://www.law.cornell.edu/uscode/text/18/208>.

¹⁵ 18 U.S.C. § 208 [See note 14].

¹⁶ 18 U.S.C. § 208 [See note 14].

¹⁷ Office of Government Ethics, *Guide to Drafting Nominee Ethics Agreements*, at 27, (October 2020), [https://www.oge.gov/web/oge.nsf/0/E4716CFB6F236C1285258610004943C7/\\$FILE/Ethics%20Agreement%20Guide%20October%202020.docx](https://www.oge.gov/web/oge.nsf/0/E4716CFB6F236C1285258610004943C7/$FILE/Ethics%20Agreement%20Guide%20October%202020.docx) (revised May 26, 2021).

¹⁸ Walter M. Shaub, Jr. and Liz Hempowicz, "Here's how to ban congressional stock trading so politicians can't cheat," *Washington Post*, February 16, 2022, <https://www.washingtonpost.com/outlook/2022/02/16/congress-stock-ban-ossoff-warren-hawley/>.

children. Relying on these bills would be worse than enacting no ban at all because they would create the illusion of reform without addressing the problem.¹⁹ Others have suggested weak enforcement mechanisms, but we have already seen too little enforcement of the STOCK Act to skimp on enforcement of a congressional stock trading ban.²⁰ Some proposals would exempt assets Members already own, which would fail to address concerns about conflicts of interest.²¹ POGO opposes all of these bills for those reasons. Their sponsors are undoubtedly well-meaning, but their proposed language does not go far enough to solve the problem.

We call on Congress to take a meaningful step forward to reduce conflicts of interest and prevent even the appearance of insider trading. We also urge Congress to be transparent about the process of crafting a congressional stock trading ban. The decision to hold a hearing today is a good start. POGO urges the committee and Congress as a whole to subject any bill and amendments to public debate. Each Member should be clear about where he or she stands on important decisions, including decisions on the question of covering spouses and minor children.

The Solution

As a floor, we recommend that you require Members of Congress and their spouses to divest a broad array of investments with no exception for those held before taking office. Then, require Members to put any remaining assets in a blind trust that is subject to new disclosures about their holdings. The logic here is simple: Members of Congress have access to nonpublic information and the power to move markets. We must eliminate opportunities for insider trading and insulate Members from the perception that they are making decisions based on benefits to their own financial interest and at the expense of the public's interest.

There are numerous pending bills, some of which are strong and some of which are not. I will discuss key concepts, warn about potential pitfalls, and recommend an approach that best responds to the public's concern and capitalizes on this unique momentum.

Key concept: These reforms are straightforward.

Before getting into the complexities of individual proposals, I want to state clearly that a ban on stock trading is not complicated. Yes, exemptions, enforcement, and transparency certainly require some finesse. But opponents of a stock trading ban who try to derail reform by making the issue seem more complicated than it is are ignoring the fact that the executive branch has successfully applied a strict criminal conflict of interest law for over half a century.²² Some executive branch employees have long been subject to a variety of prohibited stock holding restrictions, which means even mandatory divestiture is not a new issue for the government.²³

¹⁹ See the Ban Conflicted Trading Act, H.R. 1579 and S. 564, [See note 1].

²⁰ See the Banning Insider Trading in Congress Act, H.R. 6490 and S. 3504, [See note 1].

²¹ See the Banning Insider Trading in Congress Act, H.R. 6490 and S. 3504; and the STOCK Act 2.0, H.R. 6694 and S. 3612, [See note 1].

²² 18 U.S.C. § 208 [See note 14].

²³ See, for example, 10 U.S.C. § 988 (2021), <https://www.law.cornell.edu/uscode/text/10/988>; 12 U.S.C. § 242-244 (2021), <https://www.law.cornell.edu/uscode/text/12/chapter-3/subchapter-II>; 15 U.S.C. § 2053(c) (2021), <https://www.law.cornell.edu/uscode/text/15/2053>; 31 U.S.C. § 329 (2021), <https://www.law.cornell.edu/uscode/text/31/329>; 43 U.S.C. § 11 (2021),

That it seems novel to Members of Congress owes solely to the fact that Congress chose to exempt its Members from the conflict of interest law for 60 years — and, as we all know, public confidence in the institution has suffered as a result.

In our conversations with congressional offices, my colleagues and I have heard some common questions about the fairness of extending the law to interests in spouses' employers, the ban's applicability to cryptocurrency or real estate, and the misperception that Members will receive statements revealing the holdings of qualified blind trusts — the same questions posed in a recent *Politico* article.²⁴ But my testimony today addresses these questions and shows the concerns they suggest are not obstacles to Members fulfilling their ethical duty to their constituents.

For example, some of the bills pending before Congress include an exception for interests in a spouse's employer.²⁵ It will not be difficult to apply the law to spouses whose profession requires them to buy and sell stocks for clients, because the ban would not cover stocks they do not own.²⁶ When it comes to cryptocurrency and real estate, Congress can follow the lead of the executive branch, which has had no difficulty understanding the application of the conflict of interest law, 18 U.S.C. § 208, to these types of investments.²⁷ As for blind trusts, there are many misconceptions about how they work and the law that governs them, but they can be clarified, as

<https://www.law.cornell.edu/uscode/text/43/11>; 5 C.F.R. § 3101.108 (2022), <https://www.law.cornell.edu/cfr/text/5/3101.108>; 5 C.F.R. § 3201.103 (2022), <https://www.law.cornell.edu/cfr/text/5/3201.103>; 5 C.F.R. § 3401.102 (2022), <https://www.law.cornell.edu/cfr/text/5/3401.102>; 5 C.F.R. § 4101.102-103 (2022), <https://www.law.cornell.edu/cfr/text/5/4101.102>, <https://www.law.cornell.edu/cfr/text/5/4101.103>; 5 C.F.R. § 5501.104 (2022), <https://www.law.cornell.edu/cfr/text/5/5501.104>; 5 C.F.R. § 5601.102 (2022), <https://www.law.cornell.edu/cfr/text/5/5601.102>; 5 C.F.R. § 6801.103 (2022), <https://www.law.cornell.edu/cfr/text/5/6801.103>; 5 C.F.R. §§ 8301.103 and 8301.107 (2022), <https://www.law.cornell.edu/cfr/text/5/8301.103>, and <https://www.law.cornell.edu/cfr/text/5/8301.107>; 5 C.F.R. § 9001.104 (2022), <https://www.law.cornell.edu/cfr/text/5/9001.104>; 5 C.F.R. § 9401.106 (2022), <https://www.law.cornell.edu/cfr/text/5/9401.106>; 17 C.F.R. § 140.735-2 (2022), <https://www.law.cornell.edu/cfr/text/17/140.735-2>.

²⁴ Katy O'Donnell, "Spouses, taxes and crypto: The unanswered questions for Congress' stock trading ban," *Politico*, February 12, 2022, <https://www.politico.com/news/2022/02/12/congressional-trading-bans-explained-00008245>.

²⁵ See, for example, the Ban Congressional Stock Trading Act, S. 3494; TRUST in Congress Act, H.R. 336 [See note 1].

²⁶ See, for example, §2(c) of the Bipartisan Ban on Congressional Stock Ownership Act of 2022, S. 3631, which specifies that "[n]othing in this section shall be construed to prevent ... a spouse of a Member of Congress from trading any asset described in subsection (b)(1) that is not owned by the spouse or Member of Congress in the course of performing the primary occupation of the spouse." [See note 1]; Katy O'Donnell, "Spouses, taxes and crypto," [See note 24].

²⁷ For a discussion of reporting requirements and conflict of interest restrictions, see U.S. Office of Government Ethics, Legal Advisory, "Guidance for Reporting Virtual Currency on Financial Disclosure Reports," LA-18-06, June 18, 2018, [https://www.oge.gov/Web/oge.nsf/Legal%20Docs/D9038B8D8DE24D88852585BA005BEC34/\\$FILE/LA-18-06.pdf?open](https://www.oge.gov/Web/oge.nsf/Legal%20Docs/D9038B8D8DE24D88852585BA005BEC34/$FILE/LA-18-06.pdf?open). See also U.S. Office of Government Ethics, Legal Advisory, "Real Estate Investment Trusts, Master Limited Partnerships, and Business Development Companies: Financial Disclosure Reporting and Conflicts of Interest Considerations," LA-21-02, January 6, 2021, [https://www.oge.gov/Web/oge.nsf/Legal%20Docs/84EBAF6D59346CC18525865500670703/\\$FILE/LA-21-02%20Real%20Estate%20Investment%20Trusts,%20Master%20Limited%20Partnerships,%20and%20Business%20Development%20Companies.pdf?open](https://www.oge.gov/Web/oge.nsf/Legal%20Docs/84EBAF6D59346CC18525865500670703/$FILE/LA-21-02%20Real%20Estate%20Investment%20Trusts,%20Master%20Limited%20Partnerships,%20and%20Business%20Development%20Companies.pdf?open).

I will explain in the next section. The core concept behind blind trusts is simple: trustees do not let Members know what assets they buy.²⁸

Congress has the power to make these policies more complex, but there is no need to do so. Adding an exemption for small business stocks could add complexity, but we don't think Congress should exempt small business stocks from the requirement to place assets in blind trusts. Adding an exemption for stocks a Member held upon taking office could add complexity. But we don't think Congress should exempt those stocks. Adding an exemption for small purchases of stocks could again add complexity. Again, however, we don't think Congress should add a *de minimis* exemption.

One guiding principle will simplify the work of drafting a congressional stock trading ban: Members should resist the temptation to put their personal interests ahead of the public's interest. They should write the law that their constituents would write, erring on the side of prohibiting the sort of conduct that has alarmed the public.

Ultimately, the issue before the committee need not be made complex. A ban on congressional stock trades, after all, is easy to articulate and easy to legislate: Do not trade stocks. Any complexity comes from the creation of tax code-like loopholes and exemptions. POGO stands ready to lend expertise in drafting clear legislative language that addresses any reasonable concerns members may have.

Key Concept: These reforms are reasonable.

All objections predicated on the unreasonableness of a stock trading ban should be dismissed out of hand. No one is calling for Members of Congress to put their money under their mattresses. A consistent position held by almost every commentator on this issue is that Members should be allowed to buy and sell diversified mutual funds. This approach is not novel; it is the one favored by the federal executive branch.²⁹

Similarly, any concerns about the reasonableness of covering the holdings of spouses and minor children should also be dismissed. Covering the financial interests of spouses and minor children is necessary to resolve concerns about the appearance of insider trading. The public has no way to know if a Member of Congress discusses nonpublic information at home and should not have to wonder whether that information is influencing trades. Covering the financial interests of the

²⁸ See, for example, § 102(f)(3)(C)(v) in 5 U.S.C. app. § 102 (2021), <https://www.law.cornell.edu/uscode/text/5a/compiledact-95-521/title-I/section-102>.

²⁹ See, for example, 5 C.F.R. § 2640.201 (2022), <https://www.law.cornell.edu/cfr/text/5/2640.201>. See also sections requiring the purchase of diversified mutual funds or Treasury bonds upon divestiture pursuant to a Certificate of Divestiture, 5 C.F.R. §§ 2634.1003(b), 2634.1006 (2022), <https://www.law.cornell.edu/cfr/text/5/2634.1003>, <https://www.law.cornell.edu/cfr/text/5/2634.1006>. While the executive branch has also exempted *de minimis* holdings in publicly traded securities, under 5 C.F.R. § 2640.202, such an exemption would be inappropriate for Members of Congress for two reasons. First, Members of Congress have far more authority than nearly all the 2.1 million executive branch employees. Second, the executive branch's exemption for *de minimis* holdings requires aggregation of the value of all holdings affected by a covered governmental matter, and this aggregation requirement would make implementation of the exemption difficult if it were applied more broadly to legislation on which Members of Congress vote.

Member's household would eliminate the appearance of insider trading by eliminating the opportunity for it. We need not debate whether Members are sharing nonpublic information that spouses are misusing; what matters is that the public reasonably perceives a risk of misuse. The very point of an ethics program is to remove risk, not to hope it doesn't materialize. Hope is not an ethics program.

The idea of covering the financial interests of an official's immediate family is not novel: Congress has done exactly that in the executive branch. The primary federal conflict of interest law has applied to the holdings of spouses and minor children of executive branch employees for over half a century. Only now that there is momentum to extend this same principle to Congress is there discussion about the fairness of including immediate family in these regulations. As my colleague, Walter Shaub, and I recently wrote:

“While working at the Office of Government Ethics, one of us (Shaub) spent over a decade forcing presidential nominees for Senate-confirmed posts to comply with a conflict of interest law that applied to them, their spouses and their minor children. In all those years, no senator picked up the phone after reading a nominee's ethics agreement to complain that making the nominee's spouse divest assets was unfair. Not once.”³⁰

It is also instructive to remember that Congress currently requires Members to file periodic transaction reports regarding sales and purchases of the assets of their spouses and dependent children under both the Ethics in Government Act and the STOCK Act. This disclosure requirement further underscores the fact that Congress knows the finances of a member's household are inextricably linked.

A bill that does not cover the immediate family of a Member of Congress would be worse than worthless — it would be a distraction, one that creates a false appearance of having solved the problem. POGO will oppose any bill that exempts spouses and minor children of Members from the stock trading ban.

Key Concept: Blind trusts all but eliminate the potential for insider trading.

The qualified blind trust program is a creature of statute, specifically the Ethics in Government Act.³¹ Under that law, Members of Congress do not receive statements from trustees revealing the holdings of blind trusts.³² Instead, they receive quarterly statements indicating only the total value of the trust. The trustees file tax returns for the blind trusts and supply Members with only enough information to complete their personal tax returns without revealing the holdings of their blind trusts.³³ A breach of confidentiality about the holdings of the trust would subject the person

³⁰ Walter M. Shaub, Jr. and Liz Hempowicz, “Here's how to ban congressional stock trading,” [See note 18].

³¹ 5 U.S.C. app. § 102(f)(3) (2021), [See note 28].

³² 5 U.S.C. app. § 102(f)(3)(C)(v) (2021), [See note 28].

³³ 5 U.S.C. app. § 102(f)(3)(C)(v) (2021), [See note 28]; Staff of Senate Select Committee on Ethics, 114th Cong., *Qualified Blind Trusts* 17-19 (Committee Print, September 2015), <https://www.ethics.senate.gov/public/cache/files/286a4cf9-5aab-40ef-9a6c-bf2278e79e38/qualified-blind-trusts-guide---october-2020.pdf>.

responsible to civil penalties.³⁴ A Member of Congress does not need to know the holdings of the trust in order to file an annual financial disclosure report, because they are not required to report the holdings of a qualified blind trust.³⁵

There are several requirements that make qualified blind trusts useful. All qualified blind trusts must be approved by the relevant ethics committee in advance.³⁶ As part of the process of setting up the trust, the committee checks to ensure there is no relationship between the Member of Congress and the trustee.³⁷ As a way of ensuring that the trustee would face professional consequences for any violation, the law requires them to be “a financial institution, an attorney, a certified public accountant, a broker, or an investment advisor” who is independent of the Member of Congress.³⁸ (The executive branch has gone further by providing that a trustee must be a financial institution, and we recommend Congress do the same.)³⁹ The trustee must be independent and have full discretion to buy or sell any asset.⁴⁰ In setting up the trust, a Member of Congress is allowed to tell the trustee only their general goals, such as “maximizing income or long-term capital gain,” but cannot specify the types of holdings desired.⁴¹ Members are not permitted to put assets in the trust unless they are “free of any restriction with respect to its transfer or sale.”⁴² A Member of Congress can write their trustee to request a distribution of cash or to ask the trustee to divest a conflicting financial interest, but a copy of that communication must be sent to the ethics committee.⁴³ The law bars other general communications between the Member of Congress and the trustee.⁴⁴

Any bill requiring Members of Congress to place assets in a blind trust must also prioritize transparency. Members of Congress will obviously know what assets they originally add when creating the trust. Under the current system, the trustee of a blind trust also notifies a Member in writing when the trustee has sold off any assets the Member initially placed in the trust. The member and the ethics committee receive this notice, but the public does not.

That information gap leaves Members knowing more about their assets than the public knows.⁴⁵ The Ban Congressional Stock Trading Act (S. 3494) addresses this problem by requiring the

³⁴ 5 U.S.C. app. § 102(f)(6) (2021), [See note 28].

³⁵ 5 U.S.C. app. § 102(f)(2)(A) (2021), [See note 28].

³⁶ 5 U.S.C. app. § 102(f)(3)(D), (5) (2021), [See note 28].

³⁷ 5 U.S.C. app. § 102(f)(3)(A)(ii)(II), (III) (2021), [See note 28]; *Qualified Blind Trusts* at 2 and 15, [See note 33].

³⁸ 5 U.S.C. app. § 102(f)(3)(A)(i) (2021); 5 U.S.C. app. § 102(f)(3)(C)(i) (2021), [See note 28].

³⁹ 5 C.F.R. § 2634.405(a) (2021), <https://www.law.cornell.edu/cfr/text/5/2634.405>.

⁴⁰ 5 U.S.C. app. § 102(f)(3)(A)(ii)(I) (2021), [See note 28].

⁴¹ 5 U.S.C. app. § 102(f)(3)(C)(vi) (2021), [See note 28].

⁴² 5 U.S.C. app. § 102(f)(3)(B) (2021), [See note 28].

⁴³ 5 U.S.C. app. § 102(f)(3)(C)(vi), (E) (2021), [See note 28].

⁴⁴ 5 U.S.C. app. § 102(f)(3)(C)(vii) (2021), [See note 28].

⁴⁵ Under the Ethics in Government Act, the trustee is authorized to send a letter advising the Member of Congress that the value of one of these initial assets has fallen below \$1,000, as would be the case following sale of the asset, with a copy sent to the relevant ethics committee. The House of Representatives has not published much guidance on qualified blind trusts, but the Senate Select Committee on Ethics has published a sample letter for this purpose. A Senate model qualified trust agreement includes a provision that requires a trustee to send copies of the letter to the trust’s grantor, the U.S. Senate Select Committee on Ethics, and the Secretary of the Senate. The problem with this arrangement is that it gives the Member of Congress greater knowledge than the public has with regard to the holdings of the trust. If the Member of Congress has not received this notice of a sale, they know that any asset

relevant ethics committee to post these notices of sale on the committee’s website for public viewing.⁴⁶ As a result, the bill would put the public on an equal footing with the Member with respect to the Member’s holdings. This public awareness of any conflicts of interest would also create at least some pressure on a Member to direct the trustee to divest all assets initially placed in the trust or, better yet, refrain from putting anything other than cash in a blind trust.⁴⁷

Most of the stock trading bills in Congress would require investments to be placed in qualified blind trusts, but a pair of companion bills in the House and Senate would exempt investments Members held when they entered Congress.⁴⁸ This exemption serves no public interest, and it undermines the value of these bills. This problem isn’t hard to understand: It’s why Congress chose not to include any exemption for previously acquired assets in the conflict of interest law applicable to executive branch employees.⁴⁹ Including this exemption in the final version of any bill would reveal a desire to continue holding Members of Congress to a lower standard than executive branch employees. For that reason, POGO would oppose any bill that includes an existing-holding loophole.

Pitfall to avoid: Do not delay.

Speaker Pelosi has said that any ban must apply to the other branches of government: “It has to be government-wide.”⁵⁰ POGO agrees in principle that all branches of government need stronger ethics restrictions, but expanding the pending bills to cover other branches right now is a bad idea.

There is considerable momentum behind the drive to ban Members of Congress and their immediate families from trading stocks, and Congress should not risk losing that momentum by delaying the passage of a congressional stock trading ban while drafting and building support for a broader ban. Though we don’t want to invoke the cliché about walking and chewing gum at the same time, recent years have shown that when Congress tries to do everything at once, it often fails to do anything at all. For this reason, POGO strongly encourages Congress to pass the bills that already have momentum, then turn to a set of stricter prohibitions applicable to all three branches. POGO will be submitting a recommendation to support that effort, but we want to avoid any risk of losing this opportunity for the congressional ethics program to take a meaningful step forward.

There is precedent for such an approach. By exempting itself from the conflict of interest law decades ago, Congress has shown that parity among branches has not been a concern for

initially placed in the trust remains in the trust. See 5 U.S.C. app. § 102(f)(4)(A) (2021), [See note 28]; *Qualified Blind Trusts* at 6 and 18, [See note 33].

⁴⁶ See § 202(f), Ban Congressional Stock Trading Act, S. 3494, [See note 1].

⁴⁷ Existing law would allow a Member of Congress to issue such a direction, provided that a copy of the communication is provided to the relevant ethics committee. 5 U.S.C. app. §102(f)(3)(C)(vi)(III), (E) (2021), [See note 28].

⁴⁸ See § 4 of the Ban Conflicted Trading Act, H.R. 1579 and S. 564, [See note 1].

⁴⁹ 18 U.S.C. § 208(a) (2021), <https://www.law.cornell.edu/uscode/text/18/208>.

⁵⁰ Janet H. Cho, “Pelosi Supports Stock Ban for Congress and Judiciary,” *Barron’s*, February 9, 2022, <https://www.barrons.com/articles/nancy-pelosi-stock-ban-congress-judiciary-51644433862?tesla=y>.

Members before now. Therefore, the public would likely question the motivation behind any effort to delay passage of a congressional stock trading ban.

Congress can and should pass a congressional stock trading ban this session, hammering out the final language in the process, and then fast-track a separate bill to impose the same requirements on the judicial branch.

Pitfall to avoid: Do not accept a weak enforcement mechanism.

No matter how broad a ban Congress imposes on its Members, the ban will be ineffective if it has a weak enforcement mechanism. One of the pending bills, the Banning Insider Trading in Congress Act, should be avoided because its enforcement mechanism is virtually guaranteed to fail.⁵¹

The bill would allow a Member of Congress to demand a vote by the full chamber before the chamber’s ethics committee could impose a penalty for any violation. This would not only slow the process, it would also likely cause any enforcement effort to break down into partisan fighting. In the Senate, it would only take 40 Members to preclude a vote or even debate on the penalty. In the House, 218 Members would have to be persuaded to back the imposition of any penalty. Passing a bill with such a weak enforcement mechanism would do little to assuage the public outcry that has led Congress to consider a ban in the first place.

In the extremely unlikely event that the full chamber were to approve a penalty under this cumbersome procedure, the bill arms Congress with little in the way of penalties. The bill theoretically would require disgorgement of “profit” from trades.⁵² But, since a purchase does not generate a profit, the penalty only applies to sales. A Member of Congress could continue illegally purchasing assets while in office and avoid penalty by merely waiting until they leave Congress to sell any illegally purchased asset. The bill does authorize a fine, but it fails to specify its amount. In any case, given the potential for profit from such trades, it remains unclear whether an ethics committee could or would impose a fine large enough to deter misconduct.⁵³

POGO’s Recommendation: Substance of ethics restrictions

POGO would like to see a much more restrictive ban applied to elected officials and top employees of all three branches of government.⁵⁴ However, as I’ve already stressed, we support moving quickly to enact the proposed congressional stock trading ban before taking up broader reform. Specifically, we urge Congress to combine provisions 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 (introduced in the House as H.R. 6678 and in the Senate as S. 3631). The ban on ownership in H.R. 6678/S. 3631 could apply to the subset of interests currently covered under that bill, and the broader definition of “covered investments” in

⁵¹ Banning Insider Trading in Congress Act, S. 3504 and H.R. 6490, [See note 1].

⁵² See § 2 of the Banning Insider Trading in Congress Act, S. 3504 and H.R. 6490, [See note 1].

⁵³ See § 2 of the Banning Insider Trading in Congress Act, S. 3504 and H.R. 6490, [See note 1].

⁵⁴ We are submitting for inclusion in the record a separate document that details POGO’s recommendations for when Congress begins the next round of conflict of interest reforms.

H.R. 336 and S. 3494 could apply to assets required to be placed in a qualified blind trust, with the additional disclosure requirements of S. 3494. The enforcement provisions in these bills should also be included in the combined bill.

POGO recommends that Congress merge these bills to strengthen congressional ethics without delay. Two of these bills, S. 3494 and H.R. 336, would require that Members place covered investments in qualified blind trusts as a way of banning trades.⁵⁵ The third, H.R. 6678/S. 3631, would ban ownership of several types of investments.⁵⁶ These approaches are complementary and could be combined. Congress could adopt the prohibition of ownership as to the narrow set of holdings covered by H.R. 6678/S. 3631 and, at the same time, ban trades involving the broader set of holdings covered by S. 3494 and H.R. 336.

Conclusion

Divesting some assets and placing others in blind trusts, with the option to buy and sell diversified mutual funds, is not too much of a sacrifice for the public to ask our leaders to make. Nobody was ever forced to run for Congress, and every person elected to office asked the public to entrust them with great power. Accepting that power means owing a duty to those who have granted it to you.

The people have a right to demand that Members of Congress always put the public's interests first, avoiding even the appearance of impropriety. But that cannot happen if Members and their families are regularly creating conflicts of interest by buying stocks in individual companies.

Thank you again for giving me the opportunity to testify on behalf of the Project On Government Oversight. We look forward to working with the committee to address this critical issue.

⁵⁵ See § 2 of the TRUST in Congress Act, H.R. 336, and § 2 of the Ban Congressional Stock Trading Act (S. 3494), [See note 1].

⁵⁶ See § 2 of the Bipartisan Ban on Congressional Stock Ownership Act of 2022, H.R. 6678 and S. 3631, [See note 1].