House Calendar No. 163

112TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
112–690

IN THE MATTER OF REPRESENTATIVE MAXINE WATERS

R E P O R T

OF THE

COMMITTEE ON ETHICS

SEPTEMBER 25, 2012.—Referred to the House Calendar and ordered to be printed

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REPRESENTATIVE MAXINE WATERS

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LETTER OF SUBMITTAL

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ETHICS,
Washington, DC, September 25, 2012.

Hon. KAREN L. HAAS,
Clerk, House of Representatives,
Washington, DC.

DEAR MS. HAAS: Pursuant to clauses 3(a)(2) and 3(b) of rule XI of the Rules of the House of Representatives, we herewith transmit the attached Report, "In the Matter of Representative Maxine Waters."

Sincerely,

JO BONNER,
Chairman.
LINDA T. SÁNCHEZ,
Ranking Member.

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Mr. GOODLATTE, from the Committee on Ethics, submitted the following

R E P O R T

I. INTRODUCTION

In July 2009, the Office of Congressional Ethics (OCE) forwarded to the Committee on Ethics (Committee) a Report and Findings, concluding that Representative Waters may have violated House conflict-of-interest rules when she called the then-Secretary of the Treasury to set-up a meeting between the Secretary[1] and representatives of the National Bankers Association (NBA).[2] As it turned out, all of the NBA representatives who attended the meeting were also associated with OneUnited Bank (OneUnited), and OneUnited was the only minority bank represented at the meeting. In light of the fact that OneUnited requested $50 million in financial assistance from the Treasury Department at the meeting, and that Representative Waters' husband was a former member of the Board of Directors of OneUnited and a then-stockholder in the bank, OCE recommended that the Committee further investigate the allegations.

As discussed in greater detail in Section II, the Committee has conducted an extended, and at times contentious, investigation of the allegations OCE referred to it. That investigation spurred allegations that the Committee and its staff had violated Representative Waters' due process rights, which ultimately led to the Committee's decision to hire Outside Counsel William R. "Billy" Martin, the voluntary recusal of six Members of the Committee, and the appointment of six new Members to establish a Committee of Members who had no role in reviewing Representative Waters' matter in the 111th Congress and were given the sole task of resolving

[1] The Secretary agreed to the meeting but ultimately did not attend. Other Treasury officials attended the meeting in his place.

[2] Office of Congressional Ethics, Report and Findings, Review 09–2121, Aug. 6, 2009.

this matter (the Waters Committee). Further, all current Committee staff who were involved in Representative Waters' matter in the 111th Congress were recused from the matter in the 112th Congress.

Outside Counsel has made recommendations based on a "clear and convincing" standard of proof. This is the standard required by Committee Rule 23(c) to determine if allegations in a Statement of Alleged Violation (SAV) have been proven, and is the appropriate standard applied to Outside Counsel's *de novo* review of the allegations. Thus, if Outside Counsel does not believe that such a standard would be met, then his *de novo* review would appropriately recommend that no Investigative Subcommittee would be warranted, and the matter should be resolved. That standard, however, only applies to proving the allegations in an SAV in a formal adjudicatory proceeding which is necessary only before recommending a sanction to the House of Representatives. To be clear, such a burden of proof does not apply to the level of evidence necessary for the Committee to express its concerns in a letter of reproval.

In addition, Outside Counsel has recommended that there is evidence supporting certain conclusions (particularly regarding the timing and nature of Representative Waters' Chief of Staff's (COS) knowledge of her conflict), and that the Members have the responsibility to make credibility determinations about that evidence, but that prior to the Members' credibility determinations, the evidence that does exist does not meet the clear and convincing standard. The Members have now made those credibility determinations, and applied their judgment and experience to the factual findings and analysis of the Outside Counsel.

The Waters Committee has thoroughly reviewed Outside Counsel's final report in this matter. Additionally, the Committee provided Representative Waters and her COS the opportunity to appear before the Committee. Representative Waters' COS took that opportunity. The Committee heard his testimony on September 21, 2012, had a full discussion with him, and considered his testimony carefully before reaching the Committee's conclusion. The Committee agrees with Outside Counsel's conclusions and recommendations. Accordingly, the Waters Committee has unanimously determined that there is not clear and convincing evidence that Representative Waters violated any House rule, law, regulation, or other applicable standard of conduct by her efforts to assist the NBA and other minority and community banks in the 2008 timeframe. However, after making its credibility determinations, the Waters Committee has concluded that sufficient evidence suggests that contrary to Representative Waters' instructions and without her knowledge, Representative Waters' COS acted to assist OneUnited on two occasions after the COS knew or should have known that Representative Waters had a conflict of interest regarding OneUnited. Accordingly, the Waters Committee has issued a letter of reproval to Representative Waters' COS.

II. PROCEDURAL HISTORY

On April 2, 2009, the OCE began a review of allegations that Representative Waters may have violated House Rule XXIII, clause 3 and House precedent regarding conflict of interest when she called the then-Treasury Secretary and requested that Treasury

Department officials meet with representatives from the NBA. OCE's review centered on this meeting, which OCE alleged to have focused on a single bank—OneUnited—in which Representative Waters' husband held stock and for which he had previously served on the Board of Directors.

On July 24, 2009, OCE voted to refer the matter to the Committee for further investigation and transmitted its Report and Findings on this matter to the Committee later that month. Following an investigation by Committee staff pursuant to authority granted by Committee Rule 18(a), the Committee established an Investigative Subcommittee (ISC or Waters ISC) on October 29, 2009. The staff assigned to the ISC were the former Director of Investigations and two staff attorneys. That team was supervised by the former Chief Counsel and Staff Director. During the course of the investigation, the ISC issued 11 subpoenas, interviewed 13 witnesses and reviewed over 1,300 pages of documents.

In the Spring of 2010, the ISC came to an agreement to release a report critical of some conduct in the matter, but recommending no further action or sanction. However, the former Chief Counsel and Staff Director advised the Committee that the rules did not permit an ISC to issue a report that was critical of a Member without adopting a Statement of Alleged Violation (SAV) and providing the Respondent with the opportunity for an adjudicatory hearing under the rules for an adjudicatory subcommittee.[3] The former Chief Counsel, however, also assured the ISC that Representative Waters would accept an SAV and waive her right to a hearing.[4]

Ultimately, on June 15, 2010, the ISC adopted an SAV alleging three counts of misconduct: violations of clauses 1 and 3 of House Rule XXIII, the House Code of Official Conduct, and paragraph 5 of the Code of Ethics for Government Service. On June 30, 2010, Representative Waters filed a Motion for Bill of Particulars. The following day, on July 1, 2010, the ISC issued an Order denying the Motion for Bill of Particulars. On July 12, 2010, Representative Waters filed a Motion to Dismiss the SAV. The ISC denied this motion on July 15, 2010.

On July 28, 2010, the ISC transmitted the SAV to the full Committee. Shortly thereafter, the Committee established an Adjudicatory Subcommittee (ASC or Waters ASC) to conduct a hearing on the SAV. The same staff members who had been assigned to and worked on the Waters ISC continued to work on the Waters ASC, with the addition of another staff attorney. Throughout August 2010, the staff interviewed numerous witnesses, and sought the voluntary production of documents from various sources. During this time period, staff also attempted to schedule a settlement conference with Representative Waters.

On August 25, 2010, counsel for Representative Waters submitted a letter objecting to the ongoing investigation by the ASC. Specifically, counsel stated that "[s]uch inquiry violates both this Committee's rules and comparable federal criminal procedures and raises significant questions about the sufficiency of the evidence that the Investigative Subcommittee relied upon when it issued the charges contained in its SAV." The then-Chair and the then-Rank-

[3] As discussed below, the Waters Committee disagrees with this interpretation.
[4] The former Chief Counsel's assurances proved to be incorrect.

ing Member jointly responded to this letter on August 31, 2010, highlighting the fact that Committee Rule 23 contemplates that both the Committee counsel and the Respondent will prepare their case for a hearing, and also reminding counsel that criminal law precedent is not binding on the Committee, as the disciplinary proceedings in the House are not a criminal trial.

After a series of disagreements between the Committee Members and staff regarding scheduling, on October 7, 2010, the ASC scheduled a hearing in Representative Waters' matter for November 21, 2010. On or about October 12, 2010, the Committee postponed the date of the hearing by one week, until November 29, 2010.

On November 15, 2010, staff submitted a formal motion to the ASC to recommit the matter to the ISC, on the grounds that it had obtained new evidence. The following day, Representative Waters filed a response to the Motion to Recommit. On November 18, 2010, the ASC voted to recommit the matter to the ISC.

As explained more fully in the Report of Outside Counsel, the decision to recommit the matter preceded a significant upheaval in the makeup of Committee staff and the conduct of Committee business for the duration of the 111th Congress. The personnel issues that began in November 2010 were ongoing at the beginning of the 112th Congress, and only began to be resolved once the Committee hired a new Staff Director and Chief Counsel on May 2, 2011. The Committee was without a full complement of staff until July, 2011. By the end of the 111th Congress, the Committee recognized the need to hire Outside Counsel to complete this matter. However, the Committee had to first reconstitute its full time staff, which postponed the process for selecting and formalizing a relationship with Outside Counsel until the hiring of Mr. Martin on July 20, 2011.

The Committee's first charge to Outside Counsel was a thorough review of the serious allegations regarding the Committee's own conduct in this matter. Mr. Martin thus conducted an extensive review of due process allegations raised by both Representative Waters and the Committee itself, which included a document review comprising over 100,000 pages, interviews of 26 witnesses, including all Members of the Committee from the 111th Congress as well as all current and former staff who may have had knowledge of the relevant issues, and a significant and thorough analysis of the legal issues as embodied in Part II of Outside Counsel's Report. The vast majority of this review took place between July, 2011 and the end of 2011. However, one witness refused to testify without the issuance of a subpoena. This same witness indicated an intention to refuse to answer questions upon the issuance of a subpoena on the basis of the witness' Fifth Amendment privilege. The witness did ultimately testify before the Waters Committee, but the witness's recalcitrance delayed the completion of the first phase of Outside Counsel's review by at least four months.

On February 17, 2012, based on the advice received from Outside Counsel, six Members of the Committee for the 112th Congress—the Chairman, the Ranking Member, and all current Committee Members who also served on the Committee during the 111th Congress—voluntarily requested recusal from this matter. Outside Counsel did not find any evidence of wrongdoing by any Member of the Committee, and no Member requested recusal because of any such wrongdoing. Instead, the Members requested recusal because:

(1) They believed that, out of an abundance of caution and to avoid even an appearance of unfairness, their voluntary recusal would eliminate the possibility of questions being raised as to the partiality or bias of Committee Members considering this matter;

(2) They wanted to assure the public, the House, and Representative Waters that this investigation was continuing in a fair and unbiased manner; and

(3) They wanted to move this matter forward in a manner that supports the greatest public confidence in the ultimate conclusions of this Committee.[5]

The recusals necessitated bringing six new, substitute Members of the Committee, who were appointed on February 17, 2012 as well, up to speed on the work of Outside Counsel. Upon completion of this process and Outside Counsel's due process review, Outside Counsel submitted his conclusions from that phase of the review to the newly constituted Waters Committee in May, 2012. On June 6, 2012, the Acting Chairman and Acting Ranking Member of the Waters Committee wrote to Representative Waters, notifying her that upon the advice of Outside Counsel, the Waters Committee had unanimously found that none of the individual allegations raised regarding the conduct of Committee Members or staff, nor the totality of the circumstances of those claims, amounted to a deprivation of her due process rights.

Only upon conclusion of the first phase of the review was Outside Counsel authorized to conduct a *de novo* review of the actual substance of the allegations against Representative Waters. This review was similarly thorough; Outside Counsel reviewed all prior ISC and staff interview transcripts and all documents produced to the Committee, and also re-interviewed several key witnesses. Members of the Waters Committee also reviewed many of these ISC and staff interview transcripts and key documents. Finally, after providing Representative Waters and her COS the opportunity to appear before the Committee, the Waters Committee held a public hearing on September 21, 2012. The Committee heard Representative Waters' COS' testimony and fully considered it. The Outside Counsel's findings and conclusions for both phases of its work are set forth in the attached Outside Counsel's Report.

The Waters Committee, which has been involved in this matter for less time than any other participant, notes that many factors contributed to the length of this matter, which, given all those factors, while unfortunate, was not, in fact, unreasonable. Such factors include: (1) the significant number of motions and complaints raised by Representative Waters and the unprecedented level of consideration given to those concerns, even though all were eventually dismissed; (2) the very complicated task of tracking legislative actions by various staff, offices, lobbyists and departments at the center of the financial crisis in September and October of 2008; (3) the breakdown of communications in the last Congress, discussed more fully below; and (4) the normal demands of conducting thorough and responsible investigations. The time Outside Counsel spent on this matter is entirely appropriate. In total, Outside

[5] *See* Letter from the Chairman, Committee on Ethics to the Speaker of the House of Representatives at 2 (February 17, 2012), *available at* http://ethics.house.gov/sites/ethics.house.gov/files/Letter%20to%20the%20Speaker.pdf.

Counsel reviewed over 150,000 pages of documents, in addition to conducting numerous interviews. In fact, of the numerous occasions in which the Committee has engaged an outside counsel for such matters, 14 months is an average length of engagement.

III. ANALYSIS

As Section II details, Outside Counsel's work proceeded in two phases. First, Outside Counsel reviewed allegations raised by both Representative Waters and the Committee that the Committee and its staff had violated Representative Waters' due process rights. After an extensive investigation, Outside Counsel concluded, and recommended that the Waters Committee find, that none of the conduct alleged, either considered separately or in its totality, amounted to a violation of Representative Waters' due process rights. In reaching this conclusion, Outside Counsel assumed, for purposes of its due process analysis only, that certain conduct actually occurred as alleged. Thus, Outside Counsel assumed that a member of Committee staff disclosed confidential Committee information, in violation of the Committee's confidentiality rules. Outside Counsel found that Representative Waters also violated the Committee's rules by disclosing confidential Committee information during a televised press conference and on her House Web site. Outside Counsel also found that certain Committee staff communicated with Committee Members from one party regarding active matters, including Representative Waters' matter, without copying the Committee as a whole. Finally, Outside Counsel assumed that a former member of the Committee staff made comments that were racially insensitive and completely inappropriate.

Outside Counsel took these allegations extremely seriously, as did the Waters Committee. Outside Counsel concluded, for the reasons detailed in his thorough legal and factual analysis, that none of the alleged conduct rose to the level of a violation of Representative Waters' constitutional rights. The Waters Committee, whose Members had no role with respect to the investigation of Representative Waters' matter during the 111th Congress, unanimously agreed with this conclusion and independently made the same determination.[6]

Having completed the due process review, Outside Counsel commenced the second phase of his work, reviewing the substantive allegations raised by the OCE Report and Findings. After reviewing the entire evidentiary record, including information from OCE and all of the information gathered during the Committee's prior investigation, and conducting additional interviews, Outside Counsel concluded and recommended that the Committee find that Representative Waters did not violate any House rule, law, regulation, or other applicable standard of conduct. The Waters Committee unanimously concurred with this recommendation.

With respect to Representative Waters' actions to set up a meeting between the then-Treasury Secretary and representatives from the NBA—who were also associated with OneUnited—Outside Counsel concluded that Representative Waters reasonably believed, at the time she requested the meeting, that the attendees would

[6] The Waters Committee's conclusions with respect to the due process review were previously detailed in two public statements, dated June 6, 2012 and June 8, 2012.

be speaking on behalf of minority banks generally. While it appears that all of the minority bankers who attended the meeting were associated with OneUnited, and that OneUnited was alone in requesting substantial financial assistance from the Treasury Department at the meeting, the record indicates that Representative Waters did not have reason to know of either of these facts when she arranged the meeting. Accordingly, Outside Counsel recommended that the Waters Committee find that Representative Waters reasonably believed she was arranging the Treasury meeting on behalf of a broad class of minority banks, and that in doing so she did not violate any House rule, law, regulation, or other applicable standard of conduct. The Waters Committee agreed with Outside Counsel's recommendation.

Outside Counsel also reviewed allegations that Representative Waters' COS took steps to assist OneUnited after Representative Waters realized that the bank made a request for federal financial assistance from the Treasury Department and that she had a conflict of interest regarding the bank's request—and any other efforts to provide specific financial assistance to OneUnited—due to her significant financial interest in the bank. Outside Counsel concurred in Representative Waters' determination that she had a conflict of interest with respect to OneUnited's request for specific financial assistance. Outside Counsel also recognized that the House Rules prohibit Members from doing anything through staff that the Rules prohibit them from doing directly.[7] Further, longstanding Committee precedent holds Members responsible for the actions of their staff, when those actions are within the scope of the staff's official duties.[8] Thus, Outside Counsel believed that if Representative Waters' COS knowingly ignored Representative Waters' conflict of interest—after the conflict became clear—and facilitated OneUnited's request for federal financial assistance, Representative Waters could be responsible for violating House rules.

However, Outside Counsel recommended that the Committee find that the evidence here does not establish that Representative Waters violated House rules. As Outside Counsel's Report details, it appears that Representative Waters recognized and made efforts to avoid a conflict of interest with respect to OneUnited. She informed the then-Chairman of the House Financial Services Committee that she was "not going to be involved in" OneUnited's re-

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[7] *See, e.g.,* Comm. on Ethics, *In the Matter of Allegations Relating to Representative Laura Richardson,* H. Rep. 112–642, 112th Cong. 2d Sess. Appendix B at 58 (2012) ("Members are responsible for violations that occur in their office, and cannot shield themselves from liability by using staff as a proxy for wrongdoing"); House Comm. on Standards of Official Conduct, *In the Matter of the Investigation into Officially Connected Travel of House Members to Attend the Carib News Foundation Multinational Business Conferences in 2007 and 2008* (hereinafter *Carib News*), H. Rep. 111-422, 111th Cong., 2d Sess. 126 (2010) ("it would not well serve the House as an institution to allow its Members to escape responsibility by delegating authority to their staff to take actions and hide behind their lack of knowledge of the facts surrounding these actions.")

[8] *See, e.g., Carib News* at 122 ("Many times Members act through the actions of their staff and, therefore, should be held liable for those actions in certain circumstances"); Comm. On Standards of Official Conduct, *In the Matter of Representative E.G. "Bud" Shuster,* H. Rep. 106–979, 106th Cong. 2d Sess. 31 (2000) (Member held liable for violations of prohibition on campaign work by official staff arising from lack of uniform leave policy, despite finding of no evidence that the Member was aware that staff were performing campaign-related work in the congressional office); *Statement Regarding Complaints Against Representative Newt Gingrich,* 101st Cong. 2d Sess. 60, 165–66 (1990) (Member held responsible for violations arising out of presence of political consultant in his office); *In the Matter of Representative Austin J. Murphy,* H. Rep. 100–485, 100th Cong. 1st Sess. 4 (1987) ("a Member must be held responsible to the House for assuring that resources provided in support of his official duties are applied to the proper purposes")

quest for assistance from the Treasury Department, and then relayed this decision to her COS. Accordingly, Outside Counsel concluded and recommended that the Waters Committee find that Representative Waters did not violate House rules by failing to exercise adequate oversight of her COS with respect to his work on behalf of OneUnited.

The significant difference between the Waters Committee's conclusions in this matter and the report that the ISC in the 111th Congress was prepared to adopt is that the ISC was prepared to find that Representative Waters failed to adequately supervise her COS and thus allowed him to take actions to assist OneUnited that Representative Waters herself could not have taken. As previously noted, the Committee has previously held Members responsible for the actions of their staff in some circumstances, where the staff act within the scope of their official responsibilities.[9] However, the Waters Committee finds that Representative Waters took at least three steps to inform her COS of her conflict of interest with respect to OneUnited and to prevent the COS from acting on that conflict: (1) she publicly disclosed her financial interest in OneUnited at a Financial Services subcommittee hearing and on her annual Financial Disclosure Statements; (2) she informed the Chairman of the Financial Services Committee of the conflict and indicated that she would not be involved with OneUnited's request for financial assistance; and (3) she informed her COS of her conversation with the Chairman and directed her COS not to involve himself with OneUnited's request. These actions distinguish Representative Waters' conduct from other matters in which the Committee has found a Member to have violated House rules by failing to supervise their staff.

Outside Counsel also analyzed the conduct of Representative Waters' COS, who is also her grandson. Outside Counsel considered evidence that Representative Waters told her COS of her conflict of interest with respect to OneUnited prior to September 19, 2008, which is the first date on which the COS sent an email that was unambiguously intended to assist OneUnited specifically. Outside Counsel determined that the record clearly established that Representative Waters and the former Chairman of the Financial Services Committee both recalled a conversation in which Representative Waters recognized that she had a conflict of interest with respect to any specific request for financial assistance by OneUnited, and agreed not to be involved with such requests. Indeed, the Chairman of the Financial Services Committee testified that he told Representative Waters, "I recommend that you stay out of it." However, Outside Counsel recommended that the record did not establish, to a clear and convincing standard, that Representative Waters had this conversation with the Chairman of the Financial Services Committee, or relayed it to her COS, by September 19, 2008. The weight of the evidence suggests that Representative Waters' conversation with the Chairman of the Financial Services Committee occurred no later than September 20, 2008, and that Representative Waters likely directed her COS not to work on OneUnited matters soon after that conversation. For this and other reasons, the Waters Committee thus concluded that

[9] *See* n.8 *supra.*

the COS knew or should have known he was not to work on OneUnited matters before he emailed information regarding OneUnited's holdings of Fannie Mae and Freddie Mac stock to a Financial Services Committee staffer on September 23, 2008.

The Waters Committee notes that Outside Counsel did not conclude that the conversations between Representative Waters and the Chairman of the Financial Services Committee, or between her and her COS, definitely occurred on or before September 19, 2008. Rather, Outside Counsel recommended that the evidence could not establish, to a clear and convincing standard, that those conversations occurred before that date.

The Waters Committee, in weighing the credibility of the witnesses and relative strength of the evidence in the record, concluded that Representative Waters likely instructed her COS not to work on OneUnited matters before September 19, 2008. The Waters Committee credited the testimony of the former Chairman of the Financial Services Committee in late 2009 that his conversation with Representative Waters about OneUnited probably occurred around the time of the NBA's meeting with the Treasury Department, which was held on September 9, 2008. In fact, the closest reading of the then-Chairman's testimony provides an indication that his conversation with Representative Waters occurred early in the week of September 8, 2008, because that was the first time in which both parties were together in Washington, DC after the Chairman received a call from a Massachusetts State Senator alerting him to OneUnited's problems. The Waters Committee acknowledges that when Outside Counsel interviewed the former Chairman nearly two years later, his recollection of the date of the conversation was less firm. In that interview, the Chairman indicated that he believed the conversation occurred "[b]efore September 19 or 20," but was only certain that it occurred by September 20th. In light of the passage of time between these interviews, the Waters Committee gave greater weight to the Chairman's initial recollection, which, in any event, was not inconsistent with his more recent testimony.[10] Accordingly, the Waters Committee did not credit the COS's testimony that Representative Waters conveyed that conversation to him, and her direction with respect to refraining from work on OneUnited matters, in late September or early October 2008.

The Waters Committee also concluded that it strained credibility to assert, as the COS did, that when Representative Waters informed the COS of her conversation with the Chairman of the Financial Services Committee, she directed him only "not to, quote/unquote, work on issues *that day*." (Emphasis added.) The Waters Committee questioned why, if Representative Waters felt that she had a conflict of interest with respect to OneUnited matters, she would instruct her COS to refrain from working on such matters for only one day. The Waters Committee's conclusion was bolstered by Representative Waters' own description of her direction to her COS during an August 2010 press conference:

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[10] In the former Chairman of the Financial Services Committee's recent interview, he agreed that his conversation with Representative Waters concerning OneUnited was within the ten day period following the Treasury Department meeting. This recollection is obviously not inconsistent with his statement in the same interview that the conversation was before September 19, 2008.

> There has also been a question about whether or not I instructed my staff not to get involved with OneUnited Bank, and their interest in assessing (sic) TARP funds . . .
>
> I told my chief of staff that I had informed Chairman Frank about OneUnited Bank's interest, that we were only concerned about small and minority banks broadly, that Chairman Frank would evaluate OneUnited's issue and make a decision about how to proceed.
>
> And given the e-mails that the committee has offered as their evidence, we communicated with each other clearly.

Representative Waters did not state that she qualified or limited her direction to her COS in any way, and she stated that she "clearly" communicated that direction to her COS. This conclusion is further bolstered by the testimony of the Chief Counsel for the Financial Services Committee, who stated that "[the COS] and I had a conversation. I don't remember if I—I don't remember how we came to have it, whether I called him in or he stopped by. But we had a very brief conversation in which he mentioned the concern about a conflict and indicated that [Representative] Waters therefore would not be playing an active role in regard to [OneUnited] because of the concern about the conflict." This testimony confirms that the COS understood the import of the instruction from Representative Waters and chose to act in contravention of that instruction.

Outside Counsel also considered evidence suggesting that Representative Waters' COS knew or should have known—regardless of how and when Representative Waters conveyed her conflict of interest to him—that Representative Waters had a significant financial interest in, and thus a potential conflict of interest with respect to, OneUnited. That evidence included Representative Waters' disclosure of the stock ownership during a public meeting of a Financial Services subcommittee in October 2007. The COS testified that he was aware of the hearing before it occurred, and discussed Representative Waters' testimony regarding OneUnited with her beforehand. The COS further testified that he sometimes attended hearings with Representative Waters, but he could not recall whether he attended the October 2007 hearing or heard Representative Waters disclose her husband's ownership of OneUnited stock.[11] The Waters Committee's conclusion that the COS knew or should have known of his employing Member's financial interest in OneUnited is further supported by Representative Waters' own testimony to the Committee that her COS "would have known that

[11] Representative Waters' COS represented to the Committee "that the disclosure that [Representative Waters] made publicly [at the October 2007 hearing] referenced only her husband's director position, not a financial interest." He also indicated that a video recording of the hearing showed that he was not present when Representative Waters made the disclosure he referenced. The COS is incorrect on both counts. Representative Waters made two disclosures, at different times in the hearing. Her first statement on the topic disclosed only that her husband "is a director of a minority bank." However, later in the hearing, Representative Waters added that her husband "is also a shareholder in OneUnited Bank." *See* Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Financial Services, U.S. House of Representatives, 110th Cong., 1st Sess., October 30, 2007, at 6, 21–22. Further, the video recording of the hearing only shows half of the audience in the hearing room and limited views of certain seats behind the Members, and thus does not establish whether the COS was in the hearing room when Representative Waters disclosed her husband's financial interest in OneUnited.

my husband was invested in OneUnited."[12] Further, Representative Waters disclosed her financial interest on her Financial Disclosure Statements. Finally, the COS suggested to the ISC that he understood at the time that the conversation between Representative Waters and the former Chairman of the Financial Services Committee centered on Representative Waters' conflict of interest. Despite the evidence to the contrary, including Representative Waters' own statement, the COS denied any knowledge of Representative Waters' financial interest in OneUnited to Outside Counsel.

Outside Counsel recognized the evidence suggesting that the COS knew or should have known of Representative Waters' financial interest in OneUnited, but recommended that the record, standing alone, did not establish that conclusion to a clear and convincing standard. Outside Counsel thus deferred to the Waters Committee to weigh the credibility of the COS's claimed ignorance of Representative Waters' financial interest in OneUnited, in light of the evidence to the contrary. The Waters Committee credits Representative Waters' own statement regarding her COS's knowledge and the totality of the evidence in concluding that the COS knew or should have known of Representative Waters' financial interest in OneUnited. Thus, the COS knew or should have known that Representative Waters had a conflict of interest with respect to specific actions to assist OneUnited, regardless of how and when Representative Waters informed him that she believed such a conflict existed.

The Waters Committee agrees with Representative Waters' determination that she could not take specific actions to assist OneUnited due to her significant financial interest in the bank. First, it is clear to the Waters Committee, as it was to Representative Waters, that Representative Waters did have a conflict which prevented her from taking particular action to uniquely assist OneUnited. The Waters Committee notes that Representative Waters had an investment in OneUnited which, at that time, was worth approximately $350,000. Furthermore, the assistance OneUnited was seeking was nothing less than avoiding the failure of the bank itself. Such failure could have cost Representative Waters her entire investment.

It is the Waters Committee's belief, and hope, that most Members understand that they cannot take official actions that would assist a single entity in which the Member has a significant interest, particularly when that interest would clearly be affected by the assistance sought. Certainly Representative Waters seemed to understand that principle.

In assessing the credibility of Representative Waters' COS' statements on this point, the Waters Committee considered other state-

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[12] Representative Waters testified as follows:

The Witness. I remember when we had a FIRREA hearing and I said my husband was invested.

ISC Chairwoman. Because there was a witness from OneUnited at the hearing?

The Witness. Yeah. They had people there from NBA and some other places, and FDIC was there, everybody was there, and I disclosed publicly. I disclosed in all my required disclosure. I mean, I've never tried to hide anything.

ISC Chairwoman. So [the COS] understood there was a financial interest there because of the public disclosures, because of your disclosure——

The Witness. He would have known that my husband was invested in OneUnited. The public knows, everybody knows. The newspapers knew. My financial disclosure papers were available to everybody.

ments by the COS that the Waters Committee found inconsistent with the record. For example, when the COS was asked whether a person who communicated with the COS about the impact of the conservatorship was associated with OneUnited, the COS answered "I'm not sure." But the COS received an email from that person on July 16, 2008, in which the sender referenced "OneUnited Bank . . . on whose board I serve." The sender stated that he made this statement for "[f]ull disclosure," but that he believed the COS already knew at the time that he was on the Board of Directors of OneUnited. After being confronted with these inconsistencies at the hearing on September 21, 2012, the COS changed his testimony yet again. At the public hearing, the COS told the Committee that he did not deny knowing that the individual was on the OneUnited Board, but explained that in matters on Capitol Hill, individuals often "wear many hats." While he is correct to assert that, in life, people may serve in more than one role, the COS' September 21, 2012, testimony regarding his knowledge of the individual's position with OneUnited directly contradicts his testimony before the Outside Counsel just two months earlier on July 5, 2012.[13] Outside Counsel expressed the same concerns about the COS' credibility at the September 21, 2012 hearing when he stated,

> Indeed, the Committee could reasonably find that [the COS'] credibility is even less now than before this hearing started. On two key points, [the COS] appears to have changed his testimony today when confronted with evidence and arguments that contradict his earlier statements. Those points include [the COS'] knowledge of whether [the individual] was a OneUnited Board member—which [the COS] previously denied knowing but is now admitting—and his admission that Representative Waters told him to stop working on OneUnited matters and did not limit that instruction to just one day. That is a difference in his testimony.

Representative Waters' COS has suggested that the Committee has, in its Report in *In the Matter of Representative Graves,* previously excused certain actions in matters where there may be a conflict of interest.[14] The COS' reliance on *Graves* is misplaced for two reasons.[15]

First, *Graves* is factually distinct from this case in almost every relevant respect. Representative Graves invited a friend to testify before the Committee on Small Business, on behalf of the Missouri Soybean Association. Representative Graves' friend had an investment in two renewable fuel cooperatives in which Representative Graves' wife had also invested. But Representative Graves' friend did not appear on behalf of either of those cooperatives, and the

[13] This is only one example of the serious concerns the Waters Committee had about the COS' testimony. As Outside Counsel noted in their Report and at the September 21, 2012 hearing, there were other examples where the COS' testimony changed after being confronted with contradictory evidence.

[14] Representative Waters' COS submitted his views of the Committee's precedents in an interview with Outside Counsel.

[15] The Waters Committee notes that the Committee's decision in *Graves* postdated the facts of this case, and so the COS could not have relied on it at the time. *See* Committee on Standards of Official Conduct, *In the Matter of Representative Sam Graves,* H. Rept. 111-320, 111th Cong. 1st Sess. (2009) (*Graves*). In fact, the Committee's position at the time of the events of this case can be found in the *House Ethics Manual,* released in Spring 2008. *See House Ethics Manual* (*Ethics Manual*) at 237 (2008).

Small Business Committee did not intend to take any action to benefit those cooperatives; in fact, the hearing in question did not involve any legislation that would ultimately come to the House floor.[16] By contrast, the financial connection between Representative Waters and OneUnited was more direct (given that she actually owned stock in the entity in question) and the actions contemplated (attempts to prevent significant financial losses to OneUnited, either legislatively or through collaboration with the Treasury Department) more impactful than those in *Graves.*

Second, while Representative Waters' COS appears to rely on a single sentence in *Graves* that might be construed to support the proposition that a Member may advocate on behalf of singular entities in which the Member has a financial interest, so long as that interest is a small enough fraction of the entity's ownership that the Member might be situated as a member of a "class" of investors in that entity, the Committee's actual statement is considerably more limited than the COS suggests. In *Graves,* the Committee stated that Representative Graves' wife held a "minimal" interest in two biofuels companies and thus, "even if Mr. Hurst's testimony benefited only the two companies in which Mrs. Graves was invested, Representative Graves' or Mrs. Graves' personal financial interest in either investment would have been affected as members of a class of investors and not as individuals."[17] This single sentence of *dicta* the COS cites was entirely unnecessary to the Committee's decision in *Graves,*[18] which rested instead on the facts that: (1) the witness was testifying about matters of interest to an entire association of similar entities; (2) the witness did not make any specific requests on behalf of any one entity; (3) neither Representative Graves nor Mrs. Graves could derive a financial benefit from the friend's testimony; (4) Representative Graves did not, in fact, derive a financial benefit from the testimony; and (5) in any event, the witness met all reasonable and objective requirements established for a witness before the Small Business Committee. But even if it were not *dicta,* the COS' interpretation of *Graves* cannot be correct.

Certainly, the language in the Report concerning Representative Graves should not suggest that all actions on behalf of a single entity are permissible as long as there are numerous shareholders, and the interest itself is disclosed. For instance, a Member could hold two million dollars worth of stock in a major public corporation, and still hold a fraction of a percent of the overall stock. But to suggest that that Member, or their office, should be able to take official action that would uniquely affect that corporation, and directly impact the Member's two million dollar investment would be shocking to the public and to the principles and guidance that have long been a part of the standards of conduct in the House of Representatives.

It is also often said that the preferred method of addressing conflicts is full and complete disclosure of the facts that pose a conflict. That is largely true because Members are expected to be integral

[16] *See Graves* at 1–3.
[17] *See id.* at 18.
[18] *See id.* at 17 ("assuming *arguendo* that Representative Graves or his wife benefited financially from [the] testimony"); id. at 18 ("even if Representative Graves or his wife had derived a financial benefit from [the] testimony, such benefit would only have been as a member of a class of investors in renewable fuel companies.").

parts of their districts, and will not always be able to distinguish their interests from those of broader groups of their constituents. However, it has never been suggested that disclosure is the only method for addressing conflicts, and that the House has no rules prohibiting acting in conflict. One problem with assuming that disclosure of interests cures all conflicts is that the actions taken with regard to those conflicts are not always disclosed. For instance, in this case, while Representative Waters' interest in OneUnited was disclosed, Representative Waters' COS's actions to obtain direct assistance for OneUnited from other offices in the House would not have been publicly disclosed but for an investigation into allegations of impermissible conflicts by the Office of Congressional Ethics or this Committee.

Instead, Committee precedent and guidance is clear, as presented by the Outside Counsel and reiterated here by the Waters Committee, that such directed actions are impermissible. For instance, the *Ethics Manual* makes clear that legislative or official action—other than voting—on behalf of an entity in which a Member has an interest requires added circumspection and may implicate the rules and standards that *prohibit* the use of one's official position for personal gain.[19] More directly, when the House began to require that Members certify their lack of financial interest in certain official actions, the Committee provided clear guidance as to what such impermissible financial interests would include. That guidance states that "a Member's direct ownership of stock, even a small number of shares in a widely held company, likely would constitute a financial interest under Rule 23."[20] Therefore, any suggestion that there is no indication in the precedent or guidance of the Committee giving notice to Members and their staff to avoid providing official assistance to entities in which the Member has a significant financial interest, is simply incorrect. In addition, to the extent it contradicts this clear guidance, *Graves* should not be read to permit Members free rein to act on behalf of a single entity in which they have a publicly disclosed financial interest, merely because there are numerous shareholders.

Accordingly, the Waters Committee finds that the COS could not, consistent with House rules, take actions specifically directed at assisting OneUnited. However, as Outside Counsel's Report establishes, Representative Waters' COS did take such actions on at least two occasions. While Outside Counsel did not determine that the COS's efforts ultimately benefitted OneUnited, the House rules do not permit a Member or their staff to take specific actions that would, if effective, accrue to the financial benefit of the Member. The Waters Committee finds that Representative Waters' COS violated House rules by acting to specifically benefit OneUnited after he knew or should have known that Representative Waters had a significant financial interest in OneUnited—which interest would have been dramatically affected if OneUnited did not receive the assistance—and most likely after he had been instructed not to take such actions.

In deciding to resolve this matter at this stage, the Waters Committee has not followed the course taken by the Committee in the

[19] See *Ethics Manual* at 237.
[20] *Id.* at 239.

111th Congress, which impaneled an ISC, adopted an SAV, and impaneled an ASC before recommitting the matter to the ISC. It is important to note that the ISC in the 111th Congress had agreed to issue a report, much like Outside Counsel's Report here, which expressed concerns regarding the actions of Representative Waters' COS and the liability that Representative Waters had for those actions. However, the former Staff Director and Chief Counsel advised the ISC that it could not issue such a report without first adopting an SAV. The former Staff Director and Chief Counsel viewed the SAV/ASC process as the sole mechanism for the Committee to adopt a report criticizing a Member's conduct, in part based on the concern that issuing such a report, without adopting an SAV and conducting an ASC hearing, would deprive the Member of procedural rights that flow from those steps, including the right to review the SAV and the supporting evidence. The Waters Committee disagrees with that interpretation.

Instead, the Waters Committee's decision to resolve this matter without impaneling an ISC or adopting an SAV is based on two considerations. First, this Committee believes that, contrary to the advice of the former Chief Counsel, it is inappropriate to adopt an SAV where the Committee concludes that disciplinary findings and sanctions are not warranted. Second, the Waters Committee believes that, while the Rules may require some form of notice and hearing prior to the publication of a report critical of the conduct of a Member or staff, that notice and hearing is not limited to the SAV/ASC procedure. Rather, this Committee believes that notice and hearing, when there is no finding that discipline is warranted and no recommendation for a sanction by the House, requires only advance opportunity to review the report and to address the Committee in a Committee hearing. Such a hearing may be conducted as any other congressional hearing; the rules governing the adoption of an SAV or conduct of an ASC hearing would not apply.[21] The Waters Committee notes that, as with claims of a prohibition on *ex parte* communications between Committee Members and staff—which does not exist—the requirement for formal notice and hearing prior to the publication of some Committee reports, regardless of whether disciplinary findings or sanctions are recommended, is overly burdensome and may lead to greater backlogs and delays, and fewer public reports of Committee activity, particularly when the Committee does not believe disciplinary action is required.

Although it does not believe that disciplinary action or sanctions are warranted by the allegations against Representative Waters, the Waters Committee takes this opportunity to again caution all Members that they may be held responsible for the actions of their staff, and to emphasize each Member's obligation to properly supervise all staff. The Waters Committee believes that these rules and standards of conduct are unambiguous and clearly established. It is equally clear that a Member or their staff may not take actions which are intended to assist a specific entity in which the Member has a financial interest, and in a manner that could affect that interest. Thus, a Member is responsible for ensuring that her or his staff does not take actions that the Member could not take due to

[21] Committee staff has consulted with the Parliamentarian, who agrees with this interpretation.

the Member's own financial interests. Generally speaking, Members are expected to be aware of actions that staff take on the Member's behalf. However, where a Member has financial interests that could be affected by such actions by staff, the Member's responsibility for oversight of their staff may require additional measures by the Member.

Specifically, where a Member is aware that they may have a conflict of interest with respect to advocacy on behalf of certain persons, entities, or issues, the Member should inform all members of their staff of the potential conflict. A best practice to avoid mistakes, misunderstandings, and matters such as this, may be to notify all staff of each of the particular entities in which the Member has a financial interest, and document that notification. Staff should also be instructed to inform any entities in which the Member has a financial interest, to direct their specific requests for assistance to another Member or committee.

The Waters Committee recognizes that Representative Waters has long had an important role with respect to protecting minority and community banks, and that, as a senior Member of the Financial Services Committee, she can serve as a key advocate for those entities. However, the need to inform staff of potential conflicts of interest is most acute when a Member is intimately involved in representing a particular industry, policy interest, or other defined constituency and the Member has an interest in one particular entity in that constituency. Put another way, the more likely it is that an entity in which a Member holds a financial stake will come to that Member's office for assistance, perhaps because of their leadership positions and relative influence, the more that Member must make sure to prevent such conflicts.

One of the issues that complicated the resolution of this matter was the nature of the relationship between Representative Waters and her COS, who is also her grandson. Federal law prohibits a Member from employing the Member's "relative," as defined by 5 U.S.C. § 3110. While the statutory definition does not include a grandchild, the Waters Committee recommends that the House consider amending relevant statutes or House Rules to recognize that employer/employee relationships with grandchildren can be just as fraught with risk as other familial relationships. It is clear to the Waters Committee that the appearance issues that those situations raise can be just as troubling as those with children.

The Waters Committee also notes another issue that arose in the consideration of this matter during the 111th Congress, namely the breakdown in communications within the Committee and the perception that Committee Members and staff were acting on a partisan basis. The Committee works best when, and demands that, Members exercise their own independent and non-partisan judgment when considering matters before the Committee. Therefore, the Committee must operate on the principles of open, frank, and non-partisan communications. If concerns about partisan conduct among Committee Members or staff arise, the Committee must return to these basic principles. During the Committee's investigation of this matter in the 111th Congress, suspicions arose between all Members on one side of the Committee and the Committee leader from the other side, along with both partisan designees and certain nonpartisan staff who became seen as aligned with one party

or the other. The mutual suspicions were the same: that Members and staff were acting in partisan political ways. Some of those suspicions were based on the belief that, for partisan reasons, certain staff were communicating with Members of only one party. There were also suspicions that Committee members, while caucusing with members of their own party, were making decisions regarding the matter along party lines. Finally, there was a belief that the designees of the Chair and Ranking Member were themselves acting in improper partisan ways and coordinating with party leadership.

As Outside Counsel concluded, and the Waters Committee found, much of this suspicion was unfounded or overblown. However, the Waters Committee believes that if such suspicions infect the Committee's work again, Committee Members must take their concerns to the full Committee so they do not fester and multiply. The Waters Committee also recommends that the Standing Committee on Ethics consider adopting additional policies with respect to caucusing by Members, staff communications with Members of a single party, and the roles of the designees to the Chairman and Ranking Member. These policies should further the basic principles of open and frank communication and encourage Members and staff to act on a bi-partisan and non-partisan basis.

With respect to the designees, the Waters Committee notes the recommendation of an ISC in a prior matter: "[T]he Investigative Subcommittee recommends that the Standards Committee establish written policies and procedures as to the duties and responsibilities of the designated counsels to the Chair and Ranking Member to ensure that such counsels are performing their duties to the Committee consistent with the provisions of Committee Rule 6."[22] This recommendation was adopted by the full Committee, but has not yet been implemented.

The Waters Committee also believes that the principle of open, frank communication should apply to allegations of inappropriate remarks by Committee staff, whether the remarks are racially insensitive or otherwise improper. A former Committee staff member made comments that were racially insensitive and completely inappropriate during the 111th Congress.[23] It appears that the Committee Chair at the time and its former Staff Director and Chief Counsel waited to take action with respect to these allegations until well after they learned of them. Further, when they did take action, they terminated the employees without discussing the allegations with either the then-Ranking Member of the Committee or the employees themselves. This unilateral action appears to have been a result of the mutual partisan suspicion and breakdown of communication discussed above. The Waters Committee believes, and recommends that the Standing Committee consider reiterating that, at the point the Committee's leadership or staff become aware of insensitive or inappropriate comments related to bias, it is incumbent on them to deal with such allegations in an open, frank, and bi-partisan or non-partisan manner.

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[22] *Carib News* at 137.

[23] As the Outside Counsel concluded, those comments were unrelated to this matter. *See* Outside Counsel's Report at 65.

IV. CONCLUSION

The allegations against Representative Waters and her COS were serious, and they required a thorough investigation. The Waters Committee is confident that, with the assistance of Outside Counsel, its investigation of these allegations has been thorough and fair. In fact, the Committee, both before and after the appointment of the Waters Committee, has taken unprecedented steps towards fairness, including voluntary recusals of a majority of the Committee, a thorough consideration of the demands of constitutional due process, and providing notice and the opportunity for a hearing on a report that does not recommend any findings of misconduct or sanctions for the Member.

Ultimately, for the foregoing reasons, Outside Counsel recommended and the Waters Committee concluded that Representative Waters did not violate any House Rule, law, regulation, or other applicable standard of conduct. However, the Waters Committee finds that Representative Waters' COS violated House rules by taking specific actions that would accrue to the benefit of OneUnited, a bank Representative Waters had a significant financial interest in and which interest could have been significantly impacted by the actions. Specifically, the Waters Committee finds that Representative Waters' COS knew or should have known of Representative Waters' financial interest in OneUnited and her conflict of interest in taking official action on their behalf alone. Based on its findings, the Waters Committee issues the attached Letter of Reproval to Representative Waters' COS for his misconduct in this matter.

V. STATEMENT UNDER RULE 13, CLAUSE 3(c) OF THE RULES OF THE HOUSE OF REPRESENTATIVES

The Committee made no special oversight findings in this Report. No budget statement is submitted. No funding is authorized by any measure in this Report.

APPENDIX A

111TH CONGRESS *1st Session* | HOUSE OF REPRESENTATIVES | REVIEW NO. 09–2121

OFFICE OF CONGRESSIONAL ETHICS UNITED STATES HOUSE OF REPRESENTATIVES

Report and Findings

Transmitted to the
Committee on Standards of Official Conduct
on August 6, 2009
and released publicly pursuant to H. Res. 895 of the
110th Congress as amended

August 2009

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U.S. GOVERNMENT PRINTING OFFICE
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OFFICE OF CONGRESSIONAL ETHICS BOARD

UNITED STATES HOUSE OF REPRESENTATIVES
ONE HUNDRED ELEVENTH CONGRESS

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REPORT

Review No. 09–2121

The Board of the Office of Congressional Ethics (hereafter "the Board"), by a vote of no less than four members, on July 24, 2009, adopted the following report and ordered it to be transmitted to the Committee on Standards of Official Conduct of the United States House of Representatives.

SUBJECT: Representative Maxine Waters

NATURE OF THE ALLEGED VIOLATION: Representative Maxine Waters made a request in September 2008 to then Treasury Secretary Henry Paulson that Treasury Department officials meet with representatives from the National Bankers Association. A meeting was in fact granted shortly thereafter. However, at the meeting, and in the follow-up activity that occurred through Representative Waters' Congressional office, the discussion centered on a single bank—OneUnited. Representative Waters' husband had been a board member of OneUnited from 2004 to 2008 and, at the time of the meeting, was a stock holder of the bank. Representative Waters' conduct may have violated House Rule 23, clause 3 (by permitting compensation to accrue to her beneficial interest) and House precedent regarding conflicts of interest.

RECOMMENDATION: The Board of the Office of Congressional Ethics recommends that the Committee on Standards of Official Conduct further review the above allegations.

VOTES IN THE AFFIRMATIVE: 5

VOTES IN THE NEGATIVE: 0

ABSTENTIONS: 1

MEMBER OF THE BOARD OR STAFF DESIGNATED TO PRESENT THIS REPORT TO THE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT: Leo Wise, Staff Director & Chief Counsel.

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FINDINGS OF FACT AND CITATIONS TO LAW

Review No. 09–2121

On July 24, 2009, the Board of the Office of Congressional Ethics (hereafter "Board") adopted the following findings of fact and accompanying citations to law, regulations, rules and standards of conduct (in italics). The Board notes that these findings do not constitute a determination that a violation actually occurred.

I. INTRODUCTION

A. SUMMARY OF ALLEGATIONS

1. There is a substantial reason to believe that Representative Waters' conduct may have violated House Rule 23, clause 3 and House precedent regarding conflict of interest[1] when she called then Treasury Secretary Henry Paulson and requested that Treasury Department officials meet with representatives from the National Bankers Association. A meeting was in fact granted, however, the discussion at the meeting centered on a single bank—OneUnited. Representative Waters' husband had been a board member of the bank from 2004 to 2008 and, at the time of the meeting, was a stock holder of the bank.

B. JURISDICTIONAL STATEMENT

2. The allegations that were the subject of this review concern Representative Maxine Waters, a Member of the United States House of Representatives from the 35th District of California. The Resolution the United States House of Representatives adopted creating the Office of Congressional Ethics (hereafter "OCE") directs that, "[n]o review shall be undertaken" by the board of any alleged violation that occurred before the date of adoption of this resolution."1A[2] The House adopted this Resolution on March 11, 2008. Because the conduct under review occurred after March 11, 2008, review by the Board is in accordance with the Resolution.

C. PROCEDURAL HISTORY

1. A preliminary review in this matter commenced on April 2, 2009, following a written request by at least two members of the OCE Board made on March 26, 2009.

2. At least three members of the Board voted to initiate a second-phase review in this matter on April 24, 2009. The second phase review commenced on May 1, 2009.

[1] As per Rule 9 of the OFFICE OF CONGRESSIONAL ETHICS, RULES FOR THE CONDUCT OF INVESTIGATIONS 11 (2009), the Board shall refer a matter to the Standards Committee if it determines there is a substantial reason to believe the allegation.

[2] H. Res 895, 110th Cong. §1(e) (2008) (as amended).

3. The Board voted to extend the 45-day second-phase review by an additional 14 days on June 12, 2009, as provided for under the Resolution.

4. The second-phase review ended on June 23, 2009.[3]

5. Representative Waters presented a statement to the Board, under Rule 9(B) of the Office of Congressional Ethics' Rules for the Conduct of Investigations, on July 24, 2009.

6. The Board voted to refer the matter to the Committee on Standards of Official Conduct for further review and adopted these findings on July 24, 2009.

7. The report and findings in this matter were transmitted to the Committee on Standards of Official Conduct on August 6, 2009.

D. SUMMARY OF INVESTIGATIVE ACTIVITY

8. The OCE requested documentary and in some cases testimonial information from the following sources:

(1) OneUnited Bank;
(2) Mr. Robert Cooper;
(3) Mr. Kevin Cohee;
(4) Mr. Jeb Mason;
(5) The Secretary of the Treasury Department, the former Secretary of the Treasury Department who served from July 2006–January 2009;
(6) Representative A, Chairman of the Financial Services Committee in the U.S. House of Representatives;
(7) Representative Waters;
(8) Representative Waters' Chief of Staff; and
(9) Representative Waters' Congressional office.

II. REPRESENTATIVE WATERS ROLE IN A SEPTEMBER 2008 MEETING BETWEEN THE TREASURY DEPARTMENT AND EXECUTIVES FROM THE NATIONAL BANKERS ASSOCIATION AND ONEUNITED BANK

A. APPLICABLE LAWS, RULES AND STANDARDS OF CONDUCT

9. *Code of Conduct:*

Under House Rule 23, clause 1, Members "shall behave at all times in a manner that shall reflect creditably on the House." Under House Rule 23, clause 2, Members "shall adhere to the spirit and the letter of the Rules of the House".

Under House Rule 23, clause 3, Members "may not permit compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress."

10. *Conflict of Interest:*

The House Ethics Manual discusses at length the precedents guiding Members' actions on matters of personal interest. Quoting Rule III, section 673 of the Rules of the House of Representatives, the manual states, "It is a principle of "immemo-

[3] Some documents and interviews were requested by the OCE staff prior to June 23, 2009, but not provided to the OCE until after this date.

rial observance" that a Member should withdraw when a question concerning himself arises; but it has been held that the disqualifying interest must be such as affects the Member directly, and not as one of a class."[4] *Although the manual states that Rule III only applies to a Member voting on the House floor, it makes clear that contacting an executive branch agency entails "a degree of advocacy above and beyond that involved in voting."*[5] *As such, the manual cautions that a "Member's decision on whether to take any such action on a matter that may affect his or her personal financial interest requires added circumspection." A Member who considerers advocating on a matter that may affect her "personal financial interests . . . should first contact the Standards Committee for guidance."*[6]

11. The rules and precedent cited above clearly enunciate a standard that restricts Members from advocating for a matter in which they have a personal financial interest. Therefore, if Representative Waters advocated for OneUnited while her husband maintained a significant investment in the bank, then she may have violated House Rule 23 and House standards regarding conflicts of interest.

12. Based on the facts collected by the OCE, the Board concludes there is a substantial reason to believe the allegation that is the subject of this review.[7]

B. REPRESENTATIVE WATERS CALLED TREASURY SECRETARY PAULSON AND REQUESTED A MEETING AT THE REQUEST OF MR. COOPER

13. In an interview with the OCE, Representative Waters stated that she called then Treasury Secretary Henry Paulson at the request of Mr. Robert Cooper and Mr. Kevin Cohee.[8] At the time of the request, Mr. Cooper identified himself as the Chairman-elect of the National Bankers Association[9] (NBA) and also as Vice-President and Senior Counsel for OneUnited. Mr. Cohee was one of the principle founders of OneUnited and the Chairman and CEO of the bank. Representative Waters stated that Mr. Cooper met her outside her office and asked her to contact Secretary Paulson and ask for a meeting.[10] Either that day or the day after, Mr. Cohee came to the Representative's office and reiterated Mr. Cooper's request.[11]

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[4] COMM. ON STANDARDS OF OFFICIAL CONDUCT, 110TH CONG., HOUSE ETHICS MANUAL 234 (2008).

[5] *Id.* at 237.

[6] *Id.*

[7] Rule 9 of the OFFICE OF CONGRESSIONAL ETHICS, RULES FOR THE CONDUCT OF INVESTIGATIONS 11 (2009) provides that "[t]he Board shall refer a matter to the Standards Committee for further review if it determines there is a substantial reason to believe the allegation based on all the information then known to the Board."

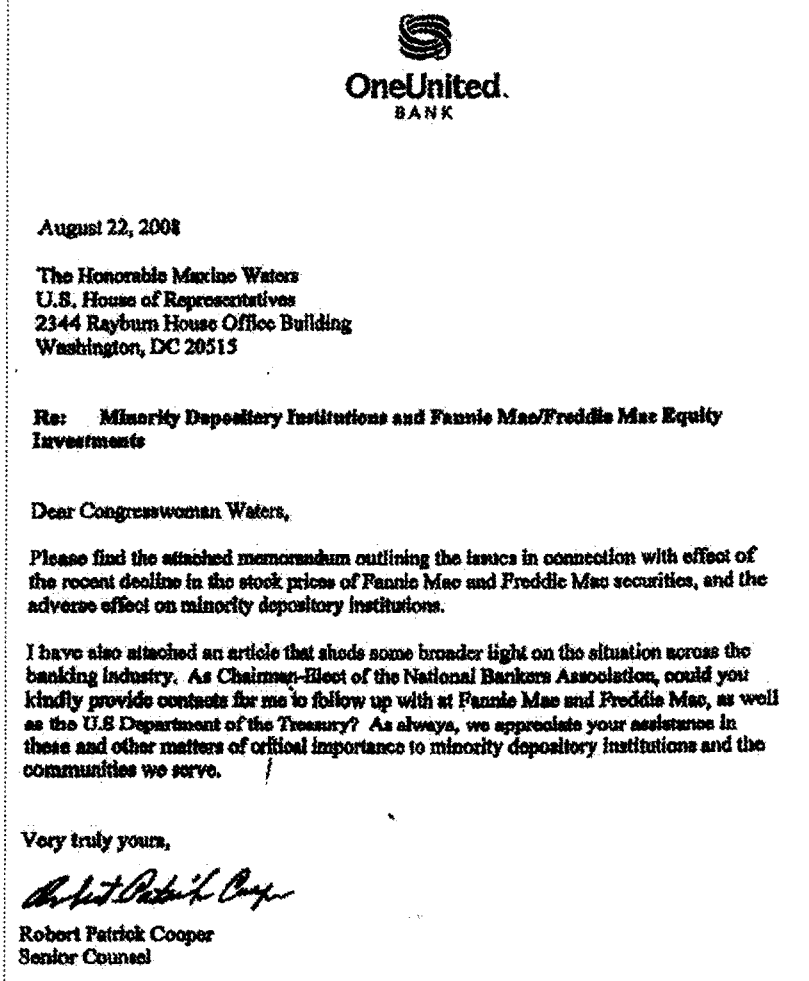
[8] Memorandum of Interview of Representative Maxine Waters, June 25, 2009 (Exhibit 1 at 09–2121—000002).

[9] The National Bankers Association was founded in 1927 as the trade association for the nation's 103 minority and women-owned banks. The members include banks owned by African-Americans, Native-Americans, American-Indians, East-Indians, Hispanic-Americans, Asian-Americans and Women. MWOB's are located in 29 states and 2 territories spanning 60 cities and the District of Columbia. *(http://www.nationalbankers.org/profile.asp* (last visited July 14, 2009)).

[10] Memorandum of Interview of Representative Maxine Waters, June 25, 2009 (Exhibit 1 at 09–2121—000002).

[11] *Id.* at 09–2121—000002–000003.

14. Representative Waters asked Mr. Cooper to prepare a document for her so that she could "speak intelligently" about the matter Mr. Cooper wanted to address with the Treasury when she called Secretary Paulson.[12] Mr. Cooper prepared a cover letter and memorandum per Representative Waters' request. The Board notes that although Mr. Cooper makes reference to his position as Chairman-elect of the NBA in the body of the letter, the letter itself is written on OneUnited letterhead and is signed "Robert Patrick Cooper, Senior Counsel."[13]



OneUnited.
BANK

August 22, 2008

The Honorable Maxine Waters
U.S. House of Representatives
2344 Rayburn House Office Building
Washington, DC 20515

Re: Minority Depository Institutions and Fannie Mae/Freddie Mac Equity Investments

Dear Congresswoman Waters,

Please find the attached memorandum outlining the issues in connection with effect of the recent decline in the stock prices of Fannie Mae and Freddie Mac securities, and the adverse effect on minority depository institutions.

I have also attached an article that sheds some broader light on the situation across the banking industry. As Chairman-Elect of the National Bankers Association, could you kindly provide contacts for me to follow up with at Fannie Mae and Freddie Mac, as well as the U.S Department of the Treasury? As always, we appreciate your assistance in these and other matters of critical importance to minority depository institutions and the communities we serve.

Very truly yours,

Robert Patrick Cooper
Senior Counsel

15. The letter and memorandum Mr. Cooper drafted for Representative Waters were followed by a letter from Mr. Cooper to

[12] *Id.*
[13] Letter from Mr. Robert Cooper, Senior Counsel, OneUnited Bank to Representative Maxine Waters, Aug. 22, 2008 (Exhibit 2 at 09–2121—000008).

Secretary Paulson on September 6, 2008, requesting a meeting. Representative Waters and Representative Barney Frank were copied on the letter. On this occasion the letter is on NBA letterhead and Mr. Cooper signs as the Chairman-elect of the NBA.[14]

16. In an interview with the OCE, the Secretary of the Treasury Department expressed a clear recollection of Representative Waters' phone call.[15] He provided the following facts regarding the phone call:

a. Representative Waters expressed concern about how the Treasury Department structured the conservatorship into which Fannie Mae and Freddie Mac had been placed. Representative Waters indicated that it could severely disadvantage minority-owned banks.[16]

b. During the call, Representative Waters indicated that she had "some people in town who were important to her" and they needed a meeting with the Treasury Department.[17]

17. The Secretary of the Treasury Department stated that the week of September 8, 2008 was extraordinarily busy given the state of the burgeoning financial crisis. Given how busy the Treasury Department was that week, the Secretary of the Treasury Department told the OCE that a meeting would not have occurred unless Representative Waters asked for it and he decided to grant it.[18]

18. The meeting was granted and scheduled for September 9, 2008.[19]

19. The Secretary of the Treasury Department was confident that Representative Waters did not mention a specific bank and he was certain that she did not mention any financial interest in OneUnited or any other bank.[20]

20. After the meeting was granted, Representative Waters asked her Chief of Staff to follow up with the Treasury Department about the meeting.[21] The Chief of Staff of Representative Waters then informed Mr. Cooper that the meeting had been granted.[22] According to the Chief of Staff of Representative Waters, he left it to Mr. Cooper to decide who to invite to the meeting.[23]

21. The Chief of Staff of Representative Waters told the OCE that Mr. Cooper told him who would attend the meeting before it occurred.[24] The anticipated attendees included: Mr. Cooper, Mr. Cohee, Mr. George Lyons, counsel for the NBA, and Ms. Terri Williams, President of OneUnited. Of these individuals, only Mr. Lyons had no affiliation with OneUnited. A representative from Senator John Kerry's office, a representative from Representative Barney Frank's office, and the Chief of Staff of Representative Wa-

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[14] Letter from Mr. Robert Cooper, Senior Counsel, OneUnited Bank, to Secretary Henry Paulson, Sept. 6, 2008 (Exhibit 3 at 09–2121—000011–000012).

[15] Memorandum of Interview of the Secretary of the Treasury Department, Apr. 20, 2009 (Exhibit 4 at 09–2121—000015).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Memorandum of Interview of the Chief of Staff of Representative Waters, June 29, 2009 (Exhibit 5 at 09–2121—000019).

[22] *Id.*

[23] *Id.*

[24] *Id.*

ters also attended the meeting. The remaining attendees were invited by the Treasury Department and were from various bank regulatory agencies.[25] Approximately 20 people attended.[26]

22. The Chief of Staff of Representative Waters described the meeting as a high level, "high priority" meeting, citing that at least one Assistant Secretary of the Treasury Department was in attendance.[27] Representative Waters confirmed the significance of the meeting. When asked how often she calls a Cabinet level official such as Secretary Paulson, Representative Water's replied that "you don't use your chits for nothing, you call when there is an important issue."[28]

23. The Chief of Staff of Representative Waters provided the following information to the OCE:

a. The meeting lasted approximately 45 minutes to one hour.[29] Mr. Cooper stated that he represented both the NBA and OneUnited, but stated that at the meeting he was representing the NBA.[30] The meeting took the form of a dialogue with everyone speaking. Mr. Cooper expressed his concerns about the impact that Fannie Mae and Freddie Mac's conservatorship would have on minority-owned banks.[31] Mr. Cohee expressed similar concerns and used OneUnited as an exemplar of the impact the Treasury Department's decisions would have on minority-owned banks.[32]

24. Mr. Cooper corroborated these facts, stating that approximately one half of the meeting was used by Treasury Department officials to explain why the government took the actions it did with regard to Freddie Mac and Fannie Mae.[33] He stated that OneUnited was represented at the meeting to illustrate what could happen to minority-owned banks if the Federal government did not assist them. He also stated that OneUnited was the only bank independently represented at the meeting.[34]

25. The Chief of Staff of Representative Waters did not think it was strange that Mr. Cooper invited such a small group of people to attend the meeting despite his knowledge that there are member banks of the NBA in the Washington, DC metro area.[35] The Board notes that OneUnited's exclusive representation at the meeting is nevertheless cause for concern given the fact that the NBA represents 103 member banks and of those banks two are in Wash-

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[25] *Id.*

[26] Memorandum for Record of Mr. Robert Cooper, Apr. 17, 2009 (Exhibit 6 at 09–2121—000023). The Board notes that this memorandum resulted from a phone conversation with Mr. Cooper during the initial phone call requesting his cooperation and the cooperation of Mr. Cohee and OneUnited. All requests for additional opportunities to interview Mr. Cooper and Mr. Cohee have been denied.

[27] Memorandum of Interview of the Chief of Staff of Representative Waters, June 29, 2009 (Exhibit 5 at 09–2121—000019).

[28] Memorandum of Interview of Representative Maxine Waters, June 25, 2009 (Exhibit 1 at 09–2121—000005).

[29] Memorandum of Interview of the Chief of Staff of Representative Waters, June 29, 2009 (Exhibit 5 at 09–2121—000019).

[30] *Id.*

[31] *Id.*

[32] *Id.* at 09–2121—000020.

[33] Memorandum for Record of Mr. Robert Cooper, Apr. 17, 2009 (Exhibit 6 at 09–2121—000023)

[34] *Id.*

[35] Memorandum of Interview of the Chief of Staff of Representative Waters, June 29, 2009 (Exhibit 5 at 09–2121—000019)

ington, DC—Industrial Bank, N.A. and Independence Federal Savings Bank—and one is in Bethesda, MD—Urban Trust Bank.[36]

26. When interviewed by the OCE the Chief of Staff of Representative Waters at first did not remember any specific potential remedies discussed, but he then stated that one potential remedy discussed at the meeting was the transfer of funds from the Treasury to the affected banks.[37]

[36] *http://www.nationalbankers.org/memberbanks.asp* (last visited June 14, 2009).

[37] Memorandum of Interview of the Chief of Staff of Representative Waters, June 29, 2009 (Exhibit 5 at 09–2121—000020).

27. The day after the meeting, September 10, 2008, Mr. Cooper sent a letter to the Acting Under Secretary, Anthony Ryan, following up on the discussion from the day before. In the letter Mr. Cooper highlighted Mr. Cooper's and Mr. Cohee's request that the Treasury return capital to the affected banks including, presumably, OneUnited. The Board draws particular attention to the language in the first paragraph stating that at the meeting "we emphasized that Treasury should provide . . . protection on an urgent basis to avert possible failure of one if not several of our institutions . . ." (Emphasis added). As OneUnited was the only bank represented at the meeting, the Board infers that the "one" bank referenced in the letter likely was OneUnited. The Board also takes note of language that indicates a request was made for a transfer of funds from the Treasury to the affected bank, including the specific request that Treasury would redeem the GSE preferred stock . . ." and the characterization of this redemption as ". . . not significant to the government in absolute dollar terms."[38]

NATIONAL BANKERS ASSOCIATION

CONFIDENTIAL

September 10, 2008

The Honorable Anthony W. Ryan
Acting Under Secretary for Financial Institutions Policy
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: National Bankers Association – Minority Bank Capital Restoration Program

Dear Mr. Ryan:

As a follow-up to our meeting yesterday, we sincerely appreciated the opportunity to discuss with you, Senior Treasury representatives and bank regulatory agency officials the impact of the recent conservatorship of Fannie Mae and Freddie Mac (collectively, the "GSEs") on minority depository institutions ("MDIs"). We emphasized that Treasury should provide appropriate protection on an urgent basis to avert possible failure of one if not several of our institutions, a situation that would undoubtedly reverberate through the entire minority banking sector, causing irreparable harm to the inner-city communities we serve. Unlike with a typical "majority" bank, no bank will

[38] Letter from Mr. Robert Cooper, Chairman Elect, National Bankers Association, to Mr. Anthony Ryan, Acting Under Secretary for Financial Institutions Policy, Sept. 10, 2008 (Exhibit 7 at 09–2121—000024).

As a result of the discussions at the meeting and subsequently, we have refined our proposal consistent with our immediate need to protect minority banks from failure or significant adverse impact due to the decline in the GSE preferred stock. Accordingly, we would propose the following Minority Bank Capital Restoration Program:

As a part of the resolution to the takeover of the GSEs, Treasury would redeem the GSE preferred stock held by an MDI in an amount equal to the lesser of: (1) the amount the MDI paid for the preferred stock; or (2) the amount necessary to return the MDI back to "well-capitalized" status (as defined in the relevant Prompt Corrective Action rules).

Again, we are not seeking a windfall from this resolution. We note that this proposal very well may result in an MDI losing money on its GSE preferred, which is consistent with Treasury's stated goal to protect taxpayers. We also reiterate our position that there is no less reason to protect minority banks that invested in GSEs than the reasons for the resolution you are developing for the GSEs themselves. Both serve critical social and economic roles in the economic and social framework of their communities.

To be clear, however, while the return of this capital is very important to the continued health of minority banks, given their size it is not significant to the government in absolute dollar terms, let alone relative to the anticipated expenditure with respect to the GSEs. Such a result will preserve the critical service provided by minority banks, and be consistent with the broader and more significant relief provided to the GSEs and the more general Congressional and other commitments to preserve minority banks in FIRREA and elsewhere.

It is also worth mentioning that time is of the essence and we continue to be concerned that the relief we are seeking, or any appropriate derivative thereof, may not be granted in time to avert an impending crisis. Therefore, we respectfully request and thank you in advance for acting on our request on an urgent basis. To put it bluntly, we are seeking Treasury action on this proposal this week.

If you have any questions, please feel free to contact me at (617) 457-[redacted]. In any event, I hereby request ongoing standing calls with you or a member of your Senior staff to discuss progress. Please call me to discuss the appropriate member of your staff to engage in those discussions.

We hereby request confidential treatment of this letter to the fullest extent permitted by your regulator.

Sincerely,

Robert Patrick Cooper

Robert Patrick Cooper
Chairman-Elect

28. Following the meeting, Representative Waters received a call from Secretary Paulson.[39] During the call Secretary Paulson stated that he had expected more members of the NBA to attend the

[39] Memorandum of Interview of Representative Maxine Waters, June 25, 2009 (Exhibit 1 at 09–2121—000003).

meeting.[40] He told Representative Waters that he made the meeting available to everyone and that he expected a larger turnout.[41]

C. FURTHER EVIDENCE OF ONEUNITED'S SINGULAR ROLE IN SEPTEMBER 9, 2009 MEETING

29. Further evidence of what appears to be OneUnited's singular role in the September 9, 2008 meeting is the fact that emails provided by Representative Waters' office show Mr. Cohee, the bank's CEO, inviting individuals to the meeting. This contradicts Representative Waters and the Chief of Staff to Representative Waters' comments that the NBA decided who would attend the meeting with the Treasury Department because Mr. Cohee was not an officer of the NBA.[42]

Moore, Mikael

From: Phillips, John (Small-Business) [redacted]@small-bus.senate.gov]
Sent: Monday, September 08, 2008 8:59 PM
To: [redacted]@oneunited.com; Moore, Mikael
Subject: Treasury meeting tomorrow

Kevin, I am happy to join you at the meeting. My direct line at work is [redacted]. My cell phone number is [redacted]
My social security # is [redacted] And my date of birth is [redacted] Please let me know if you need any additional information. Do you know what room the meeting is being held? Thanks. Jcp

Sent from my BlackBerry Wireless Handheld

From: Kevin Cohee
To: Phillips, John (Small-Business); [redacted]@mail.hksse.gov
Sent: Mon Sep 08 18:43:28 2008
Subject: Re: Kevin, please forward me the contact information for barney's staff. Thanks. Jcp

Thank you for your help on this critical issue. We would appreciate your participation at the meeting at 11am at treasury. Could you please forward your number so Congresswoman's Waters office can take care of any security issues. I will land in dc at 830.

[40] *Id.*
[41] *Id.*
[42] Email from Mr. Kevin Cohee to John Phillips and Mikael Moore, Sept. 8, 2008 (Exhibit 8 at 09–2121—000028).

30. The September 10, 2008 letter, cited above, from Mr. Cooper to Mr. Ryan on NBA stationary, appears to have first been sent to Mr. Mikael Moore, a member of Representative Waters' staff, by Mr. Phillip Perry, the Department Administrator for Legal and Business Development for OneUnited.[43]

From: Phillip Perry [mailto:[redacted]@OneUnited.com]
Sent: Wednesday, September 10, 2008 5:46 PM
To: Moore, Mikael
Cc: Bob Cooper
Subject: NBA Letter to the Treasury

Dear Mikael,

Attached please find the National Bankers Association's letter to the U.S. Dept. of the Treasury. Please don't hesitate to contact me if you have any questions or if I can be of further assistance. Thank you.

Phillip R. Perry
Department Administrator
Legal and Business Development
OneUnited Bank
100 Franklin Street, Suite 600
Boston, MA 02110
p: 617.457.[redacted]
f: 617.542.1797
bb: [redacted]
[redacted]@oneunited.com
www.oneunited.com

[43] Email from Mr. Phillip Perry to Mikael Moore, Sept. 10, 2008 (Exhibit 9 at 09–2121—000030).

31. Therefore, even though the letter on its face appears to be from Mr. Cooper in the role of Chairman-elect of the NBA, it appears that it was, at a minimum, routed through the Legal and Business Development department of OneUnited.

32. Moore then forwarded the September 10th letter to Erika Jeffers, a staff person on the Committee on Financial Services.[44]

Moore, Mikael

From: Moore, Mikael
Sent: Thursday, September 11, 2008 12:45 PM
To: Jeffers, Erika
Subject: FW: NBA Letter to the Treasury
Attachments: NBA Treasury Letter (091008).pdf

Mikael Moore
Chief Of Staff
Congresswoman Maxine Waters (CA-35)
o: 202-225-[redacted]
c. [redacted]
f: 202-225-7854

[44] Email from Mikael Moore to Erika Jeffers, Sept. 11, 2008 (Exhibit 10 at 09–2121—000034).

33. In another email, Mr. Cooper sent a message to Mr. Moore regarding a "back-up strategy in case Treasury does not grant the specific relief we are requesting within the next couple of days." The email was sent ten days after the meeting with the Treasury Department. Mr. Cooper sent the email from his OneUnited email account, he signed it as "Senior Vice President/Senior Counsel," and he copied Mr. Cohee on the email.[45]

Moore, Mikael

From: Bob Cooper [redacted]@OneUnited.com]
Sent: Friday, September 19, 2008 12:38 PM
To: Moore, Mikael
Cc: Melton, Nicole; Kevin Cohee
Subject: FW: MDI Preferred Stock Redemption Language

Hi Mikael:
Here are our thoughts on an alternative back-up strategy in case Treasury does not grant the specific relief that we are requesting within the next couple of days. We would appreciate your thoughts, comments, etc. on both the strategy and the particular language. We have had an initial conversation with Mike Capuano's office and they are supportive of this approach, 'though they stressed that the particular language around the affected group would be key. It is a legislative solution and with that we realize that it may be fraught with the challenges and uncertainty that comes with trying to pass legislation. Could you kindly share with Erika. We will follow up with her.

Robert Patrick Cooper
Senior Vice President / Senior Counsel
OneUnited Bank
100 Franklin Street, Suite 600
Boston, MA 02110

p - 617.457.[redacted]
c - [redacted]
f - 617.507.8925
e - [redacted]@oneunited.com

[45] Email from Mr. Robert Cooper to Mikael Moore, Sept. 19, 2008 (Exhibit 11 at 09–2121—000036–000037).

34. Three days later, on September 22, 2008, Mr. Cohee, not Mr. Cooper, sent Mr. Moore an email regarding "Bailout Legislation."[46] The email appears to have proposed legislation attached.

Moore, Mikael

From: Kevin Cohee [redacted]OneUnited.com]
Sent: Monday, September 22, 2008 8:01 AM
To: Moore, Mikael
Subject: Fw: Bailout Legislation
Attachments: five percent language.doc

Could you please print this for our meeting.

-----Original Message-----
From: [redacted]@aol.com <[redacted]@aol.com>
To: [redacted]@VERIZON.NET <[redacted]@VERIZON.NET>
CC: Kevin Cohee; Teri Williams
Sent: Mon Sep 22 06:04:48 2008
Subject: Re: Bailout Legislation

P <<five percent language.doc>> S to previous email.

Attached and pasted below is a draft re Robert Primus's request. I've reformatted it slightly so that it could be banking committee bill language as opposed to approps language, but Counsel will vet it in any event

35. The next day Mr. Cooper sent Mr. Moore an email with the subject line: "Treasury Request Appendix Final.xls" to which a spreadsheet is attached showing OneUnited's investments in Fannie Mae and Freddie Mac. According to the email chain, the message and the attached spreadsheet was first sent to Mr. Cooper by Ms. Terri Williams, the President of OneUnited and an attendee at the September 9, 2008 meeting.[47]

Moore, Mikael

From: Bob Cooper [redacted]OneUnited.com]
Sent: Tuesday, September 23, 2008 10:56 AM
To: Moore, Mikael
Subject: Fw: Treasury Request Appendix Final.xls
Attachments: Treasury Request Appendix Final.xls

-----Original Message-----
From: Teri Williams
To: [redacted]mail.house.gov' [redacted]@mail.house.gov>
CC: Bob Cooper
Sent: Tue Sep 23 10:45:59 2008
Subject: Treasury Request Appendix Final.xls

<<Treasury Request Appendix Final.xls>> --

[46] Email from Mr. Kevin Cohee to Mikael Moore, Sept. 22, 2008 (Exhibit 12 at 09–2121—000039).
[47] Email from Mr. Robert Cooper to Mikael Moore, Sept. 23, 2008 (Exhibit 13 at 09–2121—000041).

36. The spreadsheet included a request for $41,993,403.58 from the Treasury in exchange for $51,250,000.00 in Fannie Mae and Freddie Mac stock held by OneUnited. Based on the earlier communications between Mr. Cooper and the Treasury Department this exchange was essential to OneUnited's survival.[48]

Request from Treasury in exchange for $51,250,000 in GSE Preferred Stock (par value)	**$ 41,993,403.58**
(This amount is based on the $33,000,000 required to be well capitalized and the negative $8,993,403.58 Tier 1 Capital.)	

37. Two days later Mr. Cooper sent Mr. Moore an email, again from his OneUnited account, containing only a subject line: "Any update?"[49]

Moore, Mikael

From: Bob Cooper [redacted]@OneUnited.com]
Sent: Thursday, September 25, 2008 9:24 AM
To: Moore, Mikael
Subject: Any update?

[48] *Id.* at 09–2121—000042.
[49] Email from Mr. Robert Cooper to Mikael Moore, Sept. 25, 2008 (Exhibit 14 at 09–2121—000043).

38. Further conflating Mr. Cooper and OneUnited's role in the September 9, 2008 meeting, and the communications and requests following the meeting, is an October 29, 2008 letter to Mr. Neal Kashkari, the Assistant Secretary for Financial Stability. The letter is written on behalf of the NBA and requests that the Treasury Department create a special initiative modeled on the Capital Purchase Program of the TARP for minority-owned banks. The letter was signed by two individuals—Mr. Michael Grant and Mr. Floyd Weekes. Mr. Weekes' signature block identifies him as "Chairman, National Bankers Association." [50]

October 29, 2008

The Honorable Neel Kashkari
Assistant Secretary for Financial Stability
Office of Financial Stability
U.S. Department of Treasury
1500 Pennsylvania Avenue NW
Washington DC 20005

09-2121_000046

Dear Assistant Secretary Kashkari:

On behalf of the membership of the National Bankers Association (NBA), we like to commend the U.S. Department of Treasury (UST) for its efforts to ensure the stability of the U.S. and global financial markets. We believe the recently launched Capital Purchase Program of the TARP is an important step toward stabilizing financial markets in our country. In this context, the NBA respectfully urges the UST to create a special initiative modeled on the Capital Purchase Program targeted to banks, thrifts and their holding companies that are considered Minority Depository Institutions (MDIs) under section 308 of the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA) or as designated as MDIs by the Federal Deposit Insurance Corporation (FDIC).

We look forward to working with UST to help strengthen our nation's financial system. If you have any questions, please feel free to contact the NBA: President, Michael Grant at (202) 588-[redacted] Chairman Floyd Weekes at (615) 329-[redacted]

Sincerely,

Floyd Weekes
Chairman, National Bankers Association

Michael A. Grant, J.D.
President, National Bankers association

39. This letter shows Mr. Weekes speaking on behalf of the NBA and identifying himself as the Chairman of the organization as late as October 29, 2008. This fact raises several questions. First, why was Mr. Cooper representing the NBA at the September 9, 2009 meeting if Mr. Weekes was still the acting Chairman. If Mr. Cooper was in fact the incoming Chairman—i.e., the Chairman-elect—in September 2008 and was authorized to speak on behalf of the NBA in September, why was he not continuing to speak on behalf of the NBA in October? Did Mr. Cooper attend the September 2009 meeting to speak on behalf of the NBA or to use the NBA's name to

[50] Letter from Mr. Floyd Weekes, Chairman, National Bankers Association and Mr. Michael Grant, President, National Bankers Association to Neel Kashkari, Assistant Secretary for Financial Stability, Oct. 29, 2008 (Exhibit 15 at 09–2121—000045).

support OneUnited's request for a bailout? The Board again notes that the OCE made multiple requests to interview Mr. Cooper and Mr. Cohee. Mr. Cooper and Mr. Cohee refused the OCE's requests. The website for the NBA currently lists Mr. Cooper as the Chairman for the "2008 Board of Directors" and Mr. Weekes as the "Immediate-Past Chairman." However, this fact does little to answer the questions raised by this Review.

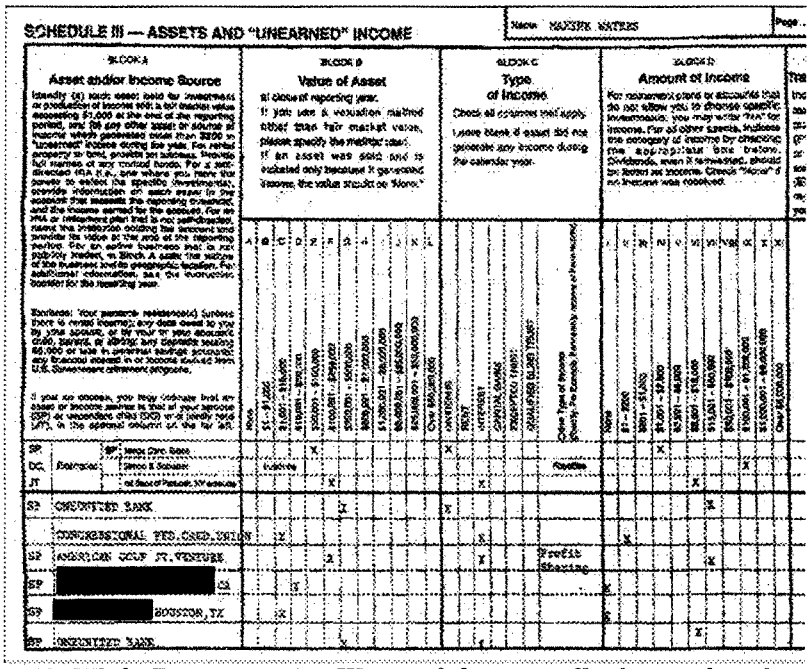
40. Pursuant to H. Res 895 1(c)(2)(C)(i)(II)(bb) and Rule 6 of the Office of Congressional Ethics Rules for the Conduct of Investigations, the Board infers that Mr. Cooper and Mr. Cohee's refusal to cooperate, taken together with the facts above, indicate that Mr. Cooper may have used his position as the Chairman-elect of the NBA to place OneUnited in a preferential position with the Treasury Department following the creation of Fannie Mae and Freddie Mac's conservatorship.

D. REPRESENTATIVE WATERS' HUSBAND WAS A FORMER BOARD MEMBER OF ONEUNITED AND HELD SIGNIFICANT INVESTMENTS IN ONEUNITED.

41. At the time of their request, Representative Waters knew Mr. Cooper and Mr. Cohee from previous interactions. Representative Waters indicated that Mr. Cohee was a friend and that he had held a fundraiser at his home to benefit her campaign on at least one occasion. She described her relationship with Mr. Cooper as professional.[51] She was aware of Mr.Cooper's [52] and Mr. Cohee's [53] affiliation with OneUnited.

[51] Memorandum of Interview of Representative Maxine Waters, June 25, 2009 (Exhibit 1 at 09–2121—000003–000004).
[52] *Id.* at 09–2121—000005.
[53] *Id.* at 09–2121—000003.

42. Representative Waters' husband had been a member of the board of directors of OneUnited for several years prior until his resignation on April 21, 2008.[54] According to her 2008 financial disclosure form, Representative Waters' husband had two investments in OneUnited valued between $500,000 and $1 million.[55]



SCHEDULE III — ASSETS AND "UNEARNED" INCOME

Name MAXINE WATERS

BLOCK A Asset and/or Income Source	BLOCK B Value of Asset	BLOCK C Type of Income	BLOCK D Amount of Income
SP	[redacted]		
DC	Rental Income	Rental Income	
JT			
SP	ONEUNITED BANK		
	CONGRESSIONAL FED.CRED.UNION		
SP	FANNIE MAE GROUP FT. VENTURE	Profit Sharing	
SP	[redacted] CA		
SP	[redacted] BOSTON,TX		
SP	ONEUNITED BANK		

43. While Representative Waters did not recall when or how her husband became a board member of OneUnited, she was aware that he had once sat as a member of the board. She was also aware of her husband's investments in the bank.

E. REPRESENTATIVE WATERS' APPARENT RECOGNITION OF CONFLICT OF INTEREST

44. In September 2008, Representative Waters Told Representative A There Was A Problem With Oneunited, But That She Didn't Know What To Do About It Because "Sydney's Been On The Board."[56]

45. Representative A recalled that the problem Representative Waters referenced was the fact that OneUnited has purchased more preferred shares of Fannie Mae and Freddie Mac than any other bank. Representative A described the problem OneUnited had as an exaggerated version of the problem every other bank had—OneUnited had overbought preferred shares in Fannie Mae

[54] Letter from Mr. Sydney Williams to Mr. Kevin Cohee, Apr. 21, 2008 (Exhibit 16 at 09–2121—000049).

[55] United States House of Representatives Financial Disclosure Statement for Representative Maxine Waters, May 15, 2008 (Exhibit 17 at 09–2121—000051).

[56] Memorandum of Interview of Representative A, July 8, 2009 (Exhibit 18 at 09–2121—000053).

and Freddie Mac and was therefore at a greater risk of collapse than any other bank holding preferred shares of Fannie Mae and Freddie Mac.[57]

46. Representative Waters told Representative A that she was in a predicament because her husband had been involved in the bank, but "OneUnited people" were coming to her for help. According to Representative A, she knew she should say no, but it bothered her. It was clear to Representative A that this was a "conflict of interest problem."[58]

47. Representative A's advice to Representative Waters was to "stay out if it"—OneUnited was a Boston bank and he had a commitment to minority banks. He would address the problem. Representative A then asked his staff to take over the OneUnited issue from Representative Waters.[59]

48. Representative A had at least two conversations with Representative Waters in which he told her to not get involved in the OneUnited matter. The conversations likely occurred in September 2008, but he could not recall any specific dates.[60]

III. CONCLUSION

49. For these reasons, the Board recommends that the Standards Committee further review the above described allegations concerning Representative Waters' meeting request.

IV. INFORMATION THE OCE WAS UNABLE TO OBTAIN AND RECOMMENDATIONS FOR THE ISSUANCE OF SUBPOENAS

50. The OCE was unable to obtain information from Mr. Robert Cooper, Mr. Kevin Cohee and OneUnited. The OCE made multiple requests for interviews with both individuals, but despite repeated assurances that cooperation was forthcoming, all requests were denied. On June 29, 2009, Mr. Cooper asked for a written request for an interview detailing the subjects the OCE wished to address. The OCE provided a written request the same day. The request was denied.

51. The Board recommends the issuance of subpoenas to OneUnited bank, Mr. Robert Cooper, and Mr. Kevin Cohee.

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[57] *Id.* at 09–2121—000054.
[58] *Id.*
[59] *Id.*
[60] *Id.*

25

EXHIBIT 1

CONFIDENTIAL

Subject to the Nondisclosure Provisions of H. Res. 895 of the 110th Congress as Amended

OFFICE OF CONGRESSIONAL ETHICS
UNITED STATES HOUSE OF REPRESENTATIVES

Memorandum of Interview

In Re:	Representative Maxine Waters
Review #:	09-2121
Date:	June 25, 2009
Location:	2344 Rayburn HOB
Time:	9:00 am
Participants:	Omar Ashmawy
	Elizabeth Horton
	Stan Brand
	Andrew Herman
	Mikael Moore

Summary: Representative Maxine Waters is a Member of the United States House of Representatives and represents the Thirty-Fifth District of California. She was interviewed pursuant to Review 09-2121. We requested an interview with Representative Waters and she consented to an interview. Representative Waters made the following statements in response to our questioning:

1. Representative Waters was given an 18 U.S.C. § 1001 warning, and signed a written acknowledgement.
2. Rep. Waters recalled calling Secretary Paulson and asking if he would meet with the National Bankers Association ("NBA"). The Secretary agreed.
3. She recalled the President of the NBA (Mr. Cooper) met her outside of her office. He was alarmed that the GSEs (government sponsored enterprise) had been taken over by the government and he was worried about the effect on the NBA banks. He asked that she contact Paulson and ask for a meeting.
4. She told Mr. Cooper to get something to her (talking points) so she could talk intelligently to the Secretary.

5. Mr. Cooper was the Chairman-elect at the time, someone else might have been outgoing.
6. Kevin Cohee is one of the principals or founders of One United. He may have been President later on, she was not sure.
7. Mr. Cohee also requested the meeting.
8. She called the Secretary and arranged the meeting.
9. Mr. Cooper asked for the meeting either the day before or after Mr. Cohee was in her office. Both men were alarmed.
10. She called Secretary Paulson and told him that the minority bankers were alarmed that the takeover of the GSEs would harm them. The Secretary said that he would set up a meeting for the bankers.
11. She did not know that Mr. Cooper or Mr. Cohee were in DC prior to seeing them in her office.
12. She did not attend the meeting. The meeting was not for her, she assumed the association would determine who would attend the meeting.
13. She heard that others attended the meeting.
14. She did not recall meeting with anyone else about the issue.
15. No one else asked her to set up a meeting.
16. Did not recall that anyone from her staff attended the meeting; however, Mr. Moore indicated that he did attend the meeting.
17. She recalled a conversation with Secretary Paulson that occurred after the meeting. She recalled that the Secretary stated that he had expected more members of the NBA to attend the meeting. He made the meeting available to anyone and he expected a larger turnout.
18. She considers Mr. Cohee a friend, she has known him for some time – 7,8, or 9 years.
19. She and Mr. Cohee have a professional and social relationship.
20. Her husband served on the Board of Directors of One United which created a certain relationship with Mr. Cohee. They saw each other for dinner and she has been to his

home for the company Christmas party. She also was at his home for a fundraiser for her.

21. Her relationship with Mr. Cooper is basically professional.

22. She would not call him a friend, they are professional.

23. One United Bank is one of the banks she advocates for – there is something in the law that relates to the stability of minority banks because they are fragile. The FDIC and Treasury should be of assistance to such banks – a stabilizer.

24. She was invested with the bank for a short period of time. She put (deposited) investment income in the bank for a short period of time. This would have been 5 years ago, the timing would be in her financial disclosure.

25. Her interaction with NBA depends, certainly around the national conference or when representatives are in DC. About 10-15 will meet with her to talk about issues.

26. She has been contacted by NBA, but individual banks contact her all of the time. She also bumps into members when she is traveling to places such as New Orleans.

27. She does not recall contacting any other agency but recalls there have been issues from time to time where she has contacted the FDIC on behalf of women's banks regarding large holdings of sub-prime loans.

28. She was also contacted when there was an attempted takeover of a DC bank. And a New Orleans banker contacted her after Katrina.

29. She did not recall any other advocacy efforts on behalf of One United other than when she wrote a letter in support of One United when they were trying to acquire a bank in California, which occurred some time ago.

30. When asked why she did not attend the meeting with Treasury, Rep. Waters stated, "[w]hy should I, I don't think Members normally do that. They (NBA) are their own best advocates, let them tell their own story, that's how I see it"

31. Her husband was on the board of the bank.

32. She was aware of her husband's investments in OneUnited and her investments are disclosed in her financial disclosure.

CONFIDENTIAL

Subject to the Nondisclosure Provisions of H. Res. 895 of the 110th Congress as Amended

33. She did not recall when or how her husband became a board member but the paper indicated that it was 2-3 years after the bank was started. "He takes care of his business and I take care of mine."

34. With respect to her conversation with Rep. Barney Frank, she stated that conversations with Rep. Frank are not sit down conversations. They are "drive-bys" where things are said in passing. You have drive-bys with Barney Frank 10 times a day. She did not recall any specifics about any conversation.

35. She called Secretary Paulson any number of times, she called about TARP issues, minority investment bankers, money managers and toxic assets. She is not good at remembering months and dates but she talked to Treasury at the time that they were all purchasing assets. They talked about the management of assets.

36. She has also spoken with Ruben, Summers, and Geitner. She may also have spoken with O'Neil when he came to the hill to talk to the committee.

37. She also calls the Secretary of HUD and she has talked with the chairs of the GSEs.

38. When asked about other conversations with Sec. Paulson, Rep. Waters stated that "you don't use your chits for nothing, you call when there is an important issue."

39. She also talks with the Secretary from time to time when he is on the hill for committee meetings.

40. She did not recall Mr. Cooper or Mr. Cohee asking her to intervene with the Treasury department in any other way.

41. She did recall a large meeting with asset managers and bankers where Geitner and other Treasury officials were present. She has also held 3 meetings where FDIC officials were involved. The meetings were held in Rayburn and Cannon.

42. When asked if she had called the Secretary on behalf of anyone else she asked Mr. Moore and then stated that she guessed that she had.

43. She was not sure if she had arranged any meetings for any other banks. She may have for an association of 30-50 banks.

44. She stated that she knew of Mr. Cooper through his testimony before the committee on FIRREA matters.

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Subject to the Nondisclosure Provisions of H. Res. 895 of the 110th Congress as Amended

45. She was aware that he worked for One United Bank and that he was an officer of the bank, either the President or CEO.

46. She was also aware of his position at the time she called Sec. Paulson to set up the meeting.

Elizabeth Horton
Investigative Counsel

EXHIBIT 2

August 22, 2008

The Honorable Maxine Waters
U.S. House of Representatives
2344 Raybum House Office Building
Washington, DC 20515

Re: Minority Depository Institutions and Fannie Mae/Freddie Mac Equity Investments

Dear Congresswoman Waters,

Please find the attached memorandum outlining the issues in connection with effect of the recent decline in the stock prices of Fannie Mae and Freddie Mac securities, and the adverse effect on minority depository institutions.

I have also attached an article that sheds some broader light on the situation across the banking industry. As Chairman-Elect of the National Bankers Association, could you kindly provide contacts for me to follow up with at Fannie Mae and Freddie Mac, as well as the U.S Department of the Treasury? As always, we appreciate your assistance in these and other matters of critical importance to minority depository institutions and the communities we serve.

Very truly yours,

Robert Patrick Cooper
Senior Counsel

RPC:prp
Encs.

OneUnited Bank 3683 Crenshaw Blvd. Los Angeles, CA 90016 tel: 323 290 4848 fax: 323 293 7746 www.oneunited.com

The Impact of the Decline in Fannie Mae and Freddie Mac Preferred Stock Price on Community Development Financial Institutions' and Minority Banks' Capital

Issue:
The recent decline in the value of the preferred stock of Government-Sponsored Entities ("GSEs") creates significant and possibly fatal losses for minority banks, Community Development Financial Institutions ("CDFIs") and not-for-profit organizations.

Background:
Certain community financial institutions, such as CDFIs and minority banks, as well as a host of not-for-profit organizations, invest in GSE securities, including bonds and preferred stock, as a function of their community development charters and other community development and support mandates. The U.S. government has committed to providing support, ensuring the viability and growth of these types of entities (see Financial Institutions Reform and Recovery Act of 1989, Section 308 and the Riegle Community Development and Regulatory Improvement Act of 1994). These community financial institutions invest their funds in GSEs as a way to support affordable housing initiatives until they can place these funds into other community development activities. These community financial institutions are neither speculators nor large institutions capable of replacing large amounts of lost capital. In a reciprocal fashion, GSEs have supported CDFIs and minority banks through equity investments and deposits and have served as a clearing house for community lending.

Critical Inflection Point:
The U.S. Treasury's attempt to reassure investor confidence by its readiness and willingness to invest capital into GSEs has unexpectedly resulted in declining values of GSE securities. Specifically, investors have been unwilling to purchase GSE equity securities because of the uncertainty as to the potential affects a government investment might have on the value of existing securities. Consequently, the preferred stock of the GSEs has dropped to the point where financial institutions that are required to mark the securities to market to calculate regulatory capital on their third quarter call reports may need to report significant "paper" losses if the value of these securities does not recover by September 30, 2008. This deterioration of regulatory capital could cause severe damage and possible failures across the banking industry, and principally within the minority and CDFI banking sector.

Recommended Solutions:

1. **Treasury completes plan to reassure investors in GSE securities by affirmatively stating that it is going to purchase preferred stock on essentially the same terms and conditions of existing preferred stock, prior to the end of the third quarter. This move would help shore up the value of all GSE securities, helping the government, GSEs and investors.**

2. **Avoid damage to minority banks, CDFIs and not-for-profits by converting their investments into the same securities the government purchases from GSEs, or simply redeeming their investments as part of a government investment plan in GSEs, and otherwise offer protection to these institutions consistent with the government's obligations under FIRREA.**

EXHIBIT 3

NATIONAL BANKERS ASSOCIATION

September 6, 2008

The Honorable Henry M. Paulson, Jr.
Secretary
United States Department of the Treasury
Office of the Treasurer
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: National Bankers Association – Comments Regarding Impact on Minority Banks in Connection with Conservatorship of Fannie Mae and Freddie Mac

Dear Mr. Secretary:

I am writing this letter on behalf of the National Bankers Association ("NBA"), the largest and oldest trade organization in the United States representing minority and women-owned banks and thrifts, founded in 1927, to among other roles, serve as an advocate on legislative and regulatory matters.

We are writing this letter urgently regarding your pending resolution of the situation regarding Fannie Mae and Freddie Mac (collectively, the "GSEs"). We want to ensure that the interests of minority banks are properly protected in any such resolution. **To be clear, we are not asking for minority banks to receive any windfall from this resolution. Rather, we simply are seeking a return of the money we invested in the GSEs. In other words, each minority bank would demonstrate the amount of funds it invested into the preferred stock of the GSEs, and be assured of receiving that amount in return as part of any resolution you develop. At a bare minimum, we urge the GSE resolution to include a provision that any minority bank that will fail due to its investment in GSE preferred stock would simply have its investment returned.**

We understand why you are acting to preserve the GSEs. The GSEs serve an important role in the fabric of US home ownership, making home ownership more available to the citizenry of the United States. These social benefits, as well as the economic calamity that would follow were the GSEs to collapse, more than warrant government action on their behalf.

We are writing this letter to re-emphasize, as FIRREA has made clear statutorily since 1989, the important role of minority banks in the urban inner city communities of America. Unlike majority banks, which principally focus on profit, the express mission of minority banks is to promote these underbanked, underprivileged communities, and serve as a rare beacon of hope to their residents. Accordingly, just as the GSEs serve

1513 P Street, NW., Washington, D. C. 20005
(202) 588-[redacted] Fax (202) 588-5443

critical economic and social roles in America, minority banks have no less importance to the communities they serve – communities that are wholly neglected by the vast majority of financial institutions. Indeed, in part due to the consistency of their missions, minority banks have acquired substantial interests in the preferred stock of the GSEs.

Accordingly, we submit that there is no less reason to protect minority banks that invest in GSEs than the reasons for the resolution you are developing for the GSEs themselves. Both serve critical social and economic roles in their communities. We would therefore strongly urge that any resolution, in addition to providing needed capital to the GSEs, also provide for minority banks to be protected with respect to those preferred stock interests. As stated above, each minority bank would demonstrate the amount of funds it invested into the preferred stock of the GSEs, and be assured of receiving that amount in return as part of any resolution you develop. To ensure that no inappropriate consequences result with the bank regulatory agencies in the interim, we also would ask that the resolution make clear that the regulators treat this right of repayment as equivalent to tier one capital during any interim period prior to the receipt of funds by the minority banks.

We appreciate this action on our behalf. If you do not adopt this request, many minority banks will fail along with the GSEs. In such a circumstance, we submit that your resolution would not have fulfilled its purpose. As while it will have protected the housing and social environment of the United States at a macro level, it will not have protected the urban inner city communities uniquely served by minority banks. Then, once again, the urban poor and underbanked would have received a lesser benefit than other constituents that rely on the GSEs. Such a result would be wholly contrary to the purposes set forth in FIRREA in 1989, and innumerable bank regulatory and government pronouncements since then. More fundamentally, such a result would be contrary to any declared efforts of this country to recognize and improve the lives of urban inner city residents.

Thank you again. Obviously this is critically important to us. If you have any questions whatsoever, or any doubts whatsoever about following this recommendation, please call the undersigned immediately at (617) 283-[redacted]

Sincerely,

Robert Patrick Cooper

Robert Patrick Cooper
Chairman-Elect

cc: The Honorable Barney Frank
The Honorable Maxine Waters

EXHIBIT 4

OFFICE OF CONGRESSIONAL ETHICS
UNITED STATES HOUSE OF REPRESENTATIVES

Memorandum of Interview

In Re:	The Secretary of the Treasury Department
Review #:	09-2121
Date:	April 20, 2009
Location:	Johns Hopkins University – School of Advanced International Studies Rome Building 1619 Massachusetts Avenue, NW Washington, DC 20036
Time:	1700hrs – 1745hrs (approximately)
Participants:	Leo Wise Omar Ashmawy

Summary: The Secretary of the Treasury Department is the former Secretary of the Treasury, serving from June 2006 until January 2009. He is currently a Distinguished Visiting Scholar at the Johns Hopkins University School of Advanced International Studies in Washington, DC. He was interviewed pursuant to Review 09-2121. We requested an interview with the Secretary of the Treasury Department and he consented to an interview. The Secretary of the Treasury Department made the following statements in response to our questioning:

1. The Secretary of the Treasury Department was given an 18 U.S.C. § 1001 warning, but would not sign a written acknowledgement of the warning until he spoke with his attorney. However, he consented to an interview. Ultimately, the Secretary of the Treasury Department refused to sign the 18 U.S.C. § 1001 warning acknowledgement.

2. The Secretary of the Treasury Department recalled the week first two weeks of September 2008 because the dates corresponded to the decision to place Fannie Mae and Freddie Mac into conservatorship. Furthermore, The Secretary of the Treasury Department is currently writing a book and, as a result, has thought considerably about this time frame.

3. In late August 2008 it was becoming apparent that there were serious concerns with the financial health of Fannie Mae and Freddie Mac and the Secretary of the Treasury Department

was working around the clock dealing with these concerns. On Friday, September 5, 2008, the Secretary of the Treasury Department met with the managers of the financial institutions and called Members of Congress to inform them of the Treasury's likely remedy for the ailing mortgage companies. On September 6, 2008, the Secretary of the Treasury Department met with the boards of Fannie Mae and Freddie Mac and on Sunday, September 7, 2008 the institutions were placed into conservatorship. The manner in which the Treasury Department structured the conservatorship, bondholder were protected, but entities holding preferred stock were vulnerable. The number of banks that this structure would affect remained an open question for the Secretary of the Treasury Department and the department.

4. As a result of these actions, the Secretary of the Treasury Department was receiving dozens and dozens of phone calls in the early part of the week of 8 September – totaling 70-80 calls a day. However, he had a clear recollection of receiving a call from Representative Waters because the Member addressed in her phone call the very matter currently under debate within the Treasury Department – the effect that the decision to not protect preferred stock holders would have on small banks. This statement by Representative Waters seemed prescient to the Secretary of the Treasury Department and he recalled being very impressed by her awareness of the problem and, in fact, commented on it to an employee after the phone call.

5. During the phone call Representative Waters indicated that she had some people in town who were important to her and that they would only be in town for a day or two. She referred to them as good people and said that they needed a sit down with the Treasury Department. The Secretary of the Treasury Department was fairly certain that Representative Waters did not mention a particular bank. He was unequivocal that Representative Waters did not mention she had a personal financial interest in OneUnited or any other bank. Had Representative Waters informed the Secretary of the Treasury Department of her financial interest, the Secretary of the Treasury Department would still have granted the meeting. It was the Secretary of the Treasury Department's policy to grant all reasonable requests made by a member of Congress regardless of political party.

6. The Secretary of the Treasury Department also stated that given how busy the department was the week of 8 September 2008, a meeting with bank officials would not have happened unless Representative Waters asked for the meeting and he decided to grant it.

I prepared this Memorandum of Interview on April 21, 2009 after interviewing the Secretary of the Treasury Department on April 20, 2009. I certify that this memorandum contains all pertinent matter discussed with the Secretary of the Treasury Department on April 20, 2009.

Omar S. Ashmawy
Investigative Counsel

EXHIBIT 5

OFFICE OF CONGRESSIONAL ETHICS
UNITED STATES HOUSE OF REPRESENTATIVES

Memorandum of Interview

In Re:	The Chief of Staff to Representative Maxine Waters
Review #:	09-2121
Date:	June 29, 2009
Location:	Office of Representative Maxine Waters 2344 Rayburn House Office Building Washington, DC 20515
Time:	1000hrs – 1045hrs (approximately)
Participants:	Omar Ashmawy Bryson Morgan

Summary: The Chief of Staff to Representative Maxine Waters is the Chief of Staff to Representative Maxine Waters. He was interviewed pursuant to Review 09-2121. We requested an interview with the Chief of Staff to Representative Maxine Waters and he consented to an interview. The Chief of Staff to Representative Maxine Waters made the following statements in response to our questioning:

1. The Chief of Staff to Representative Maxine Waters was given and signed an 18 U.S.C. § 1001 warning.

2. The Chief of Staff to Representative Maxine Waters, along with other members of Representative Waters' staff, handles minority banking issues for the Representative Waters. In the Fall of 2008 the Chief of Staff to Representative Maxine Waters was not aware of Representative Waters' or her spouse's financial interest in OneUnited Bank. The Chief of Staff to Representative Maxine Waters first heard of the September 2008 meeting between U.S. Treasury Department officials and representatives of the National Bankers Association (NBA) in late August from Bob Cooper, Chairman-elect of the NBA and Vice President and Senior Counsel of OneUnited Bank, who had raised the issue of the impact of the actions taken by the Treasury Department with regard to Fannie Mae and Freddie Mac on minority-owned banks.

3. Mr. Cooper followed up on his conversation with Representative Waters' staff with an August 22, 2008 letter to Representative Waters' office requesting that Rep. Waters request a

meeting with the Treasury Department. The request for the meeting with Treasury Department officials was the only request that the NBA made of Representative Waters' office in the fall of 2008.

4. According to the Chief of Staff to Representative Maxine Waters, Mr. Cooper then sent a letter requesting the meeting to the Treasury Department which cc'd Representative Barney Frank. Shortly thereafter, Congresswoman Waters followed up on the letter by calling Secretary Paulson. When the meeting had been granted, the Treasury Department then reached out to the representatives from regulatory institutions to invite them to the meeting. Representative Waters asked The Chief of Staff to Representative Maxine Waters to follow up with the Treasury Department about the meeting. The Chief of Staff to Representative Maxine Waters does not recall exchanging any e-mails with Jeb Mason.

5. The Chief of Staff to Representative Maxine Waters alerted Mr. Cooper that the meeting with the Treasury Department had been granted and then the NBA decided whom to invite to the meeting. The Chief of Staff to Representative Maxine Waters was not aware of whom the NBA invited to the meeting, but Mr. Cooper relayed back to the Chief of Staff to Representative Maxine Waters the names of the individuals who had accepted the invitation. It did not strike The Chief of Staff to Representative Maxine Waters as odd that the NBA had gathered a small group of people to attend the meeting. The Chief of Staff to Representative Maxine Waters stated that he deferred to the NBA to determine who would be present at the meeting. It did not seem strange to the Chief of Staff to Representative Maxine Waters that OneUnited Bank had such extensive representation at the meeting. The Chief of Staff to Representative Maxine Waters believes that there are members of the NBA in the Washington, DC area.

6. The Chief of Staff to Representative Maxine Waters spoke to and exchanged e-mails with Mr. Kevin Cohee, the Chairman and CEO of OneUnited Bank on a couple of occasions, but dealt directly with Mr. Cooper with regard to the September meeting. In their exchanges, Mr. Cohee talked about his concerns with the devaluation of Fannie Mae and Freddie Mac stock and its impact on minority-owned banks, and used his bank, One United as an exemplar of an institution that would potentially be impacted by such devaluation. The Chief of Staff to Representative Maxine Waters believes that Mr. Cohee was in Washington, DC at the time that Mr. Cooper first visited Rep. Waters' office to discuss the possibility of a meeting with Treasury Department officials.

7. The Chief of Staff to Representative Maxine Waters does not remember the identities of the administration representatives present at the September meeting. He does recall that an assistant secretary or similar high-ranking Treasury Department official was present. He does not specifically recall Jeb Mason being present at the meeting. The Chief of Staff to Representative

Maxine Waters recalls that the following non-administration persons were present at the meeting: a representative of Senator John Kerry; a representative of Representative Barney Frank; George Lyons, counsel to the NBA; Bob Cooper; Kevin Cohee; and Terry Williams, President of OneUnited. In the Chief of Staff to Representative Maxine Waters's opinion, the meeting was a "high priority" or "high-concern" meeting.

8. The September meeting lasted for about 45 minutes to an hour. Mr. Cooper revealed that he represented both the NBA and OneUnited, but said that at the meeting he was representing NBA. Mr. Cooper then presented his concerns to Treasury Department officials and a dialogue about the impact of the actions with regard to Fannie Mae and Freddie Mac on minority-owned banks and potential remedies ensued. The Chief of Staff to Representative Maxine Waters does not remember any specific potential remedies discussed, but does remember that one potential remedy that was discussed at the meeting was a transfer of funds from the Treasury Department to minority-owned banks. The Chief of Staff to Representative Maxine Waters stated that Mr. Cohee spoke using OneUnited as an exemplar of the impact the Treasury Department actions would have on minority-owned banks. Mr. Cohee also expressed similar concerns at the meeting.

9. Representative Waters' office's interactions with OneUnited occur mostly through the NBA. The Chief of Staff to Representative Maxine Waters interacted with the NBA "very often" through contact with Bob Cooper and Michael Grant, President of the NBA. Cooper and Grant were often cc'd on e-mails involving minority-bank issues. Mr. Cohee also may have been cc'd on e-mails involving discussions about potential remedies for minority-owned banks.

10. The Chief of Staff to Representative Maxine Waters is only aware of one conversation between Representative Waters and Representative Barney Frank. He became aware of this conversation when, as he went through his tasks with Representative Waters one day following the September meeting, she indicated that he need not work on the minority-bank matters because, as she said, "I spoke to Barney. Don't worry about it." The Chief of Staff to Representative Maxine Waters interpreted this to mean that he need not work on the NBA matters that day. The Chief of Staff to Representative Maxine Waters does not remember Representative Waters making any reference to Representative Frank instructing her to not get involved in NBA matters.

11. The Chief of Staff to Representative Maxine Waters remembers talking to Mr. Cooper after the front-page article about the meeting ran in the New York Times, and perhaps another conversation about the OCE reaching out to him.

I prepared this Memorandum of Interview on June 29, 2009 after interviewing the Chief of Staff to Representative Maxine Waters on June 29, 2009. I certify that this memorandum contains all pertinent matter discussed with Mr. Paulson on June 29, 2009.

Omar S. Ashmawy
Investigative Counsel

EXHIBIT 6

MEMORANDUM FOR RECORD

SUBJECT: Telephone conversation with Mr. Robert Cooper

DATE: April 17, 2009

1. I spoke to Mr. Robert Cooper today, April 17, 2009, by telephone. Mr. Cooper is a Vice President and Senior Counsel of OneUnited Bank. He is also the current Chairman of the National Bankers Association (NBA).

2. My conversation with Mr. Cooper centered on a September 2008 meeting with Treasury Department officials. This meeting is the subject of OCE Review 09-2121. Mr. Cooper related that approximately 20 people attended the meeting. The Treasury Department and all the bank regulatory agencies were represented. Mr. Anthony Ryan was described as the lead Treasury official at the meeting.

3. Although Mr. Cooper was also an employee of OneUnited he was also the Chairman-elect of the NBA and he stated that he was there as a representative of the NBA. The reason for the meeting was to bring the concerns of minority owned banks to the attention of government officials. Approximately one half of the meeting was used by Mr. Ryan to explain why the government took the actions it did with regard to Freddie and Fannie Mac. OneUnited was represented at the meeting as illustrative of what could happen to the sector if the Federal government did not assist them. OneUnited was the only bank independently represented at the meeting.

EXHIBIT 7

NATIONAL BANKERS ASSOCIATION

CONFIDENTIAL

September 10, 2008

The Honorable Anthony W. Ryan
Acting Under Secretary for Financial Institutions Policy
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: National Bankers Association – Minority Bank Capital Restoration Program

Dear Mr. Ryan:

As a follow-up to our meeting yesterday, we sincerely appreciated the opportunity to discuss with you, Senior Treasury representatives and bank regulatory agency officials the impact of the recent conservatorship of Fannie Mae and Freddie Mac (collectively, the "GSEs") on minority depository institutions ("MDIs"). We emphasized that Treasury should provide appropriate protection on an urgent basis to avert possible failure of one if not several of our institutions, a situation that would undoubtedly reverberate through the entire minority banking sector, causing irreparable harm to the inner-city communities we serve. Unlike with a typical "majority" bank, no bank will step in to save our inner-city communities should one of our banks fail.

As a result of the discussions at the meeting and subsequently, we have refined our proposal consistent with our immediate need to protect minority banks from failure or significant adverse impact due to the decline in the GSE preferred stock. Accordingly, we would propose the following Minority Bank Capital Restoration Program:

As a part of the resolution to the takeover of the GSEs, Treasury would redeem the GSE preferred stock held by an MDI in an amount equal to the lesser of: (1) the amount the MDI paid for the preferred stock; or (2) the amount necessary to return the MDI back to "well-capitalized" status (as defined in the relevant Prompt Corrective Action rules).

Again, we are not seeking a windfall from this resolution. We note that this proposal very well may result in an MDI losing money on its GSE preferred, which is consistent with Treasury's stated goal to protect taxpayers. We also reiterate our position that there is no less reason to protect minority banks that invested in GSEs than the reasons for the resolution you are developing for the GSEs themselves. Both serve critical social and economic roles in the economic and social framework of their communities.

To be clear, however, while the return of this capital is very important to the continued health of minority banks, given their size it is not significant to the government in

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(202) 588[redacted] Fax (202) 588-5443

absolute dollar terms, let alone relative to the anticipated expenditure with respect to the GSEs. Such a result will preserve the critical service provided by minority banks, and be consistent with the broader and more significant relief provided to the GSEs and the more general Congressional and other commitments to preserve minority banks in FIRREA and elsewhere.

It is also worth mentioning that time is of the essence and we continue to be concerned that the relief we are seeking, or any appropriate derivative thereof, may not be granted in time to avert an impending crisis. Therefore, we respectfully request and thank you in advance for acting on our request on an urgent basis. To put it bluntly, we are seeking Treasury action on this proposal this week.

If you have any questions, please feel free to contact me at (617) 457-[redacted]. In any event, I hereby request ongoing standing calls with you or a member of your Senior staff to discuss progress. Please call me to discuss the appropriate member of your staff to engage in those discussions.

We hereby request confidential treatment of this letter to the fullest extent permitted by your regulator.

Sincerely,

Robert Patrick Cooper

Robert Patrick Cooper
Chairman-Elect

cc: The Honorable Henry M. Paulson, Jr.

The Honorable Michael E. Capuano
The Honorable Christopher Dodd
The Honorable Barney Frank
The Honorable Edward Kennedy
The Honorable John Kerry
The Honorable Maxine Waters
The Honorable Stephen F. Lynch

EXHIBIT 8

Re Kevin please forward me the contact information for barney's staff Thanks

Moore, Mikael

From: Phillips, John (Small-Business) [redacted]@small-bus.senate.gov]
Sent: Monday, September 08, 2008 6:59 PM
To: [redacted]@oneunited.com; Moore, Mikael
Subject: Treasury meeting tomorrow.

Kevin, I am happy to join you at the meeting. My direct line at work is [redacted]. My cell phone number is [redacted] My social security # is [redacted] And my date of birth is [redacted] Please let me know if you need any additional information. Do you know what room the meeting is being held? Thanks. Jcp

Sent from my BlackBerry Wireless Handheld

From: Kevin Cohee
To: Phillips, John (Small-Business); [redacted]@mail.hluse.gov
Sent: Mon Sep 08 18:43:26 2008
Subject: Re: Kevin, please forward me the contact information for barney's staff. Thanks. Jcp

Thank you for your help on this critical issue. We would appreciate your participation at the meeting at 11am at treasury. Could you please forward your number so Congresswoman's Waters office can take care of any securit issues. I will land in dc at 830.

-----Original Message-----
From: Phillips, John (Small-Business) [redacted]@small-bus.senate.gov>
To: Kevin Cohee
Sent: Sun Sep 07 13:40:35 2008
Subject: Kevin, please forward me the contact information for barney's staff. Thanks. Jcp

Sent from my BlackBerry Wireless Handheld

EXHIBIT 9

Moore, Mikael

From: Moore, Mikael
Sent: Thursday, September 11, 2008 12:45 PM
To: Jeffers, Erika
Subject: FW: NBA Letter to the Treasury
Attachments: NBA Treasury Letter (091008).pdf

Mikael Moore
Chief Of Staff
Congresswoman Maxine Waters (CA-35)
o: 202-225-[redacted]
c. [redacted]
f: 202-225-7854

From: Phillip Perry [mailto:[redacted]@OneUnited.com]
Sent: Wednesday, September 10, 2008 8:46 PM
To: Moore, Mikael
Cc: Bob Cooper
Subject: NBA Letter to the Treasury

Dear Mikael,

Attached please find the National Bankers Association's letter to the U.S. Dept. of the Treasury. Please don't hesitate to contact me if you have any questions or if I can be of further assistance. Thank you.

Phillip R. Perry
Department Administrator
Legal and Business Development
OneUnited Bank
100 Franklin Street, Suite 600
Boston, MA 02110
p: 617-457-[redacted]
f: 617.542.1797
bb: [redacted]
[redacted]*@oneunited.com*
www.oneunited.com

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CONFIDENTIAL

September 10, 2008

The Honorable Anthony W. Ryan
Acting Under Secretary for Financial Institutions Policy
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: National Bankers Association – Minority Bank Capital Restoration Program

Dear Mr. Ryan:

As a follow-up to our meeting yesterday, we sincerely appreciated the opportunity to discuss with you, Senior Treasury representatives and bank regulatory agency officials the impact of the recent conservatorship of Fannie Mae and Freddie Mac (collectively, the "GSEs") on minority depository institutions ("MDIs"). We emphasized that Treasury should provide appropriate protection on an urgent basis to avert possible failure of one if not several of our institutions, a situation that would undoubtedly reverberate through the entire minority banking sector, causing irreparable harm to the inner-city communities we serve. Unlike with a typical "majority" bank, no bank will step in to save our inner-city communities should one of our banks fail.

As a result of the discussions at the meeting and subsequently, we have refined our proposal consistent with our immediate need to protect minority banks from failure or significant adverse impact due to the decline in the GSE preferred stock. Accordingly, we would propose the following Minority Bank Capital Restoration Program:

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Again, we are not seeking a windfall from this resolution. We note that this proposal very well may result in an MDI losing money on its GSE preferred, which is consistent with Treasury's stated goal to protect taxpayers. We also reiterate our position that there is no less reason to protect minority banks that invested in GSEs than the reasons for the resolution you are developing for the GSEs themselves. Both serve critical social and economic roles in the economic and social framework of their communities.

To be clear, however, while the return of this capital is very important to the continued health of minority banks, given their size it is not significant to the government in

absolute dollar terms, let alone relative to the anticipated expenditure with respect to the GSEs. Such a result will preserve the critical service provided by minority banks, and be consistent with the broader and more significant relief provided to the GSEs and the more general Congressional and other commitments to preserve minority banks in FIRREA and elsewhere.

It is also worth mentioning that time is of the essence and we continue to be concerned that the relief we are seeking, or any appropriate derivative thereof, may not be granted in time to avert an impending crisis. Therefore, we respectfully request and thank you in advance for acting on our request on an urgent basis. To put it bluntly, we are seeking Treasury action on this proposal this week.

If you have any questions, please feel free to contact me at (617) 457-[redacted]. In any event, I hereby request ongoing standing calls with you or a member of your Senior staff to discuss progress. Please call me to discuss the appropriate member of your staff to engage in those discussions.

We hereby request confidential treatment of this letter to the fullest extent permitted by your regulator.

Sincerely,

Robert Patrick Cooper
Chairman-Elect

cc: The Honorable Henry M. Paulson, Jr.

The Honorable Michael E. Capuano
The Honorable Christopher Dodd
The Honorable Barney Frank
The Honorable Edward Kennedy
The Honorable John Kerry
The Honorable Maxine Waters
The Honorable Stephen F. Lynch

EXHIBIT 10

Moore, Mikael

From: Moore, Mikael
Sent: Thursday, September 11, 2008 12:45 PM
To: Jeffers, Erika
Subject: FW: NBA Letter to the Treasury
Attachments: NBA Treasury Letter (091008).pdf

Mikael Moore
Chief Of Staff
Congresswoman Maxine Waters (CA-35)
o: 202-225-[redacted]
c. [redacted]
f: 202-225-7854

From: Phillip Perry [mailto:[redacted]@OneUnited.com]
Sent: Wednesday, September 10, 2008 8:46 PM
To: Moore, Mikael
Cc: Bob Cooper
Subject: NBA Letter to the Treasury

Dear Mikael,

Attached please find the National Bankers Association's letter to the U.S. Dept. of the Treasury. Please don't hesitate to contact me if you have any questions or if I can be of further assistance. Thank you.

Phillip R. Perry
Department Administrator
Legal and Business Development
OneUnited Bank
100 Franklin Street, Suite 600
Boston, MA 02110
p: 617.457[redacted]
f: 617.542.1797
bb: [redacted]
[redacted]*@oneunited.com*
www.oneunited.com

EXHIBIT 11

Moore, Mikael

From: Bob Cooper [redacted]@OneUnited.com]
Sent: Friday, September 19, 2008 12:36 PM
To: Moore, Mikael
Cc: Melton, Noelle; Kevin Cohee
Subject: FW: MDI Preferred Stock Redemption Language

Hi Mikael:
Here are our thoughts on an alternative back-up strategy in case Treasury does not grant the specific relief that we are requesting within the next couple of days. We would appreciate your thoughts, comments, etc. on both the strategy and the particular language. We have had an initial conversation with Mike Capuano's office and they are supportive of this approach, 'though they stressed that the particular language around the affected group would be key. It is a legislative solution and with that we realize that it may be fraught with the challenges and uncertainty that comes with trying to pass legislation. **Could you kindly share with Erika.** We will follow up with her.

It would be a provision in the Continuing Resolution, a temporary appropriations bill, that will be passed by Congress this coming week and signed by the president next weekend or early the following week. Alternatively, we could think about attaching it to the legislation creating a new RTC-like entity, but as we do know for sure that the CR will definitely be passed, it may be safer to put it in the CR as we are under extreme time pressure (filing of September 30th Call Report).

The brand new Federal Housing Finance Agency (the new GSE regulator) has never been addressed in an appropriations bill before. Its predecessor agency would have been addressed in the HUD appropriations bill but the new FHFA is an independent financial institution regulator which, like other such independent regulators, coordinates with the Treasury Department. So I have drafted this language as a provision in the appropriations bill (actually in this case, as a title of a continuing resolution that would fund Treasury and other fiscal agencies.) It is possible, however, that the House and Senate appropriations committees have not yet decided in which subcommittee (and, therefore, in which title of this continuing resolution) FHFA belongs. We don't really care for our purposes in this continuing resolution since, wherever they might put it in such an omnibus bill, it will be the law governing FHFA.

I've drafted this to provide only redemption at the purchase price since it's possible this provision would go in at the last minute without the committee having any time to (or wanting to?) vet it with Treasury.

Appreciate your assistance.

IN THE FINANCIAL SERVICES AND GENERAL GOVERNMENT TITLE OF A BILL MAKING CONTINUING APPROPRIATIONS FOR FISCAL YEAR 2009, INSERT AT THE APPROPRIATE PLACE THE FOLLOWING PROVISION:

Provided further, That, notwithstanding any other provision of law, the Director of the Federal Housing Finance Agency, acting as conservator, shall, or shall cause the regulated entities in conservatorship to, immediately redeem at the purchase price paid the preferred stock of such regulated entities in conservatorship which is held by a [U.S. Department of Treasury certified Community Development Financial Institution.]

Robert Patrick Cooper
Senior Vice President / Senior Counsel
OneUnited Bank
100 Franklin Street, Suite 600
Boston, MA 02110

p - 617.457[redacted]
c - [redacted]
f - 617.507.8925
e - [redacted]@oneunited.com

EXHIBIT 12

Moore, Mikael

From: Kevin Cohee [redacted]@OneUnited.com]
Sent: Monday, September 22, 2008 9:01 AM
To: Moore, Mikael
Subject: Fw: Bailout Legislation
Attachments: five percent language.doc

Could you please print this for our meeting.

----Original Message----
From: [redacted]@aol.com <[redacted]@aol.com>
To: [redacted]@VERIZON.NET <[redacted]@VERIZON.NET>
CC: Kevin Cohee; Teri Williams
Sent: Mon Sep 22 08:04:46 2008
Subject: Re: Bailout Legislation

P <<five percent language.doc>> S to previous email.

Attached and pasted below is a draft re Robert Primus's request. I've reformatted it slightly so that it could be banking committee bill languge as opposed to approps language, but Counsel will vet it in any event

I will gavel my school board committee meeting to a close this morning in time to get to the doctor in Annapolis by 9:30 AM. It soul be about 90 minutes there, unless she finds something unusual, and then 40 minutes to the office (Mindy will be at the office by 7:45) I can cancel anything after that except the reception and dinner I am hosting for San Fran Mayor Newsom that starts at 6 PM

LJF

Leander J. Foley, III
Foley Maldonado & O'Toole
613 Capitol Court NE, Suite 100
Washington, D.C. 20002
202-544-[redacted]
FAX 544-8009

Provided that, notwithstanding any other provision of law, the Director of the Federal Housing Finance Agency, acting as conservator, shall, or shall cause the regulated entities in conservatorship to, immediately redeem at the purchase price paid the preferred stock of such regulated entities in conservatorship which is held by any Department of Treasury certified community development financial institutions which, as September 5, 2007, had more than five percent of its total assets invested in the preferred stock of the regulated entities in conservatorship .

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EXHIBIT 13

Fw: Treasury Request Appendix Final.xls Page 1 of

Moore, Mikael

From: Bob Cooper [redacted]@OneUnited.com]
Sent: Tuesday, September 23, 2008 10:56 AM
To: Moore, Mikael
Subject: Fw: Treasury Request Appendix Final.xls
Attachments: Treasury Request Appendix Final.xls

-----Original Message-----
From: Ted Williams
To: [redacted]@mail.house.gov' [redacted]@mail.house.gov>
CC: Bob Cooper
Sent: Tue Sep 23 10:45:59 2008
Subject: Treasury Request Appendix Final.xls

<<Treasury Request Appendix Final.xls>> --

09-2121_000042

OneUnited Bank Investment in GSE Preferred Stock

Series	Book value	Par value	Par	Shares
Fannie Mae				
N	$ 4,780,439.30	$ 5,000,000.00	$ 50.00	100,000
Q	$ 4,833,968.46	$ 5,000,000.00	$ 25.00	200,000
S	$ 5,179,245.32	$ 5,000,000.00	$ 25.00	200,000
S	$ 10,271,226.07	$ 10,000,000.00	$ 25.00	400,000
Freddie Mac				
T	$ 5,824,130.81	$ 6,250,000.00	$ 50.00	125,000
Z	$ 5,228,121.50	$ 5,000,000.00	$ 25.00	200,000
Z	$ 5,196,576.56	$ 5,000,000.00	$ 25.00	200,000
Z	$ 5,198,789.24	$ 5,000,000.00	$ 25.00	200,000
Z	$ 5,245,807.53	$ 5,000,000.00	$ 25.00	200,000
	$ 51,756,403.58	51,250,000.00		

Call Report Data

	June 30, 2008 Reported on call report		September 30, 2008 Minimum capital needed to be well-capitalized
Tier 1 capital	$ 39,928,000.00	RC-R 11	$ 35,000,000.00
Average assets*	$ 735,370,000.00	RC-R 27	$ 700,000,000.00
Tier 1 leverage ratio	5.43%	RC-R 31	5.00%
Capital category	WELL		WELL

* OneUnited Bank has been reducing assets to reduce capital needed to remain well capitalized

Tier 1 Capital as of June 30, 2008	$	**39,928,000.00**
Tier 1 Capital at Preferred GSE Values Since Conservatorship	$	**(6,993,403.58)**
(This amount does not include the $4.7million of current value of GSE stock to be return to Treasury)		
Request from Treasury in exchange for $51,250,000 in GSE Preferred Stock (par value)	$	**41,993,403.58**
(This amount is based on the $35,000,000 required to be well capitalized and the negative $6,993,403.58 Tier 1 Capital.)		
OneUnited Bank Remaining Loss from GSE Preferred Stock	$	**(9,763,000.00)**

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EXHIBIT 14

Moore, Mikael

From: Bob Cooper [redacted]@OneUnited.com]
Sent: Thursday, September 25, 2008 9:24 AM
To: Moore, Mikael
Subject: Any update?

EXHIBIT 15

October 29, 2008

The Honorable Neel Kashkari
Assistant Secretary for Financial Stability
Office of Financial Stability
U.S. Department of Treasury
1500 Pennsylvania Avenue NW
Washington DC 20005

09-2121_000046

Dear Assistant Secretary Kashkari:

On behalf of the membership of the National Bankers Association (NBA), we like to commend the U.S. Department of Treasury (UST) for its efforts to ensure the stability of the U.S. and global financial markets. We believe the recently launched Capital Purchase Program of the TARP is an important step toward stabilizing financial markets in our country. In this context, the NBA respectfully urges the UST to create a special initiative modeled on the Capital Purchase Program targeted to banks, thrifts and their holding companies that are considered Minority Depository Institutions (MDIs) under section 308 of the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA) or as designated as MDIs by the Federal Deposit Insurance Corporation (FDIC).

Founded in 1927 the NBA is a non-profit trade association that advocates on behalf of its African American, Asian American, Hispanic American, Native American and Women-Owned financial institutions, creates educational and training opportunities, and develops programs and services for member banks. The association's office is located in Washington, D.C. Our member banks have a primary mission of promoting community development and principally serving distressed and underserved communities. The NBA's member banks deliver credit and technical assistance to borrowers in a responsible manner to foster growth and stability.

As you are aware,for over five decades,the U.S. Treasury has played a significant role in investing in minority depository institutions. The U.S. Treasury Department's Minority Bank Depository Program (MBDP) began in 1969 in response to Executive Order 11458, which established a national program supporting minority business enterprise. It was expanded under Executive Orders 11625 and 12138. The Competitive Equality Banking Act of 1987 and FIRREA include provisions supporting the intent of the MBDP that specifically sought to improve the standing and establish the preservation of minority banks. Both programs are recognition of the unique challenges of minority banks, a promise and an understanding of how to rectify them, and an effort to support the critical role MDIs play in stabilizing underserved and distressed communities by providing opportunities for constituents of those communities to have access to financial services.

As a continuation of these efforts, the provisions of the NBA Capital Purchase Program allows for MDIs, who are mostly privately held companies, to effectively participate in the Emergency Economic Stabilization Act of 2008 and assist with the intent of providing credit opportunities to the nation's residents. The member banks of the NBA believe that by providing access to capital through the TARP program on terms conducive to the needs of the banks, the UST will enable capital to be used to provide financial assistance to residents of Main Street and support strengthening and opening up of the credit markets.

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Some of the terms of a program will need to be different than are currently offered under the TARP Capital Purchase Program. To maximize our efforts as a key partner of the Federal Government in rebuilding low income

communities, devastated by the subprime meltdown and economic downturn, we will need capital that is affordable and patient and a provision to assist with accountability reporting. Attached is an outline of the proposed NBA Capital Purchase Program.

We look forward to working with UST to help strengthen our nation's financial system. If you have any questions, please feel free to contact the NBA: President, Michael Grant at (202) 588-[redacted]; Chairman Floyd Weekes at (615) 32[redacted]

Sincerely,

Floyd Weekes
Chairman, National Bankers Association

Michael A. Grant, J.D.
President, National Bankers association

EXHIBIT 16

April 21, 2008

Kevin Cohee
Chairman & CEO
One United Bank
[redacted]
Los Angeles, CA [redacted]

Dear Kevin:

As of today's date, April [redacted], 2008, this letter to you is my formal resignation as a member of the Board of Directors of One United Bank.

I would like to thank you and the members of the Board for the opportunity you offered me to serve on the Board.

I have enjoyed the association and the challenges of assisting in the oversight and development of policies that has ensured the viability of one of the most important financial institutions in the National African American Community.

I am proud of you [redacted] and the terrific knowledge, experience and hard work you bring to One United and I look forward to continuing our relationship as a customer and a friend.

Very truly yours,

Sidney A. Williams

EXHIBIT 17

SCHEDULE III — ASSETS AND "UNEARNED" INCOME

Name MAXINE WATERS

Page 3 of 7

BLOCK A Asset and/or Income Source Identify: (a) each asset held for investment purposes (see instructions) at the close of the reporting period, (b) each asset sold during the reporting period, and (b) any other asset that generated more than $200 in "unearned" income during the year. For rental property or land, provide an address. Provide full names of any mutual funds. For a self-directed IRA (i.e., one where you have the power to direct the specific investments), provide information on each asset held in the account that exceeds the reporting threshold, and the income earned for the account. For an IRA or retirement plan that is not self-directed, name the institution holding the account and provide information on the assets that it held during the reporting period. For an active business that is not publicly traded, in Block A state the nature of the business and its geographic location. For additional information, see the instruction booklet for the reporting year. Excludes: Your personal residence(s) (unless there is rental income); any debt owed to you by your spouse, or by your or your spouse's child, parent, or sibling; any deposits totaling $5,000 or less in personal savings accounts; any financial interest in or income derived from U.S. Government retirement programs. If you so choose, you may indicate that an asset or income source is that of your spouse (SP) or dependent child (DC) or is jointly held (JT), in the optional column on the far left.	BLOCK B Value of Asset at close of reporting year. If you use a valuation method other than fair market value, please specify the method used. If an asset was sold and is included only because it generated income, the value should be "None."	BLOCK C Type of Income Check all columns that apply. Leave blank if asset did not generate any income during the calendar year.	BLOCK D Amount of Income For retirement plans or accounts that do not allow you to choose specific investments, you may write "N/A" for income. For all other assets, indicate the category of income by checking the appropriate box below. Dividends, even if reinvested, should be listed as income. Check "None" if no income was received.	BLOCK E Transaction Indicate if asset was purchased (P), sold (S), or exchanged (E) in reporting year.
SP DC JT	Example:	Mega Corp. Stock Simon & Schuster 1st Bank of Paducah, KY accounts	Indefinite	None $1 – $1,000 $1,001 – $15,000 $15,001 – $50,000 $50,001 – $100,000 $100,001 – $250,000 $250,001 – $500,000 $500,001 – $1,000,000 $1,000,001 – $5,000,000 $5,000,001 – $25,000,000 $25,000,001 – $50,000,000 Over $50,000,000 DIVIDENDS RENT INTEREST CAPITAL GAINS EXCEPTED TRUST QUALIFIED BLIND TRUST Other Type of Income (Specify: For Example, Partnership Income or Farm Income) None $1 – $200 $201 – $1,000 $1,001 – $2,500 $2,501 – $5,000 $5,001 – $15,000 $15,001 – $50,000 $50,001 – $100,000 $100,001 – $1,000,000 $1,000,001 – $5,000,000 Over $5,000,000 P, S, or E
SP	ONEUNITED BANK		X	X X Royalties X	P
	CONGRESSIONAL FED.CRED.UNION		X	X X	
SP	AMERICAN GOLF JT.VENTURE		X	X X Profit Sharing X	
SP	[redacted], CA		X	X X	
SP	[redacted] TX		X	X X	
SP	ONEUNITED BANK		X	X X	

For additional assets and unearned income, use next page.

EXHIBIT 18

CONFIDENTIAL

Subject to the Nondisclosure Provisions of H. Res. 895 of the 110th Congress as Amended

OFFICE OF CONGRESSIONAL ETHICS
UNITED STATES HOUSE OF REPRESENTATIVES

Memorandum of Interview

In Re:	Representative A
Review #:	09-2121
Date:	July 8, 2009
Location:	2344 Rayburn HOB
Time:	3:15- 3:45pm (approximately)
Participants:	Omar Ashmawy
	Leo Wise

Summary: Representative A is a Member of the United States House of Representatives and the Chairman of the House Financial Services Committee. He was interviewed pursuant to Review 09-2121. We requested an interview with Representative A and he consented to an interview. Representative A made the following statements in response to our questioning:

1. Representative A was given an 18 U.S.C. § 1001 warning, and signed a written acknowledgement.

2. Representative A stated that the first interaction he could recall with Representative Waters regarding OneUnited was two to three years ago. Representative Waters told him that "Sydney [Representative Waters' husband] wants to talk about something [regarding OneUnited] I can't discuss." Representative A recalled that this interaction had something to do with a transaction that never happened. He understood that Representative Waters could not discuss the matter because of a conflict of interest arising out of the fact her husband was on the board of directors of OneUnited.

3. Regarding his interactions with Representative Waters in September 2008, Representative A recalled that Representative Waters told him that there was a problem with OneUnited, but that she didn't know what to do about it because "Sydney's been on the board." This was relevant to Representative A because OneUnited was a minority owned bank and Representative Waters and another Member of Congress on the committee had been handling minority banking issues for the committee.

CONFIDENTIAL

Subject to the Nondisclosure Provisions of H. Res. 895 of the 110th Congress as Amended

4. Representative A recalled that the problem Representative Waters referenced was the fact that OneUnited has purchased more preferred shares of Fannie Mae and Freddie Mac than any other bank. The problem OneUnited had was an exaggerated version of the problem every other bank had. OneUnited had overbought preferred shares in Fannie Mae and Freddie Mac and was therefore at a greater risk of collapse than any other bank holding preferred shares of Fannie Mae and Freddie Mac.

5. Congress decided to create a legislative fix for banks who invested in preferred Fannie Mae and Freddie Mac stocks. Banks would be able to accelerate the write off for those stocks – allowing them to write off the entire value of the stock in a single year. However, it turned out that OneUnited has so much preferred stock that the legislative fix was not enough for them to survive. As a result, the House passed legislation, authored by the Ways and Means Committee, that allowed a bank, that would otherwise be ineligible, to qualify for TARP funds if the sole reason for their capital impairment was their investment in Fannie Mae and Freddie Mac preferred stock.

6. Representative Waters told Representative A that she was in a predicament because Sydney had been involved in the bank, but OneUnited people were coming to her for help. She knew she should say no, but it bothered her. It was clear to Representative A that this was a conflict of interest problem.

7. Representative A's advice to Congresswoman Waters was to "stay out if it" – OneUnited was a Boston bank and he had a commitment to minority banks. He would address the problem. Representative A then asked his staff to take over the OneUnited issue from Representative Waters.

8. Representative A had at least two conversations with Representative Waters in which he told her to not get involved in the OneUnited matter. The conversations likely occurred in September 2008, but he could not recall any specific dates.

9. Representative Waters seemed relieved that Representative A was going to do something about OneUnited because she didn't need to feel guilty. She was grateful that the problem would be addressed.

10. Representative A did not know how big a presence OneUnited had in the National Bankers Association (NBA). However, he has interacted with the NBA often and OneUnited was never a major presence. When he thought of the NBA, he thought of southern banks and not OneUnited.

CONFIDENTIAL

Subject to the Nondisclosure Provisions of H. Res. 895 of the 110th Congress as Amended

I prepared this Memorandum of Interview on July 14, 2009 after interviewing Representative A on July 8, 2009. I certify that this memorandum contains all pertinent matter discussed with Representative A on July 8, 2009.

Omar S. Ashmawy
Investigative Counsel

APPENDIX B

Report of the Outside Counsel to the Committee on Ethics

In the Matter of Representative Maxine Waters

William R. ("Billy") Martin, Outside Counsel
Kerry Brainard Verdi

Martin & Gitner PLLC
2121 K Street, NW Suite 850
Washington, DC 20037

EXECUTIVE SUMMARY

After a two-step, year-long review, the Outside Counsel recommends to the Waters Committee that it determine that no violations of Representative Waters' due process rights were committed by the Committee on Ethics (the "Committee") during its handling of this matter. Outside Counsel further recommends to the Committee that there is insufficient evidence in the record to determine that Representative Waters knowingly violated House Rules or other standards of conduct by a clear and convincing standard. As such, Outside Counsel recommends to the Waters Committee that it consider closing the matter against Representative Waters and determine that no further inquiry is warranted.

During the 111th Congress, an investigative subcommittee ("ISC") was empaneled to investigate this Matter. At the completion of its investigation, the ISC adopted a Statement of Alleged Violations alleging three counts of misconduct. Prior to the scheduled adjudicatory subcommittee ("ASC") hearing on this matter, staff received an additional piece of evidence and recommended that the Committee recommit the matter to the ISC for further investigation of that additional evidence. The matter was recommitted and no further action was taken on the matter during the 111th Congress.

Both in the 111th and 112th Congresses, Representative Waters raised several claims alleging that the Committee had violated her due process rights. The Committee itself had also identified various concerns to be addressed that had not initially been raised by Representative Waters. In the 112th Congress, the Committee sought to retain an outside counsel to assist it in resolving these issues and the matter as a whole. Outside Counsel was retained by the Committee to first review the due process allegations. If Outside Counsel recommended that Representative Waters' due process rights were not violated, and the Waters Committee agreed, then Outside Counsel was tasked with conducting a *de novo* review of this matter.

Following a review of the record and interviews of relevant witnesses, Outside Counsel made the following recommendations to the Committee Members serving in the matter of Representative Waters (the "Waters Committee"):

- For purposes of Outside Counsel's legal analysis, the Waters Committee should assume that Representative Waters is entitled to constitutional due process. There is ultimately room for debate over whether Members of the House have constitutional due process rights in House disciplinary proceedings, but there are good reasons to conclude that they do.

- Congress has broad discretion under the Constitution to determine what specific process is required. Outside Counsel believes the existing Committee and House rules governing the Waters matter are constitutionally adequate.

- Representative Waters' specific "due process" arguments, as well as the other arguments identified by the Committee, generally do not raise any constitutional violations.

- Even assuming Representative Waters' factual allegations to be true, and that certain Committee rules were violated, such violations did not affect Representative Waters' rights and will not prejudice her in further proceedings. Any violation that may have occurred can be remedied by the new Committee which has been selected and, if appropriate, an investigatory and adjudicatory process.

Because Outside Counsel ultimately recommended a finding that Representative Waters' due process rights were not violated, a finding that was adopted by the Waters Committee, Outside Counsel proceeded with a *de novo* review of this matter. The substantive allegations in this case involved Representative Waters' alleged assistance to OneUnited bank following the conservatorship of Fannie Mae and Freddie Mac. Representative Waters' husband was a former member of OneUnited's Board of Directors and a current stockholder in the bank. During the relevant time period, Representative Waters placed a call to the former Treasury Secretary and requested a meeting on behalf of the NBA and minority banks, as she believed from conversations with OneUnited executives that minority banks would be affected by the conservatorship. Outside Counsel recommends that there was nothing improper regarding Representative Waters' call to the former Secretary of the Treasury.

At that meeting, OneUnited specifically requested $50 million from Treasury as a buy back for its shares of the preferred stock. It is Outside Counsel's recommendation that the Committee conclude that at some point in September 2008, following the Treasury meeting, Representative Waters approached the Chair of the Financial Services Committee to inform him that she was concerned about providing any specific assistance to OneUnited because of her husband's involvement with the bank, although the exact timing of that conversation is not clear from the record. The record also supports a finding that Representative Waters relayed this conversation to her Chief of Staff in an effort to ensure that he did not assist OneUnited with its specific request, although the timing of that conversation is not clear from the record. Determining the timing of these conversations ultimately requires a credibility determination which is best left to the Members of the Waters Committee.

On September 20, 2008, Treasury circulated the first draft of the Emergency Economic Stabilization Act ("EESA"). The evidence suggests that by this time, both Representative Waters and her Chief of Staff were aware that, in addition to OneUnited, the conservatorship was only a problem or concern to one other minority bank. It appears that both the prior staff and ISC believed that Representative Waters and her Chief of Staff nonetheless assisted in the provisions of EESA intended to assist small and minority banks, knowing that the provision would assist OneUnited and only one other bank. Upon further review of the record, Outside Counsel recommends that the Waters Committee determine that significant contradictory evidence is in the record. Namely, while few minority banks were affected, this was a broad issue to community banks as well, and those community banks also approached Representative Waters and the Financial Services Committee for assistance.

Because this was a broad issue being addressed by Treasury, other Members of the House of Representatives, and the Financial Services Committee, Outside Counsel recommends a finding that both Representative Waters and her staff could assist in the legislative process as it affected a broad class. Nonetheless, Outside Counsel has determined that Representative Waters' Chief of Staff ("COS") sent two emails solely on behalf of OneUnited, and not for the greater class of banks. However, because Representative Waters took the affirmative steps to inform her Chief of Staff of her conflict with OneUnited, we do not recommend that any violation for failure to supervise her staff occurred in this case. Finally, while there is evidence in the record to support that Representative Waters' COS knew or should have known of Representative Waters' conflict at the time he sent these emails, Outside Counsel recommends that the evidence does not meet the clear and convincing standard required to recommend that a knowing violation of the House rules or other standards of conduct was committed by Representative Waters' COS.

OVERVIEW

This Report addresses the findings and recommendations of the Outside Counsel with regard to the allegations made against Representative Waters.

Part I briefly summarizes the Outside Counsel's findings and recommendations in this matter with respect to both its due process review and its *de novo* review of the substantive facts underlying this matter.

Part II (summarized in Subpart A) contains a summary of the review with which Outside Counsel was tasked to perform in this matter. Subpart B contains a discussion of the factual background affecting the due process analysis, while subpart C addresses Representative Waters' arguments arising from the Committee's actions.

Part III provides Outside Counsel's due process analysis in this matter. Subpart A addresses the Constitutional Framework including (in subpart 1) whether the Fifth Amendment's due process clause applies to House disciplinary proceedings and (in subpart 2) the private interests at stake. Subpart B addresses the specific requirements of due process in Congressional disciplinary proceedings including (in subpart 1) the process due, (in subpart 2) the Constitutional Due Process contained in the House and Committee rules including (in subpart a) the House Rules, (in subpart b) the Rules of the Committee), and (in subpart c) House precedent. Subpart C analyzes Representative Waters' arguments including (in subpart 1) a discussion of the Constitutional claims including (in subpart a) claims of entitlement to procedures beyond applicable Committee rules and (in subpart b) claims of undue delay; (in subpart 2) claims that the Committee violated its own rules, (in subpart 3) arguments based on criminal law, (in subpart 4) assumed violations including (in subpart a) confidential documents were leaked to persons outside the Committee, (in subpart b) allegations that improper *ex parte* communications occurred; and (in subpart c) the ASC authorized subpoenas on incomplete representations; and (in subpart 5) allegations of inappropriate and/or racially insensitive comments.

Part IV contains Outside Counsel's conclusions and recommendations regarding its due process analysis.

Part V contains a review of Outside Counsel's factual findings with respect to the substantive allegations in this matter including (in subpart A) a summary of the factual findings; (in subpart B) a discussion of Representative Waters; (in subpart C) a discussion of OneUnited Bank including (in subpart 1) its Senior Management, (in subpart 2) its Board of Directors, and (in subpart 3) a discussion of Representative Waters' husband's service on the OneUnited Board; (in subpart D) a discussion of the National Bankers Association ("NBA") including, (in subpart 1) the NBA staff, (in subpart 2) the NBA board, (in subpart 3) OneUnited officer's service with NBA, (in subpart 4) Representative Waters' relationship with NBA; (in subpart E) a discussion of Fannie Mae, Freddie Mac and OneUnited, including, (in subpart 1) OneUnited's investments in Fannie Mae and Freddie Mac, (in subpart 2) the government conservatorship of the Government Sponsored Entities ("GSEs"), and (in subpart 3) the effect of the conservatorship on OneUnited and other minority and community banks; (in subpart F) a discussion of OneUnited's reaction to the Conservatorship including, (in

subpart 1) initial outreach efforts, (in subpart 2) discussions with Representative Waters and other Members, (in subpart 3) preparations for meeting at Treasury (in subpart 4), the meeting at Treasury; and (in subpart 5) conversation with the Former Treasury Secretary following the meeting; (in subpart G) a discussion of Representative Waters' decision that she should not assist OneUnited in its efforts to directly obtain money; (in subpart H) a discussion of the continued communications with OneUnited and Representative Waters' Office, including (in subpart 1) OneUnited's communications with Representative Waters' COS and the Financial Services Committee, (in subpart 2) the EESA legislative process begins, and (in subpart 3) the legislative solution; (in subpart I) a discussion of the recapitalization of OneUnited including (in subpart 1) the private investment, (in subpart 2) the tax relief, and (in subpart 3) the TARP funds.

Part VI contains a review of the legal analysis regarding the substantive allegations in this matter including (in subpart A) a summary of the legal analysis; (in subpart B) a discussion of the relevant rules and standards of conduct, including (in subpart 1) use of a Member's office for personal benefit, (in subpart 2) contacts with administrative agencies of the federal government, (in subpart 3) responsibility for oversight and administration of congressional staff, and (in subpart 4) a discussion of the clear and convincing standard; (in subpart C) a discussion of the specific recommendations in this matter including (in subpart 1) a recommendation that Representative Waters did not violate any rules or other standards of conduct by arranging the meeting with Treasury, (in subpart 2) a recommendation that Representative Waters recognized that she should not take any official action to assist OneUnited to directly receive money, and (in subpart 3) a recommendation that Representative Waters' Chief of Staff communicated solely on behalf of OneUnited in two circumstances. Part VII contains Outside Counsel's conclusions and recommendations regarding its *de novo* review of this matter.

TABLE OF CONTENTS

VII. CONCLUSIONS REGARDING SPECIFIC SUBSTANTIVE ALLEGATIONS AND RECOMMENDATIONS OF OUTSIDE COUNSEL

I. INTRODUCTION

Outside Counsel submits this Report for the Committee on Ethics' (the "Committee") consideration in the Matter of Representative Maxine Waters.

In July 2009, OCE submitted a report to the Committee, concluding that Representative Waters may have violated House conflict-of-interest rules when she called then-Treasury Secretary Paulson to set-up a meeting with OneUnited Bank. In light of the fact that Representative Waters' husband was a former board member and current stockholder in that bank, the OCE recommended that the Committee further investigate the allegations. An Investigative Subcommittee ("ISC") was empaneled, and on June 15, 2010, the ISC adopted a Statement of Alleged Violations ("SAV") alleging three counts of misconduct based on Representative Waters' staff's continued assistance to OneUnited Bank after Representative Waters herself determined she should no longer work to assist that bank: violations of clauses 1 and 3 of the House Code of Official Conduct (House Rule XXIII), and clause 5 of the Code of Ethics for Government Service. During preparations for the Adjudicatory Subcommittee hearing ("ASC") scheduled for November 21, 2010, Committee staff received an email for the first time, which they believed warranted recommittal of the matter to the ISC for further investigation. The matter was recommitted by a 9-1 vote of the Committee on November 18, 2010. The following day, the Chief Counsel and Staff Director ("Chief Counsel") terminated two staff members at the direction of the Chair.[1] The 111th Congress expired without any further action being taken on this Matter.

In 2011, the Committee agreed, pursuant to Committee Rule 6(g), to seek an Outside Counsel to review the matter and consider various concerns that had been raised both by Representative Waters and the Committee itself. Shortly before the Committee retained Outside Counsel, three internal personnel memos regarding the terminated employees were leaked to the press. Following their release, Representative Waters raised several additional due process allegations, arising largely from information contained in the leaked memoranda. The Committee retained attorney Billy Martin to act as Outside Counsel in this matter and directed him to perform a two-step review in this matter. The first step was to analyze and investigate several due process arguments raised both by Representative Waters and the Committee. Following the completion of the due process review, if either no violations of due process were found or no violations that deprived Representative Waters of her due process rights were identified, and the Committee agreed, then the Outside Counsel was to complete a *de novo* review of the facts and documentary evidence in this Matter. The Outside Counsel began its due process review of this matter in July 2011, pursuant to Committee Rule 18(a). Outside Counsel reviewed documents and interviewed numerous witnesses throughout its due process review. Prior to reporting any findings to the Committee,

[1] Outside Counsel notes that Kenneth P. Jorgensen and Andrew B. Brantingham from the law firm of Dorsey & Whitney LLC assisted with the due process analysis portion of this Report. Outside Counsel further notes that titles and positions of Committee Members and staff discussed in the text and citations of this report generally refer to the persons holding those titles and positions in the 111th Congress, and particularly in the summer and fall of 2010.

Outside Counsel made recommendations regarding a Motion to Disqualify several Members of the Committee, which had been filed by Representative Waters. Upon receiving advice from the Outside Counsel, six Members of the Committee chose to voluntarily recuse themselves from this Matter. The Committee was then reconstituted and six new Members were placed on the Committee solely for the purpose of consideration of the Matter of Representative Waters (the "Waters Committee"). The Waters Committee considered the analysis of Outside Counsel, which concluded and recommended that no violations of due process occurred in the handling of this matter during the 111th Congress, and the Waters Committee voted unanimously to accept the due process recommendations of the Outside Counsel.

Outside Counsel then began its *de novo* review of the substantive allegations in this case. As part of this review it examined all prior ISC transcripts and interviews, documents produced, and also re-interviewed several key witnesses. Based on the evidence and testimony in this matter, Outside Counsel recommends that the Waters Committee find the following: 1) that Representative Waters did not violate any rules or other standards of conduct by arranging the meeting with Treasury; 2) Representative Waters recognized that she should not take any official action to assist OneUnited to directly receive money; and 3) Representative Waters' Chief of Staff sent two emails solely on behalf of OneUnited, but the evidence in the record does not support by a clear and convincing margin that his actions were knowingly taken following his conversation with Representative Waters regarding her determination not to take any official action on behalf of OneUnited. The Outside Counsel's findings and conclusions for both its due process analysis and *de novo* review are set forth in this Report.

II. DUE PROCESS FACTUAL FINDINGS

In conducting the due process review, Outside Counsel examined the legal issues surrounding the due process allegations in this matter, specifically (1) the applicable constitutional principles and (2) the relevant House and Committee Rules. According to those principles, Outside Counsel then analyzed 12 specific "due process" arguments raised by Representative Waters and the Committee.

The threshold question of whether a Member of the House has constitutional due process rights in House disciplinary proceedings has no clearly established legal answer; there are arguments on both sides of the issue. However, there are compelling reasons to conclude that the Fifth Amendment does apply to congressional disciplinary proceedings, and the Waters Committee assumed for purposes of this analysis that Representative Waters is entitled to constitutional due process.

Even assuming the Fifth Amendment applies to House disciplinary proceedings, under the Constitution's explicit grant of power to the House to discipline Members, Congress undoubtedly has broad discretion to determine what specific process is required. In light of that broad discretion, and in comparison to basic due process principles articulated by the courts in other contexts, Outside Counsel concluded that the existing Committee and House rules governing matters before the Committee, including the Waters matter, are constitutionally adequate.

While the issues will be reviewed in greater detail in this Report, the Outside Counsel recommended, and the Waters Committee ultimately concluded, that Representative Waters' specific "due process" arguments, as well as the other arguments identified by the Committee, do not articulate any constitutional violation. The only Committee Rule that may have been violated relates to the leak of confidential Committee information, however, even that violation would not amount to a violation of Representative Waters' due process rights.[2] Many of Representative Waters' arguments require a factual analysis. While this Report discusses the facts and provides recommendations on the basis of the factual inquiry that has been conducted, to ensure that Representative Waters receives the benefit of the doubt, for purposes of analysis only, this Report assumes *arguendo* that her factual allegations are true. Even under that assumption, however, to the extent Committee rules have been violated, the appropriate remedy would be a new adjudicatory process, and not a dismissal of the allegations or any other procedure denying the Committee jurisdiction to continue its review of this Matter.

A. Summary of Outside Counsel's Review

On July 19, 2011, the Committee entered into a contract with attorney Billy Martin to serve as Outside Counsel to the Committee in its investigation of Representative Waters. In connection with that contract, the Committee identified allegations raised by Representative Waters, and further recognized additional allegations identified by the Committee, which were to be specifically reviewed and addressed by Outside Counsel. Those allegations included the following:

1. The ISC responded to Representative Waters' motions for a bill of particulars and to dismiss the SAV "with alacrity";
2. The ISC denied Representative Waters' request for oral argument on motions for a bill of particulars and to dismiss;
3. The Committee announced the formation of the ASC without simultaneously announcing an initial hearing date for the ASC;
4. Committee counsel collected documents and interviewed witnesses after the ISC transmitted the SAV to the full Committee;
5. The ASC proposed to conduct a *de novo* review of the facts and law at issue;
6. Committee counsel submitted pre-hearing disclosures that allegedly exceeded the amount of evidence Committee counsel could reasonably intend to use in the allotted time for an ASC hearing;

[2] Confidential information was, in fact, leaked. If it was leaked by a Member or staff, it constitutes a violation of Committee Rules. If it was otherwise unlawfully obtained by a non-Member or non-staff, it constitutes a violation of law.

7. The Committee recommitted the matter to an ISC after the ASC had been formed;

8. Confidential documents regarding the investigation were allegedly leaked to persons outside the Committee;

9. The Committee has not acted on Representative Waters' matter nor communicated with her since the recommittal to an ISC;

10. Communications occurred that allegedly violated bifurcation or *ex parte* principles; and

11. The ASC authorized subpoenas on incomplete representations.

At a meeting held on March 28, 2012, the Waters Committee authorized Outside Counsel to also address issues of whether inappropriate, insensitive or racially biased comments may have infected the investigation of Representative Waters.

Consistent with the investigative authority, as part of its due process review Outside Counsel reviewed over 150,000 pages of documents received from the Committee, the designees to the Chairman and Ranking Member, as well as documents received from the Members in response to a request for production of documents by Outside Counsel. In addition, Outside Counsel interviewed all Members of the Committee from the 111th Congress. Relevant members of the staff who were either personally involved in the investigation or may have had knowledge regarding the relevant issues were also interviewed.

B. Background

In 2009 the OCE began investigating allegations that Representative Waters had improperly arranged a meeting between Treasury officials and representatives of the National Banker's Association ("NBA") concerning TARP funding for distressed banks. The meeting allegedly centered on a single entity—OneUnited Bank. Representative Waters' husband had been a member of the board of directors of OneUnited and Representative Waters and her husband owned stock in that bank. In July 2009, OCE submitted a report to the Committee concluding that Representative Waters may have violated House conflict-of-interest rules and recommended that the Committee further investigate the allegations.[3]

Following an investigation by Committee staff pursuant to authority granted by Committee Rule 18(a), the Committee established an Investigative Sub-Committee ("ISC"). The staff assigned to the ISC was then-Director of Investigations and Deputy Chief Counsel ("Director of Investigations") along with two staff attorneys. That team was supervised by the former Chief Counsel.

[3] *See* OCE Report.

At an ISC Meeting on May 20, 2010, the ISC was presented with three options. The first was to adopt a Statement of Alleged Violations ("SAV") and recommend a sanction. The second option was to adopt an SAV and recommend no further action. The third was to adopt a report and recommend the report serve as a public admonishment on the issue of failure to supervise her staff.[4] The ISC was prepared to adopt the report when the Chief Counsel informed the ISC that it was an improper action because Representative Waters was a named Respondent and could not be admonished without the process afforded by the Committee rules.[5] Following this advice, the ISC agreed to schedule a vote for the SAV with the intention of attempting to negotiate a settlement with Representative Waters during that time period.[6] Unfortunately, the attempted settlement negotiations were unsuccessful.

Ultimately, on June 15, 2010, the ISC adopted an SAV alleging three counts of misconduct: violations of clauses 1 and 3 of the House Code of Official Conduct (House Rule XXIII), and clause 5 of the Code of Ethics for Government Service.[7] On June 30, 2010, Representative Waters filed a Motion for Bill of Particulars.[8] The following day, on July 1, 2010, the ISC issued an Order denying the Motion for Bill of Particulars.[9] Subsequently, on July 12, 2010, Representative Waters filed a Motion to Dismiss the SAV.[10] This motion was denied by the ISC on July 15, 2010, and contains a footnote addressing Representative Waters request for oral argument.[11]

On July 28, 2010, the SAV was transmitted to the full Committee. The Committee established an ASC shortly thereafter to conduct a hearing on the SAV. One additional staff attorney was added to the team. That attorney had not worked on the Waters ISC. The review by Outside Counsel revealed that the Chief Counsel took a lesser role in the Waters ASC because at that same time he was acting as the lead counsel on another matter pending before the Committee. Thus, the former Director of Investigations became the lead attorney assigned to the Waters ASC.

Throughout the month of August 2010, the staff interviewed numerous witnesses, and sought voluntary production of documents from various sources. During this time period, pursuant to Committee rules, the staff attempted to schedule a settlement conference with Representative Waters. While corresponding with her Chief

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[4] May 20, 2010, ISC Tr. at 34.

[5] *See id.* at 47.

[6] *See id.* at 52.

[7] *See* Letter dated June 15, 2010, attached hereto as Ex. 1.

[8] *See* Motion for Bill of Particulars (June 30, 2010), attached hereto as Ex. 2.

[9] *See* Order dated July 1, 2010, attached hereto as Ex. 3.

[10] *See* Motion to Dismiss (July 12, 2010), attached hereto as Ex. 4.

[11] *See* Order dated July 15, 2010, attached hereto as Ex. 5.

of Staff, staff noticed that the Chief of Staff used a personal Yahoo! account for official business in addition to his government email. While staff had previously been in possession of emails from that Yahoo! account, staff members testified that they had not connected that account to the Chief of Staff until the correspondence regarding scheduling of a settlement conference. Staff subsequently approached the designees for the Chair and Ranking Member regarding the need for a subpoena for this Yahoo! account.

Also during the August recess, on August 13, 2010, Representative Waters held a press conference addressing the pending investigation. During this press conference, she disclosed confidential information, including excerpts of approximately 24 documents and approximately 4 interview transcripts that were subject to a Non-Disclosure Agreement ("NDA"), which Representative Waters had signed.[12] In addition, Representative Waters' website contained a link to the presentation that contained the same information. In response to this press conference, staff drafted a Contempt Order for the Committee to send to Representative Waters for breaching her NDA. Rather than issue an Order, the former Committee Chair, who stated that her interpretation of the rules gave her authority to decide the issue of how to respond to Representative Waters' violation of the NDA, sent Representative Waters a letter on August 31, 2010, advising her to adhere to the NDA.[13] The two senior members of the Waters ASC staff strongly disagreed with the decision of the Chair and referred to her letter as "weak".[14] At this point, based on numerous interviews and documents reviewed, it is clear that members of the staff, particularly the two senior staff members on the Waters ASC team, began disagreeing with certain decisions made by the former Chair and began communicating with Republican Committee Members regarding their frustrations. Further, those two staff members also began to suspect that the former Chief Counsel was working with the Chair to undermine or postpone the Waters case, a claim refuted by both the former Chair and former Chief Counsel during interviews with Outside Counsel. No evidence was uncovered during Outside Counsel's review that supports that claim.

On August 25, 2010, counsel for Representative Waters submitted a letter objecting to the ongoing investigation by the ASC. Specifically, counsel stated that "[s]uch inquiry violates both this Committee's rules and comparable federal criminal procedures and raises significant questions about the sufficiency of the evidence that the Investigative Subcommittee relied upon when it issued the charges contained in its SAV."[15] Both the Chair and Ranking Member jointly responded to this letter on August 31, 2010, highlighting the fact that Committee Rule 23 contemplates that both the Committee counsel and the Respondent will prepare its case for the adjudicatory

[12] Every Member of the Committee and all staff were also required to sign NDAs.

[13] *See* Letter dated Aug. 31, 2010, attached hereto as Ex. 6.

[14] *See* Email dated Sept. 16, 2010.

[15] *See* Letter dated Aug. 25, 2010, attached hereto as Ex. 7.

hearing, and also reminding counsel that criminal law precedent is not binding on the Committee.[16]

At this same time, the Chair raised concerns about the possibility that the Yahoo! account could not be subpoenaed because it was discovered during settlement negotiations and might violate Committee rules.[17] The Chair also raised scheduling issues with the staff and indicated that she wanted to begin the hearing in September, upon Congress' return from the August recess. Initially, the staff responded that it would be impossible for them to be prepared by September 14, 2010, as the Committee needed to address the draft Order to Show Cause regarding Representative Waters' press conference and still needed subpoena authorization.[18] The Staff later changed its position and stated that they could be ready, but the Chair did not credit this position as they still had not issued witness subpoenas and were seeking additional document subpoenas.[19] The two senior staff members on the Waters ASC team believed that they surprised the Chair by announcing that they were ready and that the Chair simply continued to "stall" because she did not want the hearing to go forward, which was a view shared by several Members of the Committee and other staff as well.[20] In addition, the Director of Investigations also alleged that the Chief Counsel threatened her regarding the start date stating that the Chair and Representative Waters were Members of the same delegation and that the Director of Investigations needed to take that into account with regard to the handling of this case.[21]

Tension began mounting between the two senior staff members on the Waters ASC team, the Chief Counsel, and the Chair. This tension came to a head at an ASC meeting on September 16, 2010. At that meeting, staff, among other things, was requesting several witness subpoenas. There is some dispute regarding what happened next. The Chair stated that she was very unhappy with the level of preparation for that meeting by the staff, particularly the two senior members of the team, who she believed failed to flag important issues for the Committee and did not prepare to the level she

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[16] *See* Letter dated Aug. 31, 2010, attached hereto as Ex. 8.

[17] *See* Email dated Sept. 21, 2010. Committee Rule 26(i) states that "statements or information derived solely from a Respondent or Respondent's counsel during any settlement discussions between the Committee or a subcommittee thereof and the Respondent shall not be included in any report of the subcommittee or the Committee or otherwise publicly disclosed without the consent of the Respondent." Rule 26(i).

[18] *See* Email dated August 16, 2010; Email dated August 17, 2010; *see also* Chair Dep. at 29.

[19] *See* Chair Dep. at 29.

[20] *See* Staffer #1 Dep. at 63; Director of Investigation ("DOI") Dep. at 78; Member #1 Dep. at 34.

[21] *See* DOI Dep. at 97. This allegation is contradicted by the testimony of the Chief Counsel who testified before Outside Counsel that "I don't recall raising a political issue with the Chairwoman, big P politics certainly, and by big P politics, what I would mean is politic specific to either the Democratic or Republican party, one way or the other." (Chief Counsel Dep. at 61.)

expected.[22] According to the former Chair, she became frustrated by the staff and, when votes were called on the floor of the House, she adjourned the meeting.[23] This account was corroborated by the designee to the Chair.[24] To the contrary, the two senior staff members of the Waters ASC both stated that Chair Lofgren berated them and stormed out of the Committee room, even though there were at least 15 minutes before the Members had to leave for votes.[25] This account is consistent with the testimony of several other Members of the Committee as well.[26] The other Members of the Committee did not recall this incident with the same level of detail.

After the adjournment of the meeting there was a verbal altercation among the two senior members of the Waters ASC and the Chief Counsel while several Members were still present in the room. The two senior members of the Waters ASC team argued that the Chief Counsel undermined them and did not support them with the Chair.[27] During this verbal altercation, the Ranking Member, who believed that the Chief Counsel was preoccupied with the other matter he was working on[28] and was impeding the work of the Waters staff, told the Chief Counsel to "stay out" of further involvement with the Waters matter.[29] The Ranking Member also stated that he later found the Chair on the House Floor and told her that she needed to set a different tone with the Committee.[30]

The following day an email was sent to the entire ASC by one of the attorneys on the Waters team providing information on the areas that were not covered at the meeting. This email was edited by the entire Waters team, but according to the Director of Investigations, it was her practice to direct a particular member of the team to send various communications to the Committee. Despite the fact that this was sent from a

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[22] *See* Email dated Sept. 23, 2010; Chair Dep. at 40-42.

[23] *See* Chair Dep. at 40-42.

[24] *See* Chair Designee Dep. at 29-30.

[25] *See* Staffer #1 Dep. at 62-65; DOI Dep. at 140-141.

[26] *See* Member #2 Dep. at 24; Member #3 Dep. at 24; Ranking Member ("RM") Dep. at 58-60; Member #1 Dep. at 30. The Members who recalled this incident with detail include the former Chair, Ranking Member, and other Members of the Republican party. With the exception of the Chair, no democratic Members of the Committee recalled this incident in any great detail.

[27] *See* Staffer #1 Dep. at 63-65; Member #2 Dep. at 24; RM Dep. at 75-76; DOI Dep. at 144-147; Member #1 Dep. at 32.

[28] At this time, the Committee had an unprecedented two ASC's sitting at the same time. The Chief Counsel was the lead attorney for the other ASC, while the Director of Investigations was the lead attorney for the Waters ASC.

[29] *See* RM Dep. at 75.

[30] *See id. at* 59.

more junior member of the team, one Member of the Committee responded only to the two most senior members of the Waters ASC staff stating "nicely done."[31]

The Chair continued to raise concerns regarding staff preparation, scheduling issues, as well as the subpoena issue, in a September 22, 2010, email that the Chair sent to both the Ranking Member and the Chief Counsel.[32] The Chief Counsel forwarded this email to the Director of Investigations so that she could be prepared for the upcoming ASC meeting. The Director of Investigations ultimately forwarded the email to the Ranking Member's designee.

By late September 2010, a hearing date for the Waters matter had still not been set. The Chair stated that she had been trying to set a hearing date before the general election, but that the ASC staff had not been ready.[33] The two senior members of the Waters ASC team both testified that they had been ready but they believed that the Chair did not want to set a hearing date until after the election.[34] Outside Counsel's review did not uncover any evidence to support their belief. Republican Committee Members also stated that they were frustrated that the Chair would not set a hearing date and, ultimately, on September 28, 2010, the Ranking Member issued a press release (signed by all Republican Representatives on the Committee) urging the Chair to set a hearing date.[35]

Two days later, the ASC held a brief meeting to authorize the document subpoenas sought by staff. During the course of Outside Counsel's review, Members of the ASC that recalled this issue advised that they received sufficient information from the staff who assisted them during consideration of the subpoena issue, and were prepared to, and did take, official action and vote in support of the issuance of the subpoena.[36] Although the Chair noted that she was generally unhappy with the staff, she stated that she would not have voted for the subpoenas if she did not feel she had sufficient information to do so, and further noted that the approval of subpoenas was a ministerial act.[37]

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[31] *See* Email dated Sept. 17, 2010.

[32] *See* Email dated Sept. 23, 2010.

[33] *See* Chair Dep. at 29.

[34] *See* Staffer #1 Dep. at 63; DOI Dep. at 161; Staffer #2 Dep. at 126; *but see* Chief Counsel Dep. at 60 (testifying that the Chair never asked, implied or suggested that the hearings be delayed).

[35] *See* Email dated Sept. 28, 2010.

[36] *See* Member #4 Dep. at 22-23; Member #5 Dep. at 33-34; Member #3 Dep. at 35-37; RM Dep. at 72-73; Member #2 Dep. at 33-34.

[37] *See* Chair Dep. at 43.

On October 7, 2010, the Chair, believing the rules permitted the Chair to unilaterally decide the issue of the ASC hearing date,[38] responded to the September 28, 2010, press release and issued a statement setting the hearing dates for both the Matter of Representative Waters and another matter pending before the Committee at that time.[39] The Chair set the Waters hearing for November 21, 2010. One of the senior attorneys on the Waters ASC selectively forwarded the statement of the Chair, which was public, from her personal Gmail account to three of the Republican Representatives on the Committee, as well as to the Republican designee working on the separate ASC pending before the Committee.[40]

On October 12, 2010, the Chair sent a letter to Representative Waters in which she informed Representative Waters that her adjudicatory hearing would convene on Monday, November 29, 2010.[41] The letter also indicated that each side would be given 6 hours to present their respective cases, exclusive of opening and closing statements.[42] The Chair testified that while she had tried to collaborate on setting a schedule, after she was "blasted" in the press release issued by the Republicans for not setting a hearing, she went back to the rules which state that the "Chair shall" set the hearing date, and unilaterally set the hearing date and ground rules.[43]

Both of the senior members of the Waters ASC team were unhappy about the time constraints set for the hearing, as the Waters team had estimated that the hearing would take 20 business days.[44] Therefore, on October 13, 2010, the most junior staff attorney on the Waters ASC team sent an email to the Members of the ASC expressing the staff's need for more time. Staff members testified that, as with previous emails sent by staff, the drafting of the email was a collaborative effort by all of the staff assigned to the Waters matter.[45] The junior staff attorney testified that she had not been the primary drafter of the email, but had been directed to send this email by the Director of Investigations, and that she did not want to send it because she did not agree with it.[46] This same email was leaked to the Washington Post and cited in an article dated

[38] While the Rules do seemingly permit the Chair to act unilaterally, it has been the consistent practice of this Committee for the Chair and Ranking Member to act jointly.

[39] *See* Email dated Oct. 7, 2010.

[40] *Id.*

[41] *See* Letter to Representative Waters (Oct. 12, 2010), attached hereto as Ex. 9.

[42] *Id.*

[43] *See* Chair Dep. at 31-32; *but see supra* n.34.

[44] *See* Email dated August 19, 2010.

[45] *See* Email dated Oct. 13, 2010.

[46] *See* Staffer #2 Dep. at 136-137.

December 16, 2010.[47] The staff attorney who was directed to send the email was so distraught by the leak of this email that she authored a memorandum memorializing her concerns over this e-mail, which stated that she was concerned about sending the email for 3 reasons: 1) she didn't agree with every statement in the email, and had voiced these concerns with both of the senior members of the Waters ASC team; 2) because she believed the email to be controversial, she believed it was the Director of Investigations' responsibility to send it; and 3) she did not want the perception that she had drafted and sent the email to Committee Members on her own initiative.[48] During interviews with the Outside Counsel, both Republican and Democratic Members of the Committee agreed that 6 hours per side was not enough time.[49] Ultimately, on October 15, 2010, the Waters ASC team filed formal objections to the Chair's procedures, which the Chair denied on October 20, 2010.[50] The Chair modified the scheduling order on October 22, 2010, and allowed the staff until October 25, 2010, to provide Representative Waters with copies of the evidence, their intended witness list, and a summary of the witnesses' expected testimony.[51]

Committee staff produced documents to Representative Waters as directed on October 25, 2010, and two days later Representative Waters filed objections arguing that staff produced all documents in its possession, many of which were unrelated to the charges in the SAV.[52] On October 28, 2010, the Chair overruled all objections, with the exception of two discrete witness summaries that were ordered to be revised.[53] Staff on the Waters ASC team provided the revised witness summaries as ordered on October 29, 2010. In that same production, they produced an email to counsel for Representative Waters that they had recently received for the first time during a witness interview conducted in preparation for the upcoming hearing (the "newly discovered email").

On November 3, 2010, one of the senior staff attorneys on the Waters ASC team sent an email to the entire Committee attaching this newly discovered email.[54] This

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[47] *See* Ethics Probe of Rep. Waters Derailed by Infighting, Sources Say (Washington Post, Dec. 16, 2010), attached hereto as Ex. 10.

[48] *See* Memorandum dated December 17, 2010.

[49] *See* RM Dep. at 62; Member #5 Dep. at 29-30; Member #1 Dep. at 27.

[50] *See* Committee Counsel's Objections to the Chair's Proposed Adjudicatory Hearing Procedures (Oct. 15, 2010), attached hereto as Ex. 11; Letter to Director of Investigations from Chair (Oct. 20, 2010), attached hereto as Ex. 12.

[51] *See* Letter to Representative Waters & Director of Investigations from Chair (Oct. 22, 2010), attached hereto as Ex. 13.

[52] *See* Respondent's Objections to Committee Counsel's Rule 23(f)(1) Production (Oct. 27, 2010), attached hereto as Ex. 14.

[53] *See* Letter to Representative Waters' Counsel from Chair (Oct. 28, 2010), attached hereto as Ex. 15.

[54] *See* Email dated Nov. 3, 2010.

communication outlined many reasons why the newly discovered email was important to the case and argued that the matter should be recommitted to the ISC.[55] The Waters ASC team did not consult with the Chief Counsel prior to sending this email. In notes taken by one of the junior members of the Waters ASC team, it appears that another member of the Waters ASC team raised concerns that sending this email could possibly violate the Committee's "bifurcation rule".[56] However, the Director of Investigations testified that they were not concerned with the bifurcation issue, but rather were concerned that the Chair would try to exclude this email from the hearing.[57] The other senior member of the Waters ASC team stated that she did not even know what the bifurcation rule was at that time.[58]

On November 15, 2010, the Waters ASC team sent a formal motion to the ASC to recommit the matter to the ISC (the "Recommital Motion") on the ground that newly discovered evidence suggested Representative Waters may have had more direct involvement with assisting OneUnited than previously suspected or believed.[59]

The following day, Representative Waters filed a response to the Recommital Motion.[60] Based on the Recommital Motion, the Chair sent a letter indicating that the scheduled pre-hearing conference was inappropriate.[61] The following day, the Committee held a sanctions hearing in another matter, which was followed immediately by a Waters ASC meeting. At that meeting, notebooks were provided to the Members and certain Members observed that the notebooks for the Republican Members appeared to have been tabbed and highlighted, while no such tabs or notations were provided for the Democratic Members. Later that night, the Chief Counsel, along with the designee for the Chair, reviewed the binders and the Chief Counsel stated that he believed the handwriting in the annotated binders belonged to Ms. Kim.[62]

During the course of the Outside Counsel's review, Outside Counsel located and reviewed what Outside Counsel believes are those very notebooks. Outside Counsel

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[55] *See id.*

[56] *See* Notes dated Nov. 3, 2010. The Committee's "bifurcation rule", Committee Rule 8(a), states that with the exception of the Chair and Ranking Member, "evidence in the possession of an investigative subcommittee shall not be disclosed to other Committee members except by a vote of the subcommittee." Rule 8(a).

[57] *See* DOI Dep. at 174-175.

[58] *See* Staffer #1 Dep. at 131.

[59] *See* Committee Counsel's Motion to Recommend Recommital of the Matter to the Investigative Subcommittee (Nov. 16, 2010), attached hereto as Ex. 16.

[60] *See* Respondent's Response to Committee Counsel's Motion to Recommend Recommital of the Matter to the Investigative Subcommittee (Nov. 16, 2010), attached hereto as Ex. 17.

[61] *See* Letter dated Nov. 17, 2010, attached hereto as Ex. 18.

[62] *See* Chair Designee Dep. at 51.

determined that only one tab and minimal highlighting was placed on the notebooks in question. In addition, the designee to the Ranking Member testified that she had highlighted the binders to assist the Republican Members to more easily locate the documents that were going to be discussed at the meeting.[63] As this was done by the designee to the Ranking Member, who was acting within the scope of her services and authority,[64] and not by a staff member to assist one party, there is nothing noteworthy about the highlighted binders. At the November 18, 2010, meeting, the Committee voted to recommit the Waters matter.[65]

The following day, November 19, 2010, at the direction of the Chair, the Chief Counsel fired both of the senior members of the Waters ASC team.[66] Both individuals testified that they were shocked and had no notice that this was going to happen. After they were fired, the Committee's Administrative Staff Director escorted them out of the offices. Each contacted the designee to the Ranking Member to advise her that they had been fired.[67] The Ranking Member's designee, in turn, contacted the Ranking Member who was still in Washington, and had not been informed that either staff member was being terminated. The Chair testified that a few days prior to the termination, the Chief Counsel had brought several emails to her attention that indicated, in her opinion, that there had been inappropriate *ex parte* communication between the two senior members of the Waters ASC staff and Republican Members of the Committee, including the Ranking Member, which is why she did not consult him in her decision.[68]

Later in the evening of November 19, 2010, upon learning of the terminations, the Ranking Member immediately returned to the Committee offices and interviewed the staff members who remained in the offices. He testified before Outside Counsel that he also tried several times to contact the Chair and consulted with the Parliamentarian about whether the Chair had the authority to unilaterally fire any staff members. Ultimately, the Ranking Member contacted the sergeant at arms to lock down the Committee offices and told all staff to stay out of the offices. He further ordered the systems administrator to move the computers from the two senior staff attorneys' offices into a locked room so that no one would access them, due to the fact that he had reason to believe the Chief Counsel had accessed their computers following the terminations, despite the Chief Counsel's statements that he had not done so.[69]

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[63] *See* RM Designee Dep. at 38-39.

[64] *See* Committee Rule 6(j).

[65] *See* Letter dated Nov. 19, 2010, attached hereto as Ex. 19.

[66] *See* Chief Counsel Dep. at 69.

[67] *See* Email dated November 19, 2010; Staffer #1 Dep. at 166-167.

[68] *See* Chair Dep. at 53.

[69] *See* RM Dep. at 91-99.

The next day, the Chief Counsel emailed the designee to the Chair and the Chair's Chief of Staff, outlining the issues for the employment action stating that the primary issue was "ex parte, adversarial contacts with Members of the Committee on substantive matters and the repeated failure, after notice, to follow my instructions."[70] The next day, November 21, 2010, the evidence indicates that the Chief Counsel forwarded several emails from both of the terminated senior staff attorneys' email accounts to the Chair's designee; it is unclear how or when he obtained these emails.[71] Outside Counsel's review was unable to determine whether the Chief Counsel accessed the terminated employee's accounts after the Ranking Member ordered their computers to be locked, as the Chief Counsel invoked his Fifth Amendment privilege when asked whether he had accessed the computers after the Ranking Member's order.[72] Whether he accessed the computers after the Ranking Member's Order or not, it is clear from a review of the evidence that he had been accessing the email accounts from the two senior members of the Waters ASC staff for some time.[73]

Shortly after the two staff members were fired, several internal Committee emails were leaked and the Washington Post published an article discussing the Waters matter and alleging that "infighting" derailed the investigation. It specifically discussed the concern regarding the scheduling of the Waters hearing. More importantly, the article quoted both internal staff emails and a September 16, 2010, Committee hearing.[74]

After several tense meetings between the Chair and Ranking Member, the two staff members who had been unilaterally terminated were instead placed on administrative leave from the Committee. The Chief Counsel authored two memoranda and one set of personnel notes, which seemed to provide the basis for the personnel action taken against the two individuals.[75] The Chief Counsel testified that these documents were created after the termination of the two employees.[76] These three documents were leaked to and publicized by Politico.com. During the course of witness

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[70] Email dated November 20, 2010.

[71] *See* Emails dated Nov. 21, 2010.

[72] *See* Chief Counsel Dep. at 73.

[73] *See, e.g.*, Email dated August 2, 2010; Email dated August 3, 2010; Email dated November 16, 2010. Outside Counsel's review of the Chief Counsel's emails was limited to those emails that were provided from other sources as the Chief Counsel's emails were no longer accessible at the time of Outside Counsel's review.

[74] *See* Ethics Probe of Rep. Waters Derailed by Infighting, Sources Say (Dec. 16, 2010), attached hereto as Ex. 10.

[75] *See* Memo to Chair Lofgren RE: Recent Personnel Action ("the First Personnel Memo"; Memo to Chair Lofgren RE: Personnel Issues Related to the Matter of Rep. Maxine Waters ("the Second Personnel Memo"); Additional Personnel Notes ("the Personnel Notes").

[76] *See* Chief Counsel Dep. at 65-67.

interviews, the Chief Counsel invoked his Fifth Amendment right not to incriminate himself when responding to all questions regarding the leaked documents.

For purposes of our analysis only as we review the issue of due process as it relates to Representative Waters' claims, and without drawing any final conclusion, the Waters Committee assumed that a staff member may have violated their agreement to keep Committee information confidential, as well as House and Committee Rules.

The personnel matters carried over to the 112th Congress, when the former Ranking Member became the Committee Chair and wanted to re-hire both of the employees who were placed on administrative leave. The current Ranking Member, who was not a Member of the Committee in the 111th Congress, objected to the re-hiring based on what she had learned about the two individuals from both the former Chair and her then-designee, who also currently serves as the designee to the Ranking Member in the 112th Congress. Ultimately, an agreement was reached in which the two individuals were told they would be re-hired, and then they simultaneously tendered their resignations.

As a result of Outside Counsel's review indicating that an atmosphere of suspicion and mutual distrust arose between the Republican Members of the Committee and the Committee Chair in the 111th Congress, Outside Counsel recommended that the five Republican Members of the 112th Congress, who also served in the 111th Congress, recuse themselves from this matter, along with the Ranking Member, due to her involvement in the personnel action.[77] All Democratic Members that served on the 111th Congress were replaced in the 112th Congress.

All six members accepted the recommendation of Outside Counsel and they voluntarily recused themselves from any consideration of the Waters matter. The recusals occurred prior to Outside Counsel providing any recommendation on either the due process portion of the review or any recommendation regarding the underlying substantive allegations. The Waters Committee that considered the issues in this matter is comprised solely of Members who had no prior involvement in the Waters Matter before the Committee during the 111th Congress.

C. Representative Waters' Arguments Arising from the Committee's Actions

Following the recommital of the Matter, Representative Waters objected to the ISC's resumption of its investigation, arguing that the SAV could be amended only *before* transmittal to the Committee and insisting that the only appropriate course would be to proceed through an adjudicatory hearing limited to the allegations in the original SAV. On December 22, 2010, the 111th Congress adjourned without the Committee concluding the Matter.

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[77]During interviews with the Outside Counsel, with the exception of the Chair, the other Democratic Members of the Committee during the 111th Congress denied knowing of any atmosphere of suspicion that existed within the Committee.

In general, Representative Waters did not articulate the legal basis for her arguments. In particular, it is often unclear whether she alleges a violation of Committee or House rules, of the Constitution, or of some other source of law. Broadly speaking, however, Representative Waters' arguments may be understood as falling into two categories—claims that the Committee's actions have violated the U.S. Constitution, specifically due process requirements; and arguments that the Committee has violated its own procedural rules (some arguments may fall into both categories).

This Report will first analyze the constitutional facets of Representative Waters' arguments, then turn to the House and Committee rules. Finally, for purely analytical purposes, we assume arguendo that Representative Waters' factual allegations are true, and then analyze the appropriate remedy for any violations that may have occurred.

III. DUE PROCESS ANALYSIS

A. The Constitutional Framework

Representative Waters assumes, without legal support, that Members in House ethics proceedings are entitled to certain due process rights under the U.S. Constitution. That proposition is not necessarily justified. Two threshold questions must be answered before it is possible to consider any of Representative Waters' specific claims of due process violations. First, does the Fifth Amendment's Due Process Clause apply to House disciplinary proceedings at all? Second, if the Due Process Clause applies in the abstract, do such proceedings threaten a protected liberty or property interest so as to trigger due process rights?

Existing authorities provide no definitive resolution of either question. There are sufficiently compelling reasons to answer each affirmatively. Therefore, for purposes of this analysis, the Committee should at least assume that the Fifth Amendment does apply to its proceedings and that Members are entitled to some constitutional due process.

1. Whether the Fifth Amendment's Due Process Clause Applies to House Disciplinary Proceedings

Federal courts have, with relative consistency, recognized two general constitutional principles governing internal procedural rules of Congress, including disciplinary rules. The first is that the Constitution explicitly grants Congress broad power in this area: Article I, section 5, clause 2 of the Constitution (sometimes called the Rulemaking Clause) provides that "[E]ach House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrences of two thirds, expel a member." In light of this clear textual authority, as well as separation-of-powers principles, the courts recognize that Congress has nearly plenary

power to establish its own procedural rules, and they often conclude that challenges to those rules are nonjusticiable.[78]

The second principle is that Congress's power under the Rulemaking Clause (like all congressional powers) is subject to certain overriding constitutional constraints. "Congress may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained."[79] Thus, specific constitutional provisions, particularly those protecting "fundamental rights," constrain congressional authority under the Rulemaking Clause.[80]

Many of the fundamental rights enshrined in the Constitution are not precisely defined, however. Consequently, while Congress must respect these rights, it also enjoys significant discretion to define their specific content. In other words, while there are outer bounds to its power under the Rulemaking Clause, where the Constitution does not mark out those bounds precisely, Congress may do so itself. As the Supreme Court stated in *Ballin*:

> [W]ithin these [constitutional] limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. . . . The power to make rules . . . is always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.[81]

Procedural due process is surely among the fundamental rights Congress is constitutionally bound to respect.[82]

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[78] *See, e.g.*, *Metzenbaum v. Federal Energy Regulatory Comm'n*, 675 F.2d 1282, 1287 (D.C. Cir. 1982); *see also Nixon v. United States*, 506 U.S. 224, 229 (1993) (holding challenge to Senate impeachment procedures nonjusticiable under art. I, § 3, cl. 6). It is important to distinguish between justiciability—which concerns the federal courts' jurisdiction and power to grant relief—and the question whether, as a matter of law, the Constitution imposes due process constraints on Congress regardless of whether a court would enter judgment on that basis. *See, e.g.*, *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1172-73 (D.C. Cir. 1983). This Report is concerned with the latter question, as the Committee's primary interest is in the duties imposed upon it by the Constitution itself rather than the likely result of any judicial review.

[79] *United States v. Ballin*, 144 U.S. 1, 5 (1892); *see also Vander Jagt*, 699 F.2d at 1172-73; *cf. Powell v. McCormack*, 395 U.S. 486, 551 (1969) (concluding that "in judging the qualifications of its members [under art. I, § 5, cl. 1] Congress is limited to the standing qualifications prescribed in the Constitution").

[80] *Ballin*, 144 U.S. at 5.

[81] *Id.* at 5.

[82] *See County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *see also Hastings v. United States*, 802 F. Supp. 490, 504 (D.D.C. 1992) (concluding that Fifth Amendment applied to impeachment proceedings against federal judge, and such proceedings "must be conducted in keeping with the basic

2. The Private Interests at Stake

Even if it is true that the Fifth Amendment applies to House disciplinary proceedings as a general matter, a second threshold question arises before a Member can claim any specific due process rights. The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law."[83] Accordingly, a preliminary issue in all cases is whether government action threatens one of these protected interests.[84] It is far from clear whether Members of Congress hold a constitutionally cognizable interest in their offices (or the benefits associated with their offices) giving rise to due process rights. There is no clear judicial authority on the question, the constitutional text is open to conflicting interpretations, and historical practice does not give a definitive answer.[85]

In addition, the wide range of potential sanctions complicates consideration of the interests at stake in House disciplinary proceedings. Members of Congress accused of ethical violations face possible sanctions up to and including expulsion from the House.[86] Some of the available sanctions may implicate a constitutionally cognizable interest and others may not.

Despite this uncertainty, Committee proceedings likely implicate protectable interests in several ways. Consequently, Outside Counsel recommends that the Waters Committee assume for purposes of the present analysis that the proceedings implicate Representative Waters' cognizable liberty and/or property interests so as to give rise to due process rights.

As a preliminary matter, a Member of Congress probably has no cognizable private interest in the powers of his/her office, and the threat of expulsion from the House alone does not give rise to due process rights. While the Supreme Court has not directly addressed the question whether an elected federal official holds a cognizable property interest in his/her office, it has in several cases reaffirmed that "unlawful denial by state action of a right to state political office is not a denial of a right of

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principles of due process that have been enunciated by the courts and . . . by Congress itself"), *vacated on other grounds*, 988 F.2d 1280 (D.C. Cir. 1993); *Michael J. Gerhardt*, Book Review: The Utility and Significance of Professor Amar's Holistic Reasoning, 87 Geo. L.J. 2327, 2342-43 (1999) ("Members of Congress are still persons and thus entitled to at least some protections of the Fifth Amendment Due Process Clause.").

[83] U.S. Const. amend. V.

[84] *See, e.g.*, *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 569 (1972) (applying 14th Amendment).

[85] *See, e.g.*, Gerhardt, 87 Geo. L.J. at 2339-40 (considering textual and historical evidence relevant to question whether President holds a property interest in his office giving rise to 5th Amendment rights in impeachment proceedings).

[86] *See* Comm. R. 24(e) (listing potential sanctions including expulsion, censure, reprimand, fine, and "[a]ny other sanction determined by the Committee to be appropriate").

property or of liberty secured by the due process clause."[87] In the first such case, *Taylor v. Beckham*,[88] the Governor of Kentucky alleged that he had been deprived of his office without due process of law through a fraudulent vote recount. The Court rejected his due process claim, stating:

> The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. . . . [G]enerally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right.[89]

In addition, more recent Supreme Court decisions have—albeit in different contexts—reaffirmed the basic principle that the "legislative power . . . is not personal to the legislator but belongs to the people; the legislator has no personal right to it."[90]

While a Member may not hold a property interest in the political powers of his/her office, she may hold a protectable interest in the salary that goes along with it.[91] With respect to their salaries, Members of Congress may be analogized to public employees who can only be terminated under certain circumstances (in the case of a Member, only in accordance with House and Committee rules), and who thus hold a property interest in continued employment.[92]

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[87] *Snowden v. Hughes*, 321 U.S. 1, 7 (1949).

[88] 178 U.S. 548 (1900).

[89] *Id.* at 577; *see also Velez v. Levy*, 401 F.3d 75, 86 (2d Cir. 2004) ("The Court's pronouncements in *Taylor* and *Snowden* have since been echoed in numerous decisions."). It should be noted that in the decades since the *Snowden* decision in 1949, the Court has taken a significantly more expansive view of what constitutes a cognizable property interest, and consequently "intervening cases may cast a shadow over *Taylor* and *Snowden*." *Id.* at 86. In particular, to the extent *Taylor* suggests a public official has no constitutionally cognizable interest in the emoluments of his/her office absent a contractual right to them, it has probably been abrogated by the Court's subsequent due process jurisprudence, which recognizes property interests in certain contexts even absent contractual rights.

[90] *Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011).

[91] *See Powell*, 395 U.S. at 498 (rejecting contention of mootness because Congressman Powell retained a live claim that he had been unconstitutionally deprived of his congressional salary); *Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result) ("[N]o officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest," but "[t]hey have a private right to the office itself . . . and to the emoluments of the office.") (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and *Powell*).

[92] *Cf. Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 538-39 (1985).

House disciplinary proceedings may also threaten a Member's private property interests in a much simpler and more direct way—any fine imposed would plainly amount to a deprivation of property and thus trigger due process rights.

In addition to potentially threatening property interests, House ethics proceedings may implicate Members' liberty interests insofar as they inherently threaten respondents' reputations in conjunction with the threat of expulsion or other concrete sanctions.

A person's interest in her reputation—and particularly her professional reputation—is one of the facets of the right to "liberty" contemplated by the Due Process Clause.[93] But government defamation standing alone is not a constitutional violation. In *Paul v. Davis*,[94] the Supreme Court held that "injury to reputation by itself [is] not a 'liberty' interest protected under the Fourteenth Amendment."[95] The Court explained in Paul that reputational harm only rises to the level of a constitutional violation if in connection with it some other concrete "right or status [is] altered or extinguished."[96] Based on this principle, the courts have developed what has come to be known as a "stigma plus" due process claim.[97]

The archetypal example of a stigma-plus case is when a government actor publicly accuses an employee of wrongdoing in the course of terminating her employment, without affording an adequate opportunity for the employee to clear her name. In conjunction with the concrete harm of a lost job, the public stigmatization amounts to a deprivation of liberty without due process of law.[98]

While the Supreme Court has not applied this theory to the context at issue here, the Second Circuit has on more than one occasion considered stigma-plus claims by elected officials.[99]

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[93] *See Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (stating that due process is implicated "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him").

[94] 424 U.S. 693 (1976).

[95] *Siegert v. Gilley*, 500 U.S. 226, 233 (1991) (*citing Paul*).

[96] *Paul*, 424 U.S. at 712.

[97] *Siegert*, 500 U.S. at 234.

[98] *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 631 (1980); *see also McGhee v. Draper*, 639 F.2d 639, 643 (10th Cir. 1981) (stating that reputational damage infringes upon a liberty interest when it is "entangled with some other 'tangible interests such as employment'") (*quoting Paul*, 424 U.S. at 701).

[99] *See Velez*, 401 F.3d at 90 (concluding that plaintiff stated stigma-plus claim based on removal from elected school board position on allegedly false charges); *Monserrate v. New York State Senate*, 599 F.3d 148, 158 (2d Cir. 2010) (analyzing state senator's due-process challenge to expulsion from office for ethical violations under stigma-plus theory).

In the context of House ethics proceedings, expulsion could very likely constitute the requisite "plus," even if Members do not hold a property interest in their offices or the associated benefits.[100] Other less severe sanctions potentially could constitute the requisite "plus" as well, depending on the particular burden imposed on the respondent.

Finally, it bears emphasis that Congress's own views as to the applicability of constitutional due process principles in congressional disciplinary proceedings are entitled to significant weight. The judicial precedents discussed above may provide the most detailed guidance with respect to the relevant legal principles, but the proceedings at issue are of course internal disciplinary proceedings explicitly committed to Congress's discretion by the Constitution. In light of this, it is significant that the Rules of the House specifically require the Committee to adopt rules protecting the "due process rights of respondents."[101] While there is of course no explicit indication that this obligation stems from the Fifth Amendment, the House's employment of the phrase "due process" is likely no accident. It suggests an institutional sense that Congress bears a fundamental obligation to provide procedural protections to those who face accusation and punishment.

Although there are arguments to the contrary, the foregoing considerations suggest that the Fifth Amendment applies to congressional disciplinary proceedings and that Members of Congress enjoy some constitutional due process rights in such proceedings. At the least, the Committee should assume for purposes of the present inquiry that this is the case; the contrary position cannot be lightly adopted.

Reaching this conclusion only begins the inquiry, however, for due process is a fluid concept, subject to variation in different contexts. "Once it is determined that due process applies, the question remains what process is due."[102]

B. The Specific Requirements of Due Process in Congressional Disciplinary Proceedings

1. The Process Due

While there is virtually no judicial authority directly addressing what procedural protections are constitutionally required in congressional disciplinary proceedings, general due process principles as well as case law on impeachment and analogous proceedings provide some guidance. These sources strongly suggest that the Constitution does not impose rigid technical requirements in congressional disciplinary

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[100] The requisite "plus" need not be an independently cognizable property interest or other constitutional right. *See, e.g., Velez*, 401 F.3d at 87, 90 (holding that plaintiff's removal from office constituted "plus" for purpose of liberty interest claim even though plaintiff had not cognizable property interest in the office).

[101] H.R. R. XI cl. 3(p).

[102] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

proceedings, and that the Committee and the House have broad discretion to determine the appropriate procedures subject only to minimal constitutional constraints.

The Constitution's text establishes no specific procedural requirements. It says simply that "each House may . . . punish its members for disorderly behavior."[103] There is accordingly no textual basis for the notion that the Constitution requires certain specific procedures or, as some of Representative Waters' arguments seem to suggest, something akin to a criminal trial.

Indeed, the Supreme Court has declined to impose such procedural requirements in the analogous area of impeachment proceedings. In *Nixon v. United States*, an impeached federal judge challenged the Senate's use of a fact-finding committee in his impeachment, arguing that the constitutional mandate to "try all Impeachments," U.S. Const. art. I, § 3, cl. 6, required something akin to a traditional judicial trial in the full Senate.[104]

The Court held the case nonjusticiable, concluding that the Constitution vested in the Senate sole authority to determine the required procedure.[105] Justice White, concurring in the judgment, rejected Nixon's argument on the merits. Quoting Justice Story's statement that "the strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments," he concluded that the Constitution did not require a full trial in the nature of a judicial proceeding.[106] Justice White also gave special weight to the Rulemaking Clause. "Particularly in light of the Constitution's grant to each House of the power to 'determine the Rules of its Proceedings,'" he wrote, "the existence of legislative and judicial delegation [in historical practice] strongly suggests that the Impeachment Clause was not designed to prevent employment of a fact-finding committee."[107]

Here, as in *Nixon*, there is no reason to conclude that the Constitution imposes rigid procedural requirements on the Committee. Indeed, because such proceedings are at the heart of Congress's explicit power to "punish its members for disorderly behavior," the basic requirements of due process should be at their most flexible and subject to the broad discretion of the House.[108]

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[103] Art. I, § 5, cl. 2.

[104] 506 U.S. at 229.

[105] *See id.* at 237-38.

[106] *See id.* at 249 (quoting 1 J. Story, Commentaries on the Constitution of the United States § 765, at 532 (3d ed. 1858)).

[107] *Id.* at 250.

[108] *Cf.* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 140 (2d ed. 2000) ("Even if the Fifth Amendment due process clause applied to the impeachment context . . . it is not likely that it would mandate any different procedures from those already applicable.").

In light of that broad discretion, the basic constitutional requirements of due process are neither highly technical nor particularly stringent. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."[109] In determining what procedures are required, the House and Committee must consider "the private interests at stake . . . , the governmental interests involved, and the value of procedural requirements."[110]

The Second Circuit recently had occasion to apply these principles in a context similar to this one, and its decision provides some guidance here. In *Monserrate v. New York State Senate*,[111] the New York State Senate had voted to expel a senator because of his commission of domestic violence offenses.[112] The senator advanced a stigma-plus claim, contending that the expulsion deprived him of his liberty interest in his reputation without due process of law.[113] He specifically claimed that his due process rights were violated when (1) he was not given copies of all materials relied on by the senate committee; (2) he was not allowed to cross-examine all of the witnesses; and (3) several of the committee's sessions were held in executive session.[114]

Recognizing that both the private and governmental interests were significant, the Second Circuit focused on the procedural requirements, holding they were constitutionally adequate notwithstanding *Monserrate's* specific procedural complaints. The court began with the observation that the "touchstone of due process . . . is the requirement that a person in jeopardy of serious loss be given notice of the case against him and an opportunity to meet it."[115] It noted the various procedural obstacles *Monserrate* had faced, but simply concluded that he "nevertheless received a sufficient opportunity to clear his name—and that is all the Constitution requires."[116]

2. The House and Committee Rules Afford Constitutional Due Process

Ultimately, the Constitution requires that the House and the Committee provide a respondent in disciplinary proceedings with meaningful notice of the charges and

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[109] *Morrissey*, 408 U.S. at 481.

[110] *Washington v. Harper*, 494 U.S. 210, 229 (1990).

[111] 599 F.3d 148 (2d Cir. 2010).

[112] *Id.* at 153.

[113] *Monserrate*, 599 F.3d at 158.

[114] *Id.* at 159.

[115] *Id.* (quoting *Spinelli v. New York*, 579 F.3d 160, 169 (2d Cir. 2009) (citing *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976)).

[116] *Id.* at 159-60.

evidence and "a meaningful opportunity to present [her] case."[117] As set forth above, the House's power to punish its members—and its concomitant interest in exercising that power effectively—strongly support the conclusion that the House and the Committee enjoy broad discretion in establishing the specific procedures necessary to establish these basic protections.

In fact, both bodies have adopted robust procedural rules that adequately serve to protect these basic due process interests in disciplinary proceedings.

a. The House Rules

House Rule XI governs procedures of committees. It requires them to adopt written rules of procedure consistent with the House Rules and the provisions of Rule XI "to the extent applicable."[118] Rule XI cl. 1(b)(1) confirms that committees enjoy a significant degree of investigatory discretion with respect to issues within their respective jurisdictions, providing that "[e]ach committee may conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X."[119]

Rule XI cl. 3 establishes further specific rules and procedures for the Committee on Ethics. It provides:

> The committee may investigate . . . an alleged violation by a Member . . . of the Code of Official Conduct or of a law, rule, regulation, or other standard of conduct applicable to the conduct of such Member . . . . After notice and hearing . . . the committee shall report to the House its findings of fact and recommendations, if any, for the final disposition of any such investigation and such action as the committee may consider appropriate in the circumstances.[120]

This rule thus recognizes the basic constitutional requirement of "notice and hearing." The remainder of Rule XI provides more specific requirements establishing the precise nature of the notice and hearing to be provided.

Most saliently, Rule XI cl. 3(p) establishes specific "due process rights of respondents," which the Committee rules are required to adopt. These rules are set forth in their entirety below:

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[117] *Mathews*, 424 U.S. at 349.

[118] H.R. Rule XI cl. 2(a)(1)(C).

[119] Rule XI cl. 1(b)(1) (Rule X provides that the jurisdiction of the Committee on Ethics is "The Code of Official Conduct.").

[120] Rule XI cl. 3(a)(2).

(1) not less than 10 calendar days before a scheduled vote by an investigative subcommittee on a statement of alleged violation, the subcommittee shall provide the respondent with a copy of the statement of alleged violation it intends to adopt together with all evidence it intends to use to prove those charges which it intends to adopt, including documentary evidence, witness testimony, memoranda of witness interviews, and physical evidence, unless the subcommittee by an affirmative vote of a majority of its members decides to withhold certain evidence in order to protect a witness; but if such evidence is withheld, the subcommittee shall inform the respondent that evidence is being withheld and of the count to which such evidence relates;

(2) neither the respondent nor the counsel of the respondent shall, directly or indirectly, contact the subcommittee or any member thereof during the period of time set forth in paragraph (1) except for the sole purpose of settlement discussions where counsel for the respondent and the subcommittee are present;

(3) if, at any time after the issuance of a statement of alleged violation, the committee or any subcommittee thereof determines that it intends to use evidence not provided to a respondent under paragraph (1) to prove the charges contained in the statement of alleged violation (or any amendment thereof), such evidence shall be made immediately available to the respondent, and it may be used in any further proceeding under the rules of the committee;

(4) evidence provided pursuant to paragraph (1) or (3) shall be made available to the respondent and the counsel of the respondent only after each agrees, in writing, that no document, information, or other materials obtained pursuant to that paragraph shall be made public until—

(A) such times as a statement of alleged violation is made public by the committee if the respondent has waived an adjudicatory hearing; or

(B) the commencement of an adjudicatory hearing if the respondent has not waived an adjudicatory hearing;

but the failure of respondent and the counsel of the respondent to so agree in writing, and their consequent failure to receive the evidence, shall not preclude the issuance of a statement of alleged violation at the end of the period referred to in paragraph (1);

(5) a respondent shall receive written notice whenever—

(A) the chair and ranking minority member determine that information the committee has received constitutes a complaint;

(B) a complaint or allegation is transmitted to an investigative subcommittee;

(C) an investigative subcommittee votes to authorize its first subpoena or to take testimony under oath, which occurs first; or

(D) an investigative subcommittee votes to expand the scope of its investigation;

(6) whenever an investigative subcommittee adopts a statement of alleged violation and a respondent enters into an agreement with that subcommittee to settle a complaint on which that statement is based, that agreement, unless the respondent requests otherwise, shall be in writing and signed by the respondent and respondent's counsel, the chair and ranking minority member of the subcommittee, and the Outside Counsel, if any;

(7) statements or information derived solely from a respondent or the counsel of a respondent during any settlement discussions between the committee or a subcommittee thereof and the respondent shall not be included in any report of the subcommittee or the committee or otherwise publicly disclosed without the consent of the respondent; and

(8) whenever a motion to establish an investigative subcommittee does not prevail, the committee shall promptly send a letter to the respondent informing the respondent of such vote.

The House Rules thus guarantee the essential rights of notice and hearing, and provide certain specific requirements particularly directed to guaranteeing respondents have adequate notice of the specific charges and evidence against them.

b. The Rules of the Committee on Ethics

The Rules of the Committee on Ethics incorporate and elaborate upon the procedural protections established by House Rule XI. Part II of the Committee Rules contains the provisions governing the Committee's investigative and adjudicatory capacities.

Committee Rule 19 governs the procedures of investigative subcommittees, and incorporates several provisions that protect the due process rights of respondents. Rule 19(a)(2) requires that the respondent be notified of the membership of an ISC and have the right to object to participation of any member. Subsection (b)(3) provides that the respondent has the right to make a statement to the ISC, orally or in writing, regarding the allegations against her and any relevant issues. Subsection (b)(2) guarantees the respondent's and witnesses' right to counsel in ISC proceedings.

After the ISC adopts a Statement of Alleged Violation, Rule 22 provides the respondent with formal mechanisms to challenge its allegations.[121] Specifically, it

[121] The ISC may amend its Statement of Alleged Violation at any time before it has been transmitted to the Committee, in which case the respondent has 30 days to submit an answer to the amended SAV. Committee Rule 20.

requires the respondent to submit an answer, allows her to file a motion to dismiss, and allows her to file a motion for a bill of particulars.[122]

If the respondent does not admit to the allegations in the SAV, she has the opportunity to present her case in an adjudicatory proceeding, governed by Rule 23. This rule includes several specific provisions protecting the due process rights of respondents, notably:

- The respondent must be notified of the membership of the adjudicatory subcommittee and may object to the participation of any member.[123]
- Allegations against the respondent must be proven by "clear and convincing evidence,"[124] and the burden of proof is on Committee counsel.[125]
- The ASC must notify the respondent in writing of her and her counsel's right to inspect all documents and tangible evidence to be used at the hearing. The respondent must be given access to such evidence and must receive witness lists at least 15 days before any hearing. "Except in extraordinary circumstances," no witness or evidence may be introduced unless the respondent has had prior access under this rule.[126]
- Upon request, the respondent must be given access to any other testimony, statement or document evidence in the committee's possession "which is material to the respondent's defense."[127]
- The respondent may apply to the committee for issuance of subpoenas to obtain evidence she is not otherwise able to obtain.[128]
- The respondent may cross-examine witnesses.[129]

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[122] *See* Comm. Rule 22(b), (c).

[123] Comm. Rule 23(a).

[124] Comm. Rule 23(c).

[125] Comm. Rule 23(n).

[126] Comm. Rule 23(f)(1).

[127] Comm. Rule 23(f)(3).

[128] Comm. Rule 23(h).

[129] Comm. Rule 23(j)(4).

In addition, Rule 25 specifically requires disclosure to a respondent (or potential respondent in the case of a complaint) of any exculpatory information received by the Committee or any subcommittee.

Finally, Rule 26 establishes "rights of respondents and witnesses" that are protected in both the investigatory and adjudicatory contexts. With some structural changes, Rule 26 incorporates the provisions of House Rule XI cl. 3(p)(1) ("due process rights of respondents") verbatim:

- The respondent must receive 10 days' notice and disclosure of relevant evidence before an investigatory subcommittee can vote on a Statement of Alleged Violation.[130]
- If, after issuance of an SAV, the Committee or any subcommittee determines that it intends to use evidence not previously disclosed, that evidence must be immediately disclosed to the respondent.[131]
- The respondent must receive written notice of receipt of a complaint; transmittal of a complaint to an ISC; an ISC's first vote to take testimony or issue a subpoena; and the Committee's vote to expand the scope of the inquiry of an ISC.[132]
- Witnesses must be furnished a copy of the Committee's Rules of Procedure and the House Rules applicable to witness rights before their testimony is taken.[133]

c. House Precedent

While the Committee has not previously encountered the specific issues raised by Representative Waters, prior disciplinary proceedings at least illustrate the application of the procedural rules. For example, in July 2002, an adjudicatory subcommittee of the Committee on Standards of Official Conduct (the predecessor to the Committee on Ethics) held an adjudicatory hearing on the Statement of Alleged Violations against Representative James Traficant. The Chairman opened the hearing by stating that it would be governed by the Committee Rules (specifically Rule 24, which governed adjudicatory hearings under the version of the Rules then in effect) and that Committee counsel bore the burden to prove the charges by clear and convincing evidence.[134] The

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[130] Comm. Rule 26(c).

[131] Comm. Rule 26(e).

[132] Comm. Rule 26(g).

[133] Comm. Rule 26(l).

[134] *See In the Matter of Representative James A. Traficant, Jr.*, H.R. Report No. 107-594, at 221-22 (2002).

Chairman further specified that the "adjudicatory hearing will be conducted subject to the rules and the decorum of the House of Representatives."[135] At the close of the hearing, the Chairman reiterated and explained the standard of proof.[136]

The Committee followed similar procedures in hearings concerning Congressman Charles Rangel. As in the *Traficant* hearings, the Chair opened the ASC session by specifying that the hearing was "authorized by House rule 11, clause 3, and committee rule 23."[137] She went on to explain the roles of the respective subcommittees, the burden of proof and basic procedures, and specified that the hearing would "follow the procedures established by the rules of the committee."[138]

The impeachment trial of Judge Thomas Porteous, although not conducted under the same rules as those applicable in the Committee, provides another illustration of the types of procedural protections available to respondents in congressional disciplinary proceedings. Like the *Traficant* proceedings, the *Porteous* evidentiary hearing began with the Chair's recitation of the governing rules, in this case Rule 11 of the Senate rules of Procedure and Practice for impeachments.[139]

The record in each of these cases reflects clarity on the governing rules and practice both in the adjudicatory hearings and in extensive pre-hearing written procedure. In each case the respondent had ample notice of the allegations and evidence and had ample opportunity to mount a defense.

In addition, these prior proceedings lend some precedential support to the application of the House and Committee rules in Representative Waters' case. That is, given Congress's broad discretion to determine what procedures appropriately protect due process interests, its employment of similar rules in prior cases reflects an established institutional consensus about the types of procedures required.[140]

C. Analysis of Representative Waters' Arguments

1. Constitutional Claims

a. Claims of Entitlement to Procedures Beyond Applicable Committee Rules

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[135] *Id.* at 224.

[136] *See* id. at 903-04.

[137] *In the Matter of Representative Charles B. Rangel*, H.R. Rep. No. 111-661, at 428 (2010).

[138] *See id.* at 429-30.

[139] *See On the Articles of Impeachment against Judge Thomas Porteous, Jr.*, S. Hrg. No. 111-691, vol. 2, at 5-6 (2010).

[140] *See Yellin v. United States*, 374 U.S. 109, 116-17 (1963) ("Weight should be given [the] practice of [a congressional] Committee in construing its rules.").

To the extent Representative Waters contends that the Constitution requires procedural rules different from or in addition to the House and Committee Rules that governed the proceedings against her, her arguments are not persuasive. As set forth above, the Constitution does not impose rigid procedural requirements on the Committee, and the existing House and Committee rules provide robust due process protections that are more than constitutionally adequate.

While Representative Waters does not neatly categorize her "due process" arguments, most of the arguments identified for our analysis can be understood as contentions that certain of the Committee's procedures were unconstitutional, regardless of whether they were permitted by Committee rules. Specifically, Representative Waters argues that (1) the ISC responded to her motions for a bill of particulars and to dismiss too quickly; (2) the ISC denied her request for oral argument on her motions; (3) the Committee announced the formation of the ASC without simultaneously announcing an initial hearing date for the ASC; (4) Committee counsel collected evidence after the ISC transmitted the SAV to the full Committee; (5) the ASC proposed to conduct a *de novo* review of the facts and law; (6) Committee counsel submitted an unreasonable volume of pre-hearing disclosures; (7) the Committee recommitted the matter to an ISC after the ASC had been formed; and (8) the Committee has not acted on the matter since recommitment to the ISC.

None of these objections concerns the essential constitutional requirements of notice and the opportunity to be heard. The Constitution does not require the decision maker to act on a specific time frame or to employ a specific standard of review. It does not necessarily require oral argument on all issues.[141] And it does not require precise procedures for gathering evidence or apportioning responsibilities between subcommittees.[142]

As explained above, constitutional due process requires only basic protections to guarantee that a respondent is afforded notice of the charges and evidence and an opportunity to refute them. Even at the investigatory stage, the House and Committee rules provide for written notice of significant committee actions and relevant evidence, and guarantee the respondent's right to make a statement to the ISC. At the adjudicatory stage, they require, among other things, pre-hearing disclosure of all evidence (including all exculpatory information), compulsory process to obtain additional evidence, and the right to cross-examine witnesses. Representative Waters has not articulated any specific way in which the existing Committee Rules fail to meet the basic constitutional requirements, nor has she demonstrated constitutional entitlement to any procedural protections beyond those afforded by the existing rules.

b. Claims of Undue Delay

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[141] *See Loudermill*, 470 U.S. at 546.

[142] *Cf. Nixon*, 506 U.S. at 249-51.

Among Representative Waters' most fundamental contentions is that the delay in the Committee's resolution of the allegations against her has violated her due process rights.[143] This argument can be understood in two ways.

First, Representative Waters may be relying on an (unarticulated) analogy to the Sixth Amendment's guarantee of a speedy trial. To the extent she does so, however, her argument bears very little legal weight. There can be no serious contention that the Sixth Amendment applies to Committee proceedings; the "Sixth Amendment right of the accused to a speedy trial has no application beyond the confines of a formal criminal prosecution."[144]

Even for the limited purpose of guidance by analogy, Sixth Amendment principles do not support the notion that the proceedings against Representative Waters have been impermissibly delayed. First, Sixth Amendment rights only attach upon formal indictment.[145] The analogous event in these proceedings would be adoption of the SAV on June 15, 2010. While a delay of several years is not insignificant, in this case it is largely attributable to the need for additional investigation and to respond to Representative Waters' own motions filed in this Matter and public complaints made by Representative Waters (as well as Congress's calendar, which is of course more limited than a court's). In addition, Representative Waters has not articulated any specific prejudice to her defense attributable to the delay, such as loss of evidence and/or witness testimony. Where prosecutorial delay is based on a legitimate purpose and the defendant suffers limited prejudice, a delay of a few years does not violate the Sixth Amendment.[146] In short, the Sixth Amendment offers no support for Representative Waters' arguments, even by analogy.

Second, Representative Waters suggests that delay may raise due process concerns. As a general proposition, this is correct. The Supreme Court has recognized (at least in the criminal context) that even outside the scope of the Sixth Amendment, the "Due Process Clause has a limited role to play in protecting against oppressive delay."[147] Nevertheless, there is little reason to conclude that the delay in the proceedings thus far has violated Representative Waters' due process rights. The requirements of the Due Process Clause are not rigorous in this context; prosecutorial delay only rises to the level of a constitutional violation if it offends "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and

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[143] *See* Letter from Representative Waters to Chair and Ranking Member (May 9, 2011), attached hereto as Ex. 20.

[144] *Doggett v. United States*, 505 U.S. 647, 655 (1992).

[145] *United States v. Lovasco*, 431 U.S. 783, 788-89 (1977).

[146] *Cf. Doggett*, 505 U.S. at 656 (stating that 8½-year delay between indictment and trial would not violate Sixth Amendment if Government had "pursued [the defendant] with reasonable diligence").

[147] *Lovasco*, 431 U.S. at 789.

which define 'the community's sense of fair play and decency.'"[148] Where, as here, the delay has been occasioned by the need for further investigation and to address the Respondent's own motions and public complaints, and the Respondent has articulated little or no prejudice to her defense, there is no due process violation.[149]

Furthermore, the proceedings against Representative Waters are within the time limit established by the House itself. Addressing the problem of delay in the criminal context, the Supreme Court has ascribed more significance to statutes of limitations than to the ill-defined protections of the due process clause, describing statutes of limitations as the "primary" bulwark against undue delay.[150] The House has a provision analogous to a statute of limitations for ethical violations. House Rule XI cl. 3(b)(3) provides: "The [C]ommittee may not undertake an investigation of . . . an alleged violation that occurred before the third previous Congress unless the [C]ommittee determines that the alleged violation is directly related to an alleged violation that occurred in a more recent Congress." Thus, pursuant to the Rule, the Committee has jurisdiction over this Matter through the conclusion of the 113th Congress.

This rule both protects respondents and evidences an institutional consensus that proceedings taking place within three Congresses of the alleged violation are not unreasonably delayed. Committee precedent bolsters this conclusion. For example, the Committee investigated allegations of ethical violations by Representative Bud Shuster for some two-and-a-half years before finally adopting an SAV.[151]

The time period to resolve the proceedings against Representative Waters may have taken longer than Representative Waters would like, but it has been caused by the Committee's legitimate investigatory needs and the need to respond to Representative Waters' own motions and public complaints. It does not amount to a deprivation of due process.

2. Claims that the Committee Has Violated Its Own Rules

In addition to her apparent constitutional claims, Representative Waters contends in some instances that the Committee violated its existing procedural rules. Representative Waters has not consistently articulated her arguments with clear reference to specific Committee rules. Indeed, some of her contentions—such as the claim that the Committee could not recommit her matter to an ISC—might be interpreted as alleging both constitutional and rule-based violations. Any such latent

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[148] *Lovasco*, 431 U.S. at 790 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) and *Rochin v. California*, 342 U.S. 135, 173 (1974)).

[149] *Cf. id.* at 796 ("[T]o prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.").

[150] *See id.*

[151] *See In the Matter of Representative E.G. "Bud" Shuster*, H.R. Rep. 106-979, at 3B (2000).

constitutional concerns are addressed above, and this section will accordingly focus on the Committee's own rules.

As a preliminary matter, it must be noted that the Committee's violation of one of its own rules would not necessarily constitute deprivation of constitutional due process. Rules of Congress and committees are of course binding and generally are judicially cognizable,[152] but their violation does not necessarily amount to a violation of the Constitution.[153] Under limited circumstances, a legislative body's violation of its own procedural rules could rise to the level of a constitutional due process violation if, for example, "an individual has reasonably relied on [such rules] promulgated for his guidance or benefit and has suffered substantially because of their violation."[154] Ordinarily, however, unless the rules in question are themselves constitutionally required or necessary to protect fundamental fairness,[155] their violation does not raise a constitutional issue.[156]

Representative Waters' filings with the Committee advance three discernible rule-based arguments, analyzed in turn below.

First, Representative Waters contends that the Committee violated Rules 19(e) and (f) and 20(a) by continuing to gather information after the ISC transmitted the SAV to the Committee in June 2010.[157] Specifically, Representative Waters alleges that:

> Committee Rules 19 and 20 plainly establish that an investigative subcommittee must complete its investigation prior to the issuance of the SAV. Indeed, in writing Rule 20 the drafters clearly contemplated a situation where an investigative subcommittee acquires additional information requiring it to amend its SAV before transmission to the full Committee. What the rules do not authorize, however, is the post-issuance investigation that the Committee is currently conducting in this matter.[158]

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[152] *See Yellin*, 374 U.S. at 114.

[153] *See id.* at 111, 125 (granting relief where House committee violated its procedural rules, but declining to reach constitutional issues).

[154] *United States v. Caceres*, 440 U.S. 741, 752-53 (1979) (citing *Raley v. Ohio*, 360 U.S. 423, 437-38 (1959)).

[155] *See, e.g., Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945).

[156] *See Caceres*, 440 U.S. at 751-52 (finding IRS officials' violation of IRS surveillance regulations did not raise constitutional issues because "the IRS was not required by the Constitution to adopt these regulations").

[157] *See* Letter from Counsel Chair and Ranking Member (Aug. 25, 2010), at Ex. 7; Respondent's Reply to Committee Counsel's Response to Respondent's Second Set of Objections to Committee Counsel's Production 3 (Nov. 8, 2010), attached hereto as Ex. 21.

[158] *See* Letter from Counsel to Chair and Ranking Member (Aug. 25, 2010), at Ex. 7.

This argument is not persuasive for two reasons. First, the rules Representative Waters cites do not clearly establish the limitation on the Committee's authority that she asserts. Rule 20(a) specifically governs amendment of an SAV—not further investigation—and thus by its terms does not apply to the issue of further investigation. Rules 19(e) and (f) do suggest that ordinarily an ISC will have completed its investigation before transmitting an SAV, but no Committee Rule specifically says that all investigatory activity must cease after transmittal of an SAV. Thus, nothing in the rules suggests that the Committee exceeded its authority.

Second, as the Committee noted in responding to this argument initially, Rule 23(i) provides that all relevant evidence is admissible in adjudicatory hearings, and Rule 26(e) provides for post-transmittal disclosure of evidence the Committee determines to use in proving the charges in an SAV. Both rules thus contemplate that evidence not relied upon in the ISC may be introduced in subsequent adjudicatory proceedings. Contrary to Representative Waters' argument, there is no express or implied requirement in the Committee Rules that all investigatory activity must cease upon transmittal of an SAV.

Representative Waters' second rule-based argument is her objection to Committee Counsel's production under Rule 23(f)(1) of evidence to be used at the adjudicatory hearing. The Committee thoroughly addressed this argument in ruling on Congresswoman Waters' objections.[159] Representative Waters' fundamental objection was that Committee Counsel produced more evidence than it could reasonably have intended to introduce during the adjudicatory hearing. As the Committee noted in overruling the objection, however, the parties were not limited to offering evidence during the hearing itself, and Committee Counsel's production violated no express or implied limitation in Rule 23.[160] The Committee's interpretation and application of the rule was entirely tenable.

Finally, Representative Waters argues that the Committee violated its rules by voting to recommit her matter to an ISC after transmittal of the original SAV. This argument is closely related to the argument raised above insofar as it goes to the scope of proceedings permissible after transmittal of the original SAV. It fails for many of the same reasons. First, Representative Waters points to no clear provision in the rules prohibiting formation of a new ISC. Second, Committee Rule 1(c) provides that "[w]hen the interests of justice so require," the Committee may "adopt any special procedures, not inconsistent with these rules, deemed necessary to resolve a particular matter before it." When a Special Procedure is adopted copies of the procedure must be furnished to all parties in the matter.[161] In this case, while the recommital was not technically voted on as a "special procedure" pursuant to the authority of Rule 1(c), the full Committee voted to recommit the matter to the ISC and Representative Waters received notice of

[159] *See* Letter from Committee on Standards of Official Conduct to Counsel (Oct. 28, 2010), at Ex. 15.

[160] *See id.* at 2.

[161] *See* Rule 1(c).

this vote.[162] The recommital followed the procedure outlined in Rule 1(c), and it, therefore, cannot be said that the Committee exceeded its authority or otherwise violated its rules by recommitting the matter to the ISC.

Representative Waters' argument also fails to the extent that it rests entirely on Rule 20(a)'s provision for amendment of an SAV only before transmittal. Her assumption that recommittal to an ISC amounts to amendment of the SAV is unfounded, however. The Committee is authorized under Rule 10(a)(2) to form a new—in effect superseding—ISC, and nothing in that Rule or elsewhere limits the scope of the new ISC's investigation or suggests that formation of a new ISC would equate to an improper "amendment" of the prior SAV.

Sound policy considerations also further support the Committee's actions. The public has a clear interest in full and fair investigation and adjudication of ethical violations by elected officials. That interest would be severely undermined if the Committee were prevented from acting on additional information it uncovers during the course of the proceedings. Representative Waters has offered no compelling reason why the Committee should be forced to proceed through adjudication of its original SAV no matter what additional information comes to light. Certainly the Committee Rules by their plain terms do not require that result, and policy considerations do not support Representative Waters' strained interpretation of them.

Finally, to the extent the language of the Rules is subject to more than one reasonable interpretation, there is no legal basis to challenge the Committee's interpretation and application of them. As set forth above, Congress has broad and explicit authority to discipline its Members under Article I, section 5, clause 2 of the Constitution. The Committee has drafted and adopted its Rules pursuant to that authority, and those same Rules explicitly authorize the Committee to adapt its procedures "[w]hen the interests of justice so require."[163] A court would defer to the Committee's own interpretation if in doubt.[164] Here, the Committee's interpretations are solidly grounded in the language of the Rules and supported by relevant policy concerns, and they are not inconsistent with Committee or House precedent. For all these reasons, the Committee's interpretation and application of the Rules in this proceeding should stand undisturbed.

3. Arguments Based on Criminal Law

In addition to contending that the Committee violated its own rules, Representative Waters asserts that it violated analogous principles of federal criminal procedure when the ASC was permitted to investigate subsequent to the transmittal of

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[162] *See* Letter to Representative Waters from Chair and Ranking Member (Nov. 19, 2010), at Ex. 19.

[163] Comm. R. 1(c).

[164] *See Yellin*, 374 U.S. at 116-17.

the SAV. In particular, she contends that this continued investigation violated rules analogous to those governing federal grand juries.

This argument fails for two reasons. First, as the Committee has made clear, analogies to criminal law can provide some guidance in interpreting and establishing appropriate Committee procedures, but Committee proceedings are not criminal matters, and principles of criminal law are not binding on the Committee.[165] Put simply, the Committee cannot "violate[] . . . federal criminal procedures,"[166] because those procedures do not apply to the Committee.

Second, to the limited extent that analogies from the criminal context provide any guidance with respect to Committee proceedings, federal grand jury practice and procedure provide no reason to conclude that the Committee could not or should not recommit the matter to an ISC. Representative Waters argues from analogy to the principle that prosecutors may not use the grand jury to continue gathering evidence against a defendant once that defendant has been indicted.[167] Even if this analogy were apt, Representative Waters overstates the scope of the principle. The correct legal analysis demonstrates that it is only "improper for the Government to use the grand jury for the sole or dominant purpose of *preparing for trial under a pending indictment*."[168] In contrast, "good faith inquiry into other charges not included in the indictment is not prohibited even if it uncovers further evidence against an indicted person."[169]

The Committee's decision to recommit the SAV terminated the ASC's jurisdiction and cancelled the scheduled adjudicatory hearing.[170] The Committee thus did not use the ISC to continue gathering evidence in preparation for a pending adjudication—instead it reopened the investigation to examine new evidence that may support additional charges. If any analogy to federal criminal procedure were appropriate, it would be to the common—and wholly permissible—practice of obtaining a superseding indictment.[171]

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[165] *See* Letter from Committee on Standards of Official Conduct to Counsel (Aug. 31, 2010), attached hereto as Ex. 8.

[166] Letter from Counsel to Chair and Ranking Member (Aug. 25, 2010) (attached at Ex. 7).

[167] *See id.* at 2.

[168] *United States v. Leung*, 40 F.3d 577, 581 (2d Cir. 1994) (emphasis added).

[169] *United States v. Moss*, 756 F.2d 329, 332 (4th Cir. 1985) (internal quotation marks and alterations omitted). It must also be noted that the 111th Congress expired without concluding this matter. By way of analogy, if a grand jury expired without taking action on a matter, the matter is not simply dismissed. Rather, the matter would await action or inaction by a new grand jury.

[170] *See* Letter from Committee on Standards of Official Conduct to Representative Waters (Nov. 19, 2010), at Ex. 19.

[171] *See, e.g.*, 24 Moore's Federal Practice § 607.06[1] (3d ed.) (stating that a "common reason to supersede [an indictment] is when the government has developed evidence since the first indictment to support additional charges against the defendant").

In short, Representative Waters' arguments based on federal criminal law cannot succeed. Rules of criminal procedure clearly are not binding on the Committee. And, even for the limited purpose of guidance by analogy, the Committee's actions are consistent with analogous criminal procedures.

4. Assumed Violations

Representative Waters' remaining arguments are that (1) confidential documents were leaked to persons outside the Committee; (2) improper *ex parte* communications occurred; and (3) the ASC authorized subpoenas on incomplete representations. These claims turn on factual issues, and will be discussed individually below.

a. Confidential Documents Were Leaked to Persons Outside the Committee

This allegation is likely based on the internal Committee emails and hearing transcript that were leaked to the Washington Post, which formed the basis of the article discussing conflicts regarding the scheduling of the Waters hearing.[172] The emails and transcript were not published until after the Committee voted to recommit the Waters matter to the ISC. Outside Counsel's review did not uncover the identity of the individual or individuals that leaked the information to the press. However, it is clear that if documents were leaked by a Member or staff member, the individual who leaked the information violated his/her oath of confidentiality to the Committee. Thus, the leak of this information clearly violated Committee rules if committed by a Member or staff. If the leak was done by an individual who is neither staff nor a Member, that individual could possibly face criminal penalties depending on the manner in which he obtained the documents. The question to address in this Report, therefore, is whether this violation of a Committee rule affects any of Representative Waters' rights as a Respondent in this action.

In analyzing whether a leak of confidential documents by an unknown person or persons within the Committee violates any of Representative Waters' constitutional rights, it is helpful to consider constitutional principles governing the problem of leaks and publicity in criminal trials and the rule of grand jury secrecy. Of course, these principles of criminal law are not binding on the Committee, but are rather reviewed here for guidance.

i. Pretrial Publicity

Even though someone improperly publicized confidential information related to the proceedings against Representative Waters, such publicity did not violate her constitutional rights.

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[172] *See* Ethics Probe of Rep. Waters Derailed by Infighting, Sources Say (Dec. 16, 2010), attached hereto as Ex. 10.

In analyzing this question, it is useful to consider the constitutional principles governing the problem of publicity in criminal trials. Excessive publicity is of constitutional dimension and concern insofar as it can affect a defendant's Sixth Amendment right to an impartial jury and his right to a fair trial as a matter of basic due process.[173] Excessive publicity may threaten these rights to the extent it biases a jury or leads it to base its verdict on information not properly introduced in open court.[174]

Pretrial publicity does not per se violate a defendant's right to a fair proceeding, however. The fundamental concern is whether the defendant is prejudiced by the jury's exposure to improper information. The courts will presume such prejudice only in "extreme case[s]."[175] Ordinarily, a court will examine the circumstances of the case and the publicized information, and will carefully voir dire the jury to determine whether it has actually been infected with prejudice.[176]

Where the potential for prejudice is apparent, the available solutions are practical and rather obvious. When a particular juror is unable to render an impartial verdict, he or she must be dismissed. When publicity renders it unlikely that an impartial jury can be seated, the trial court should transfer the case to another venue or continue it until the prejudicial publicity subsides.[177] And, when a defendant has been convicted by a jury improperly influenced by outside information, the remedy is a new trial.[178]

Taking guidance from these principles, several conclusions about Representative Waters' claims may be reached. First, the mere fact of publicity does not necessarily render a proceeding fundamentally unfair. Second, if the trier of fact—here the ASC or potentially the House itself—has been influenced by media coverage, the remedy is not, as Representative Waters appears to suggest, simply to dismiss the charges. The remedy is to find a new, unbiased trier of fact who can give the respondent a fair hearing.

There are obvious limitations to the analogy between House disciplinary proceedings and criminal trials with respect to the issue of publicity. In particular, the same remedies are not available. There can be no change of venue, and the pool of potential alternative "jurors" is obviously limited to Members of Congress. These limitations do not demonstrate, however, that Representative Waters cannot receive a fair hearing. Instead, they highlight a fundamental point: While due process

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[173] *See Skilling v. United Sates*, 130 S. Ct. 2896, 2912-13 (2010).

[174] *See id.* at 2913.

[175] *Id.* at 2915; *see also Sheppard v. Maxwell*, 384 U.S. 333 (1966) (presuming prejudice where press coverage created a "carnival atmosphere" at trial).

[176] *See id.* at 2917.

[177] *See Sheppard*, 384 U.S. at 363.

[178] *See id.*

undoubtedly requires a fundamentally fair and unbiased proceeding, the constitutional implications of publicity must be evaluated in light of the unique constitutional context of this proceeding. Congressional disciplinary proceedings by definition take place within a small community in which publicity is virtually guaranteed (given the prominence of Members in the public eye) and in which the pool of available "jurors" is both limited and likely to be aware of public information about the charges. These are inherent attributes of congressional disciplinary hearings that result from the design of the Constitution. It would be incoherent to conclude that the same attributes render disciplinary proceedings unconstitutional.

Regardless, in this investigation, because her matter was recommitted and Members of the Committee that were on the Committee in the 111th Congress have either been replaced by other Members in the 112th Congress, or voluntarily recused themselves from this matter, Representative Waters will have an investigation and possible hearing conducted by unbiased "jurors."

Of course, should the Committee ultimately conclude that a sanction is warranted in this case, it must be voted on by the entire House. Therefore, recusal or appointment of new Members does not cure any possible exposure to the improperly leaked material that was accessed by the entire House membership. This issue can be analyzed by looking to the law governing pre-trial exposure by prospective jurors and judges. Again, there are several strong reasons to conclude that the leak does not present any significant threat to Representative Waters' constitutional rights.

First, as indicated above, the fundamental concern with pretrial publicity is prejudice to the defendant, and publicity alone does not *per se* generate prejudice. Obviously, whether publicity causes or threatens prejudice depends on the actual information publicized. News stories may be problematic, for example, when they report a defendant's "confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight."[179]

Clearly this is not the case here. The Washington Post article underlying Representative Waters' concerns contains no information that could reasonably be expected to lead other Members to prejudge the case against her. The focus of the article is the problems with the Committee's investigation, not the evidence against Representative Waters, and it contains only a basic and essentially neutral description of the allegations against her. In short, there is virtually no reason to believe the article will prejudice Representative Waters in future proceedings.

Second, even when pretrial publicity includes some potentially prejudicial information, several measures are available to mitigate the effects of the publicity and ensure the defendant a fair proceeding. One is delay, and that has already happened here. The article in question was published nearly 18 months ago, and it is not likely to inflame the passions of Members who may be called upon to vote on a sanction months

[179] *Skilling*, 130 S. Ct. at 2915-16.

from now.[180] Another mitigating measure is to determine through voir dire the extent to which jurors have been affected by outside information, and whether they are able to render a fair verdict nevertheless. Importantly, courts will generally accept a juror's assurance that he can act impartially notwithstanding exposure to potentially prejudicial information.[181] Finally, absent extraordinary circumstances, instructions to the jury that they must base their verdict only on appropriate information help to minimize prejudice to the defendant.[182]

Again (except for the passage of time since the leak), these exact remedies are not available in a congressional disciplinary proceeding. But they highlight a fundamental point: the decision maker need not be completely isolated from all outside information in order to make a proceeding fair. As the Supreme Court has emphasized, "[p]rominence does not necessarily produce prejudice, and juror impartiality . . . does not require ignorance."[183] The law places a certain amount of trust in people's ability to set aside their preconceptions and base a decision only on the information appropriately considered in the proceeding at hand. Where the facts reasonably indicate that a decision maker can do this, the fact that he or she was exposed to some outside information does not mean the proceeding is rendered unfair.

This is particularly true when the decision makers are reasonably sophisticated individuals like Members of Congress, who are likely to be more conversant in legal concepts than the average juror. In this context Members are perhaps better analogized to judges than to jurors. Judges in bench trials routinely make evidentiary rulings, including decisions to exclude evidence, and it is presumed that they can compartmentalize both their roles and review of the evidence and then base their decisions only on properly admitted evidence.[184] Indeed, it appears Congress has taken a similar view with respect to evidentiary issues in impeachment proceedings. "Members of Congress have generally decided not to follow any particular rules of evidence in impeachment proceedings, because they have concluded that they are more sophisticated than . . . typical jurors . . . and thus can appreciate the potential unreliability of some kinds of evidence, such as hearsay."[185] Consequently, while voir dire or curative instructions are not available here, they are probably not necessary.

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[180] *See id.* at 2917.

[181] *See id.* at 2922-23.

[182] *See id.* at 2918 n.21.

[183] *Id.* at 2914-15.

[184] *Cf. Vatyan v. Mukasey*, 508 F.3d 1179, 1187 (9th Cir. 2009) (Clifton, J. dissenting) (""The rules of evidence are designed to protect unsophisticated members of a jury and hence are not appropriate for hearings in which the trier of fact is sophisticated and usually expert in the area of the factual controversy.'") (quoting 2 Admin. L. & Prac. § 5.52 (2d ed. 2007)).

[185] Gerhardt, 87 Geo. L.J. at 2344 n.61.

Members of Congress no doubt understand their duties, and should know what information is appropriately considered in voting on a recommended sanction.

In light of these considerations, there can be no serious contention that the leak of confidential Committee information has deprived or will deprive Representative Waters of a constitutionally fair disciplinary proceeding. The content of the leak is minimally prejudicial to her—if at all—and even if it contained some problematic information, Members of Congress can be expected to limit their consideration of any potential sanction decision to appropriate information.

ii. Grand Jury Secrecy

Representative Waters also argues that her due process rights were violated by leaks of confidential information to persons outside the Committee and/or by improper leaks of information to Members of the ASC. Again, useful guidance may be found in analogy to criminal procedure, in particular the rule of grand jury secrecy.

It is a long-established rule that grand jury proceedings must be kept secret, subject to carefully circumscribed exceptions. A knowing violation of this rule is punishable by contempt.[186]

A violation of the secrecy rule can implicate a defendant's rights in at least two ways. First, it could influence the grand jury itself and thus lead to an improper indictment.[187] Second, a "breach of grand jury secrecy can jeopardize the defendant's right to a fair trial before a petit jury" insofar as it may introduce improper information to and therefore prejudice the petit jury.[188] In either case, however, the question is whether the violation influenced the decision maker. Breach of the secrecy rule does not *per se* violate a defendant's rights; indeed, some breaches do not affect a defendant in any significant way at all.

The Supreme Court has held that violations of Fed. R. Crim. P. 6(e) should be reviewed for harmless error, and "dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations.'"[189] Similarly, a defendant seeking reversal of his conviction on the ground of "alleged grand jury abuse must show prejudice or bias."[190]

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[186] *See* Fed. R. Crim. P. 6(e)(7).

[187] *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 257 (1988).

[188] *United States v. Eisen*, 974 F.2d 246, 261 (2d Cir. 1992); *see also United States v. Eisenberg*, 711 F.2d 959, 961 (11th Cir. 1983) (stating that one purpose of secrecy rule is "preventing adverse pretrial publicity about a person who may be indicted and subsequently tried").

[189] *Bank of Nova Scotia*, 487 U.S. at 256 *(quoting United States v. Mechanik*, 475 U.S. 66, 78 (1986)).

[190] *Eisen*, 974 F.2d at 261.

In either case, a violation of the grand jury secrecy rule virtually never allows a defendant to avoid adjudication of the charges against her. Courts rarely, if ever, dismiss indictments because of violations of the secrecy rule. Indeed, it appears that "no indictment has been dismissed [or at least no dismissal upheld on appeal] for prejudicial preindictment publicity."[191] If an indictment were dismissed on the basis of a secrecy violation, there is no requirement that it be dismissed with prejudice. Ordinarily the government could seek another indictment from a new, untainted grand jury. Similarly, if a convicted defendant could show that improperly disclosed information from grand jury proceedings prejudiced his petit jury, the remedy would at most be a new trial.[192] The problem is essentially the same as that posed by trial publicity in general; the solutions are essentially the same as well.

These considerations ultimately suggest that the violation of confidentiality rules by Committee staff, if actually prejudicial, may be cured by beginning the proceedings against Representative Waters anew. To the extent any such violation affected the decision to adopt an SAV, a conclusion unsupported by the record, the solution is to begin the process again with a new Committee untainted by violations, which is exactly what is happening in this case. Obviously, no violation could have affected the decision of the ASC since no decision was reached, and, in the event that this matter reaches the House floor, Members are sophisticated enough to only base their decisions on the information presented on the House floor.

b. Allegation that Improper *Ex Parte* Communications Occurred

While Representative Waters alleges that improper *ex parte* communications occurred between staff and certain Members of the Committee, she cites no Committee or House rule that supports this allegation. The Committee staff is a non-partisan, professional staff that serves all Committee Members. There is no prohibition on *ex parte* contact between Committee Members and staff.

The concept of an *ex parte* communication in the judicial branch evolved in the United States because of the tri-partite system that exists. Generally, *ex parte* communications, which are those communications between only one party to a legal action and the trier of fact to the exclusion of the other party, are prohibited during the course of legal proceedings.

Here, however, the Committee is not part of the judiciary system and its staff serves both the ISC and ASC, so any comparison to *ex parte* communications are not relevant. The only rule in place governing communication by staff with the Committee

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[191] 24 Moore's Federal Practice §606.05[2][g] (3d ed.) (citing cases); *see, e.g., United States v. Dunham Concrete Prods., Inc.*, 475 F.2d 1241, 1249 (5th Cir. 1973) (where convicted defendants alleged secrecy violation, "the remedy in any case would not be to dismiss the indictment;" rather, "a contempt citation [is] adequate to halt any impropriety and to protect grand jury secrecy").

[192] *See, e.g., United States v. Bazzano*, 570 F.2d 1120, 1128 (3d Cir. 1977) (holding that particular prosecutorial violation of secrecy rule at issue did not require that defendants receive a new trial, but that in general "a violation of Rule 6(e) may well require a new trial").

is the "Bifurcation Rule."[193] The "Bifurcation Rule" prohibits the staff from sharing evidence outside of the ISC without authorization from the ISC. During the course of Outside Counsel's review, the issue of bifurcation arose with respect to the November 3, 2010, email that was sent to the Committee regarding the newly discovered evidence that staff believed supported recommital of the Waters matter.[194] A review of the rules demonstrates that once the ISC is no longer in possession of its evidence, the bifurcation rule is no longer operable. Committee Rule 26(c) requires the ISC to provide the respondent with all evidence it intends to use to prove the charges in the SAV 10 days before the vote on the SAV. Clearly the transmittal of the SAV to the Committee necessarily is accompanied by the evidence in the possession of the ISC intended to be used to prove the SAV.

This interpretation is supported by Committee Rule 26(e), which requires the Committee or any subcommittee thereof, to make any additional evidence it intends to use to prove the SAV available to the Respondent.[195] Likewise, Committee Rule 23(f)(1) also contemplates that the ASC may have evidence different from the Respondent. Therefore, with respect to the November 3 email, there is no bifurcation violation for two reasons: 1) the newly discovered evidence attached to the email was never in possession of the ISC; and 2) the information contained in the November 3 email is information from the evidence that had been released by the ISC consistent with Rule 26(c) and thereby, Rule 8(a) as well. This email raises no other potential violations either as the attachment was provided to Representative Waters and, further, the arguments included in the November 3 email is derived from evidence that had previously been transmitted to Representative Waters.

In addition, it is also important to note that the "Bifurcation Rule" does not prohibit the same staff serving both subcommittees. The Committee has always interpreted its rules this way. In fact, at a Committee meeting on March 6, 1991, a Congressman then serving on the Committee had the following exchange with the former Chief Counsel:

[Congressman]: Is there any bifurcation of the staff under these functions or is it the same staff used for investigation and adjudication?

[Chief Counsel]: It is the same staff.

[Congressman]: The person who sits with the investigating committee, that staff person would sit with the adjudicatory committee?

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[193] *See* Committee Rule 8(a).

[194] *See* Email to Committee dated Nov. 3, 2010.

[195] *See* Committee Rule 26(e).

[Chief Counsel]: They would present the case to the adjudicatory subcommittee.[196]

However, because Staff serves all Committee Members, it is useful to review the ethical rules that apply to lawyers representing organizational clients, such as the Committee, as Committee Staff are also bound by these rules. Rule 1.13 of the D.C. Rules of Professional Conduct, entitled Organization as Client, provide that a lawyer representing an organization represents the organization acting through its duly authorized constituents. The duties defined in Rule 1.13 apply equally to unincorporated associations. "Other constituents" as used in the Comment to Rule 1.13 means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations. Comment [8] provides that the duties defined in Rule 1.13 encompass the representation of governmental organizations.

D. C. Rule 1.4 establishes the ethical duties relating to client communication. Specifically, Rule 1.4 (b) states that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Comment [4] recognizes that when the client is an organization, it may not be practical or even possible to communicate with every one of the organization's Members about its legal affairs, but in such circumstances directs the lawyer to "address communications to the appropriate officials of the organization." (emphasis added). Oftentimes organizations have individuals or committees that possess specific or sometimes general authority to act for the entire organization or direct counsel (e.g. Chief Executive or Operating Officers, Executive Committees, Operating Managers, or Executive Directors). Absent such authority, a lawyer should not selectively communicate with or advise only certain organizational Members to the exclusion of others who possess similar or concurrent authority to act for the organization or direct counsel. Comment [5] to Rule 1.4 prohibits lawyers from withholding information to serve the lawyer's own interest or convenience. Thus, in this circumstance, if advice or assistance was intentionally provided by counsel on a partisan or selective basis, then the lawyer may not have complied with his or her ethical duty to communicate with the client. However, if staff was merely responding to a Member's question or request, no violation has likely occurred. Likewise, if staff has reason to believe that one side is acting in a partisan manner and reaches out to the other side to protect the process, no violation likely exists. It appears to only be a violation of the ethical rules if the communication was solely for a partisan purpose.

Since the Committee acts as a body, with each member possessing the same authority, all substantive communications, advice and assistance should be made available to all Committee Members. Moreover, any assistance to selected Members based upon party affiliation would suggest that some interest, other than that of the organization (Committee), interfered with or was placed above the organization's interest in contravention of the Ethics Rules if there was no other basis for the selective conversations.

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[196] Transcript of Committee Meeting, March 6, 1991, pp. 48-49.

Our review determined that sometime during the Summer of 2010, Members of the Republican party concluded that the Chief Counsel stopped responding to them and, therefore, certain Republican Members began contacting the Director of Investigations directly.[197] Several Members of the Republican Party expressed concern that Chief Counsel had quit responding to the Ranking Member of an ASC that was occurring simultaneously with the Waters ASC.[198] The Chief Counsel testified that while there was a complicated period of time during which an issue of recusal was raised, he never intended to stop speaking to the Ranking Member of the ASC and, rather, recalled having several conversations with him.[199]

Suspicions also surfaced during this same time period regarding the relationship between the Chair and the Chief Counsel, as the Chief Counsel had previously worked with the Chair on the Judiciary Committee, and prior to his selection as the Chief Counsel, he had served as the designee to the Chair. Thus, the Chief Counsel had a partisan past, and a suspicion by certain Members and staff arose that the Chief Counsel was aligned with the Democratic party and the Chair and was acting in a partisan manner. These suspicions were fueled by the fact that the designee to the Ranking Member observed calls coming into the Chief Counsel's office from the former Speaker of the House's office.[200] Of course, there is no prohibition on calls being placed to the Chief Counsel by anyone, including the Speaker of the House. Further, while there was testimony that these calls were made, no one had any knowledge of what was discussed on any of these calls or who, in fact, was on the other end of the phone. These suspicions were further fueled by the fact that the two senior staff members on the Waters ASC team felt they were undermined by the Chief Counsel and that the Chair went directly to the Chief Counsel and did not consult with them on the Waters matter.[201] The Chair did, in fact, testify that she regularly communicated with the Chief Counsel about all matters pending before the Committee since, as the Chief Counsel he was the appropriate person in the organizational structure for her to communicate with on all matters before the Committee.[202]

Suspicions also arose because it was perceived that the Chief Counsel spent a lot of time in meetings with the designee to the Chair, and that together the Chief Counsel, the Chair's designee and the Chair made unilateral decisions regarding the matters pending before the Committee.[203] The Chair's designee, however, indicated that as the Chair of the

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[197] *See* RM Designee Dep. at 13-14.

[198] *See* RM Dep. at 33-34; Member #2 Dep. at 13; Member #3 Dep. at 13-14.

[199] *See* Chief Counsel Dep. at. 59.

[200] *See* RM Designee Dep. at 65-66.

[201] *See* DOI Dep. at 36.

[202] *See* Chair Dep. at 29

[203] *See* RM Designee Dep. 16-17.

ASC, it was the Chair's responsibility to make primary or initial rulings on objections and other matters before the ASC.[204]

In addition, several individuals indicated that both the Chair and the Chief Counsel acted in a partisan way in the investigations of both Representative Waters and in another matter pending before the Committee.[205] In fact, the Director of Investigations went so far as to allege that she believed that the Chair was trying to "sabotage" the case.[206] To the contrary, the Chair indicated that she was continually trying to move the matters forward and her designee stated that to the extent any tension existed, it was over the matter of scheduling, and had nothing to do with a political agenda.[207]

The suspicions were not entirely one-sided. As discussed previously in the factual background section, both the Chief Counsel and the Chair's designee believed that the Director of Investigations had notated binders that were provided to the Republican Members of the Waters ASC. This allegation was cited in Chief Counsel's memoranda supporting the decision to terminate the two senior attorneys on the Waters ASC team. As discussed, there was no basis for this allegation as the notations were made by the designee to the Ranking Member, and notating binders for the Republican members of the Committee is within her authority as the designee.

With respect to specific communications between staff and Members of only one party, a review of staff email uncovered emails between the two senior members of the Waters ASC team and the Ranking Member, and three other members of the Republican party. However, with respect to communications concerning the Waters matter, the majority of the communications do not discuss the substance of the allegations against Representative Waters and do not provide any information on the matter that was not available to all Members.

For example, on September 22, 2010, the Chair sent an email to the Ranking Member discussing the subpoena issue that had been raised at the previous ASC meeting as well as concerns the Chair had with the staff. The designee to the Ranking Member forwarded this email to the Director of Investigations so that she and the Waters team could be prepared for the meeting, and it was subsequently forwarded by the Director of Investigations to the entire Waters team. From there, one of the senior members of the Waters ASC team forwarded the email to her personal Gmail account, and then forwarded the email to two Republican committee members. One of the Members responded by

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[204] *See* Chair Designee Dep. at 33. While the rules do state that the "Chair" shall make initial rulings, it has been the practice of this Committee that whenever possible the Chair and Ranking Member jointly make decisions affecting the Committee. As noted earlier, this practice changed following the joint press release by the Republican Members of the Committee.

[205] *See* Member #3 Dep. at 17-18; RM Designee Dep. at 66.

[206] *See* DOI Dep. at 70.

[207] *See* Chair Designee Dep. at 63-68.

stating "Yep. Be prepared." To which the staff attorney responded, "Pls pick up my head for me when it is ripped off..."[208]

Similarly, on October 7, 2010, the Chair issued a public statement announcing the hearing dates for the hearings of Representative Waters and an additional hearing involving a separate Representative. One of the senior attorneys on the Waters ASC team received this statement by email, and subsequently forwarded it to three Republican representatives on the Committee, and also copied the Republican designee for the ASC on the other matter.[209] On that same day, the same senior attorney on the Waters ASC sent an email to the Ranking Member on the Waters ISC, indicating that she was enjoying reading the ISC's interview of one of the ISC's witnesses, to which the Member responded "Thanks. I now see the Chair has come to her senses, sort of."[210]

On November 8, 2010, the same senior attorney on the Water's ASC team forwarded an article about the Waters case that was published by thehill.com to three Republican members of the Committee, and again copied the Republican designee for the ASC in the other matter. One of the Members responded that "this is known as prepping the battle field." The staff attorney responded with a lengthy email about the newly discovered email and her opinion that the Chair would try to suppress it. Although this email may not constitute best practices, or comply with the spirit of the bar rules discussed above, because the Member with whom the staff attorney was communicating was on the ISC and not a member of the ASC, this communication is not an improper factual discussion with a member of the ASC in contravention of the "Bifurcation Rule."[211]

On November 18, 2010, the same staff attorney sent an email from her personal Gmail account to a Republican Committee Member stating "you guys are good...thx!" The Member responded stating "Happy thanksgiving." And the staff attorney again responded "...but there's always another 'ask': now you have to get them to let us start investigating the failure to turn over the document before the next congress starts." During the interview of the staff attorney, she testified that she believed this email referred to the recommital of the Waters matter and that she wanted the Committee to allow the staff to investigate why the newly discovered evidence had not been previously produced.[212]

The only email identified that passed along any information regarding the merits of the case was sent by a senior attorney on the Waters ASC on November 3, 2010. Initially, at 5:05 PM she forwarded an article that had been published on slate.com regarding the ethics case to the designee to the Ranking Member stating "in case the members are interested, a

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[208] *See* Email dated Sept. 23, 2010.

[209] *See* Email dated October 7, 2010.

[210] *See* Email dated Oct. 7, 2010.

[211] *See* Email dated Nov. 8, 2010.

[212] *See* Staffer #1 Dep. at 123-124; Email dated November 18, 2010.

long piece on Waters."[213] Because this was sent only to the designee for the Ranking Member and did not include the designee to the Chair, a rebuttable presumption arises that the senior attorney intended this to only be circulated to Republican Members. However, four minutes later, at 5:09PM, the senior attorney forwarded the same article to three Republican members of the Committee, with a message stating "FYI, Extensive piece on OneUnited and how one little bank got so much attention during the meltdown."[214] By forwarding this article with her spin on it, the senior attorney is actually passing along only select articles, and an argument can be made that the attorney is endorsing the facts and allegations contained in the article. When questioned about this, the senior attorney defended this action stating that this email merely provided a public article which the Members had access to, but recognized that in hindsight it probably should not have been sent.[215] It is the conclusion of Outside Counsel's review that the sending of this email was inappropriate. However, because the Members who received the communication have recused themselves from this matter, there is no harm to Representative Waters.

A review of the Director of Investigations' email evidenced communications between the Director of Investigations and the Ranking Member, and three Republican members of the Committee. Like the senior attorney, many of these emails are sent from a personal email account, as opposed to an official House account.[216] While the Director of Investigations does have substantive communication with the Ranking Member, the rules allow both the Chair and Ranking Member to receive all information available to the ISC, even if they will ultimately serve on the ASC.[217] For example, on August 18, 2010, the Director of Investigations responded to an email sent by the Ranking Member to the Chair, on which the Director of Investigations had been copied. The Ranking Member raised a number of issues in the email including scheduling and Representative Waters' press conference, and he specifically states that he would like the Director of Investigations' thoughts on the issues. The Director of Investigations responded directly to the Ranking Member and did not include the other recipients from the previous email. The Director of Investigation's response listed the facts that the Director of Investigations believed supported the receipt of an actual benefit by Representative Waters and argues that the evidence supports an actual violation, as opposed to an appearance of impropriety. The Director of Investigations followed-up with the Ranking Member and discussed an altercation she had had with the Chief Counsel and asked if the Ranking Member felt she should resign as she believed both the Chair and Chief Counsel wanted her to do. The

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[213] *See* Email dated Nov. 3 at 5:05PM.

[214] *See* Email dated Nov. 3, 2010 at 5:09PM.

[215] *See* Staffer #1 Dep. at 113.

[216] Beyond creating an appearance of impropriety through the use of a personal email account as opposed to staff's official House account, the use of personal email accounts for official Committee business is not best practices as personal accounts do not have the same level of security as the official accounts. Maintaining the confidentiality of Committee information is a priority of this Committee and use of personal email accounts to conduct official Committee business does not comport with that priority.

[217] *See* Committee Rule 8(a).

Ranking Member responded that she should not quit and promised to call her later.[218] This email was cited by the Chief Counsel in the memo he drafted after the termination of the two employees as evidence of an *ex parte* communication. However, as described above, there is no such Committee rule and, further, the Ranking Member is entitled to all information regarding a case whether he is on the ASC or not.

On September 15, 2010, the Ranking Member sent an email to the Director of Investigations stating simply "great job."[219]

With respect to communications between the Director of Investigations and other members of the Committee, the Director of Investigations emailed one Republican Member of the Committee on July 23, 2010, to provide him with a summary of a conversation she had with Representative Waters' attorney regarding settlement negotiations that was a "substantially different" conversation than the one the Chief Counsel had had on the subject.[220] The Member responded that he has enjoyed "about all of this 'dual universe' that I can. I am sure glad you are handling the negotiations."[221]

On July 25, 2010, the Director of Investigations forwarded a Republican Member of the Committee an email communication she received from Representative Waters' counsel indicating that she was not prepared to agree to any violations in the SAV, but would attend a settlement meeting. The Director of Investigations expressed her views on this matter to the Member who also responded to the Director of Investigations with his position.[222]

After transmittal of the SAV to the ASC, the Director of Investigations forwarded an article regarding the CEO and Chairman of OneUnited to a Republican Member of the Committee.[223]

Following the September 16, 2010, ASC meeting that was abruptly adjourned by the Chair, another member of the Waters ASC team sent a follow-up email to the Committee addressing the issues raised at the meeting. As previously indicated, one Republican Member of the Committee responded to the Director of Investigations and the other senior member of the Waters ASC team stating "nicely done." The Director of Investigations responded directly to this Representative indicating that "it was important to lay out exactly what was done so there is no confusion." Indicating the political nature of the Committee at that point in time, the Representative responded: "You have to. It's unfortunate how much they have politicized this Committee." The Director of Investigations ended the conversation

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[218] *See* Email dated August 18, 2010.

[219] *See* Email dated Sept. 15, 2010.

[220] *See* Email dated July 23, 2010.

[221] *See id.*

[222] *See* Email dated July 25, 2010.

[223] *See* Email dated August 11, 2010.

indicating that "[t]he non-partisan staff needs to protect themselves from the partisan staff director and the Chair that is seeking to protect her party members at whatever the cost."[224]

On September 22, 2010, the Director of Investigations sent an update to a Republican Member of the Committee from her personal email account letting him know that Representative Waters' attorneys had not agreed to any additional stipulations and that the Chair had not signed the requested subpoenas, which the Director of Investigations characterized as "another delay tactic."[225] She followed up with the same Member on Sept. 27, 2010, and emailed him copies of the most relevant excerpts from the Committee meeting held on September 23, which the Member had attended.[226] The Director of Investigations again communicated with the same Member in an email with the subject "high alert" on September 29, 2010. In that email, she informs him that she just learned that the Chair's designee was attempting to schedule a late night meeting for the Waters ASC.[227]

On November 8, 2010, the Director of Investigations emailed four Republican Members of the Committee from her personal email account regarding an article that had been forwarded to them. In the email she states that they are "still waiting to see what argument [the Chief Counsel and the Chair] are going to come up with to try and exclude the 2-page 'smoking gun' email on Rep. Waters and her grandson/COS."[228]

Finally, during the Committee meeting regarding the issue of recommital, the Director of Investigations emailed a Republican Member of the Committee on both a personal and professional email account to let him know that while the staff was "kept out of attendance by the Chair, the Waters staff is waiting outside in case any of the members have questions."[229]

During the course of our review, Outside Counsel observed several emails between the Director of Investigations and another senior attorney of the Waters ASC team with several Republican Members of the Committee. They appear to communicate almost exclusively with those Members. Likewise, we also observed that the Chief Counsel had significant, substantive exchanges with only the Chair.[230] It is questionable that any of the emails rise to the level of an ethics violation, pursuant to the D.C. Code of Professional Ethics as the staff members seemed to believe they were acting to protect the Committee from perceived misconduct of other Members. Rather, the emails discussed illustrate the level of

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[224] *See* Email dated Sept. 17, 2010.

[225] *See* Email dated Sept. 22, 2010.

[226] *See* Email dated Sept. 27, 2010.

[227] *See* Email dated Sept. 29, 2010.

[228] *See* Email dated Nov. 8, 2010.

[229] *See* Email dated Nov. 18, 2010.

[230] Outside Counsel notes that no other Democratic Members other than the Chair had substantive exchanges with the Chief Counsel or any other staff members.

distrust that existed on the Committee during this time period. The emails further demonstrate the risk that partisan suspicions among the Members can infect the staff and risk the important non-partisan nature of its work. But such emails do not create any alleged *ex parte* violation as there is no *ex parte* Committee Rule.

An *ex parte* rule would be unworkable in this Committee, since the non-partisan staff must serve all Members, as the Members are not allowed to have any personal staff assistance on Committee matters. It is, therefore, clear that Members are allowed to reach out to staff members when they have questions relating to the work of the Committee. However, while staff should always be responsive to Members, staff should show restraint in reaching out to Members on only one side. As the staff of this Committee is non-partisan, repeatedly reaching out to Members on only one side, as we observed occurring during this review, only leads to suspicions and mutual distrust arising within the Committee.

Finally, it must be noted that, even assuming that an *ex parte* or bifurcation violation existed in this case, such violation would be cured by the fact that the matter was recommitted prior to any vote by the ASC and all Members that previously served on the Committee have recused themselves from further involvement in the Waters matter.

c. ASC Authorized Subpoenas on Incomplete Representations

The Committee has also raised the issue of whether the ASC authorized subpoenas on incomplete representations. This issue was raised in the two memos authored by the former Chief Counsel following the termination of the two staff members. The Chief Counsel argued that staff sought Representative Waters' Chief of Staff's Yahoo! account on the basis of "newly discovered evidence." He indicates that they had the evidence regarding the Yahoo! account and failed to recognize the significance of this. In a September 23, 2010, email to the ASC, a senior attorney on the Waters ASC team recognized this point and admitted that they had not recognized the significance of the email account until the scheduling of the Waters' settlement discussion. The ASC did not vote on this subpoena request until after receipt of this email.

As discussed in detail in the background section above, all Members that voted to authorize the subpoenas felt that they had adequate information upon which to vote on the issue. Even the Chair stated that while she was not happy with the staff's performance with respect to the subpoena issue, she felt that the authorization was a ministerial act and one that she would not have performed had she not had sufficient information to do so. Again, this matter was not taken lightly and was the subject of at least two separate ASC meetings, as well as detailed email communication from the staff regarding the information sought and the manner in which it was brought to staff's attention. As such, no violation of any due process rights occurred. Further, even assuming her allegation is true, because of the procedural posture of this case, any violation would be cured by the recommital of the investigation to a new ISC and now a new committee.

5. Allegations of Inappropriate and/or Racially Insensitive Comments

In the memos drafted by the former Chief Counsel in support of the terminations of both staff members, he raised several examples of inappropriate and/or racially insensitive comments made by one of the attorneys. The allegation raised in his first memo[231] indicates that during deliberations regarding a count to include in the SAV in a different matter, a staff member, who is African-American, raised issues regarding the count's factual and legal efficacy. The staff attorney who was subsequently terminated was present in that meeting and sent an email referring to the African-American staff member to the Director of Investigations stating: "Wow, so glad we have a member of the CBC in our midst."[232]

In the personnel notes drafted by the Chief Counsel, he stated "[the staff attorney] often made inappropriate racial comments to other staff members. She often lamented her time as a prosecutor in the DC U.S. Attorney's office saying that how could she, a 'blond-haired, blue-eyed prosecutor' be expected to ever get a DC jury to convict a defendant."[233]

The notes continue to state that "[both of the terminated employees] were overheard complaining about the fact that the Chair likes to hire minorities."[234]

The notes further state that "[one of the staff attorneys] was talking about detailee prosecutors assigned to the DC USAO from Prince Georges County. She became quite animated saying 'they would bring these African-American prosecutors over from PG County. And, I'll just say it – they're just not as smart." *See id.*

Finally, with respect to staff interviews in another matter, the notes indicate that the Director of Investigations conveyed to the Chief Counsel that the staff attorney "often acted in an inappropriate way, flirting with witnesses and making inappropriate comments. For example, she stated about a homosexual man that finally there's one man I don't have to worry about [hitting on me or something to that effect]."[235]

During the course of Outside Counsel's review, we examined an email which was sent by the staff attorney to the Director of Investigations,[236] but found no additional emails indicating racially biased or insensitive comments. The Director of Investigations testified regarding this comment and indicated that she recognized it as

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[231] *See* the First Personnel Memo.

[232] *See* Email dated June 29, 2010.

[233] *See* the Personnel Notes.

[234] *See id.* Other than the Personnel Notes, there is nothing in the record to support that the Director of Investigations made inappropriate or racially insensitive comments.

[235] *See id.*

[236] *See id.*

insensitive or inappropriate, but never discussed it with the staff attorney who authored the email.[237]

During the course of Outside Counsel's interviews it was discovered that some Committee staff and Members had also heard racially insensitive or other inappropriate comments made by the staff attorney. For example, the designee to the Chair testified that another staff member[238] had told him that the staff attorney made the comment regarding being a blond-hair blue eyed prosecutor, as well as the comment regarding African-American prosecutors not being as smart, which comments were also included in the Chief Counsel's memos.[239] The African-American staff member who was the subject of the previously discussed email testified to hearing the same comments,[240] but also indicated that the staff attorney did not make comments that were insensitive on a regular basis.[241] Others also testified to hearing the same comments.[242] The most junior member of the Waters team testified to a conversation she had with the staff attorney wherein the staff attorney made a comment that certain judges nominated to the D.C. courts were only appointed because they were African-American.[243] In addition, the Chair a testified that at some point the staff member said something that the Chair found "concerning."[244] "It was kind of a racially tinged remark and it wasn't on the record, but it was a dismissive remark about – that as a white prosecutor she couldn't get a fair – you can imagine how she would be treated in a D.C. jury with all black jurors. And I thought that's really inappropriate."[245]

Several other staff members testified to never hearing any racially insensitive or inappropriate remarks being made by the staff attorney.[246] With the exception of the

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[237] *See* DOI Dep. at 182.

[238] It is clear that the particular staff member who relayed this information to the Chair's designee had a strained relationship with both of the attorneys that were terminated. In fact, this particular staff member testified to having an office "blow-up" with one of the attorneys. (Staffer #3 Dep. at 20-21.) In addition, this same staff member noted that she had several disagreements with the Director of Investigations and only spoke to her in meetings. (*See id. at* 41-42.) In fact, there was testimony that after one such disagreement with the Director of Investigations , this particular staff member remarked in her office that "that bitch is going down." (Staffer #4 Dep. at 39.)

[239] *See* Chair Designee Dep. at 27-28.

[240] *See* Staffer #5 Dep. at 47.

[241] *See id.*

[242] *See* Staffer #3 Dep. at 28-29; Chair Dep. at 47.

[243] *See* Staffer #2 Dep. at 163.

[244] *See* Chair Dep. at 47.

[245] *Id.*

[246] *See* Staffer #4 Dep. at 36-37; Staffer #6 Dep. at 38.

email received by the Director of Investigations, she never otherwise heard the staff attorney make any additional racially insensitive or inappropriate comments.[247] Committee Members also testified to never hearing any racially insensitive or inappropriate remarks made by the staff attorney, the Director of Investigations or anyone else on the staff.[248] In fact, the Ranking Member testified that the Chief Counsel never even brought these allegations to his attention prior to his termination of both employees.[249]

Even those individuals who testified to hearing insensitive remarks being made did not report those remarks to anyone in a supervisory position.[250]

Despite hearing remarks that were classified as either racially insensitive or inappropriate made by the staff attorney, no one accused her of racism or of allowing any insensitivity to invade her decision-making with respect to cases. Rather, the African-American attorney who was the subject of the previously discussed email made a point of stating that he did not want to paint her as a bigot, but rather indicated that the staff attorney was a nice, thoughtful person who was just lacking in cultural awareness of the fact that what she said could offend someone.[251] Likewise, the junior member of the Waters team indicated that she did not take particular offense to what the staff attorney said, but rather chalked it up to people having different views.[252]

During the course of Outside Counsel's review, the staff attorney was specifically questioned regarding these comments. She recognized that in a vacuum the email regarding the member of the CBC appeared "remarkably insensitive."[263] However, she explained that the Chief Counsel repeatedly talked about the pressure the CBC was putting on the Chair to make the charges against the Representative in a different matter go away or to make them resolve quickly. Thus, as the African-American staff attorney was advocating having a particular charge in a different matter dismissed, when she sent her email she was referring to the pressure the Chief Counsel referred to and not about the staff attorney himself.[254]

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[247] *See* DOI Dep. at 183.

[248] *See* Member #6 Dep. at 74; Member #7 Dep. at 54-55; Member #1 Dep. at 52; Member #3 Dep. at 44-45; Member #8 Dep. at 38-39; Member #2 Dep. at 55-56; Member #5 Dep. at 45-46; Member #4 Dep. at 37.

[249] *See* RM Dep. at 110-111.

[250] *See* Staffer #2 Dep. at 164; Staffer #5 Dep. at 54.

[251] *See* Staffer #5 Dep. at 46.

[252] *See* Staffer #2 Dep. at 164-165.

[253] *See* Staffer #1 Dep. at 135.

[254] *See id.* at 135-136.

With respect to the alleged comments regarding lawyers from Prince George's County, the staff attorney categorically denied making any such comment, and further stated that she never worked with lawyers from Prince George's County.[255] She indicated that most of the prosecutors she worked with were excellent attorneys, and to the extent they were not it had nothing to do with their race.[256] The staff attorney also denied making comments about it being difficult to get a conviction because she was blond-haired and blue-eyed, and stated that it was untrue as she did, in fact, get convictions.[257]

The Outside Counsel concludes that the staff member made racially insensitive and inappropriate comments. From a constitutional perspective, however, the comments' impact is less clear. Representative Waters could assert a violation of the Equal Protection Clause, either as a claim of deprivation of liberty or racial discrimination/selective prosecution, although the Outside Counsel does not believe the record would establish either claim.[258] With respect to an equal protection claim based on deprivation of liberty, courts have long held that, without proof of some additional constitutional injury, even the most offensive racial statements do not deprive a person of equal protection of the law.[259] Thus, even comments far worse than those allegedly made in this instance have been found not to cross any constitutional threshold even for criminal defendants who are the subject of racial epithets by their arresting officer.[260] In this case, Representative Waters cannot assert any additional constitutional injury

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[255] *See id.* at 139.

[256] *See id.*

[257] *See id.* at 140-141.

[258] Representative Waters has not, and could not, assert a claim under Title VII of the 1964 Civil Rights Act or 42 U.S.C. § 1981. However, courts apply the same standard or proof for discriminatory intent or purpose as in the equal protection context. Accordingly, judicial authority from those areas of law is relevant to any equal protection analysis. *See Redding v. Tuggle*, 2007 U.S. Dist. LEXIS 67853, at *32 (N.D. Ga. July 11, 2007) ("Claims brought under Title VII, § 1981, and the Equal Protection Clause are analyzed under the same framework, and all require proof of intentional discrimination."); *Johnson v. City of Fort Wayne*, 91 F.3d 922, 940 (7th Cir. Ind. 1996) ("Although section 1981 and Title VII differ in the types of discrimination they proscribe, the methods of proof and elements of the case are essentially identical.").

[259] *See Williams v. Bramer*, 180 F.3d 699, 706 (5th Cir.1999) ("[A]n officer's use of a racial epithet, without harassment or some other conduct that deprives the victim of established rights, does not amount to an equal protection violation ."); *Brims v. Barlow*, 441 Fed. Appx. 674, 678 (11th Cir. 2011) ("Here, even if one were to accept Brims's contention that Barlow used a racial epithet, Brims has not established that Barlow engaged in any other misconduct. Therefore, to the extent that Brims was attempting to bring a separate equal protection claim, that claim is meritless."); *Carter v. Morris*, 164 F.3d 215, 219 (4th Cir. 1999) ("although Carter alleges that individual officers insulted her with racial epithets, such undeniably deplorable and unprofessional behavior does not by itself rise to the level of a constitutional violation.").

[260] *See Williams*, 180 F.3d at 702 (no equal protection violation where officer allegedly called African American arrestee "boy" and [the 'N' word]). Given that congressional disciplinary matters carry far less due process weight than criminal matters in general, it would seem odd were Members of Congress to award themselves greater constitutional protections than those afforded to criminal defendants.

because the Committee never recommended, and the House never adopted, any sanction of her. Moreover, even if Representative Waters had suffered some constitutionally cognizable injury, it was cured by the process of recommitting her matter to the ISC and, ultimately, by the formation of a new Committee to decide her matter.

If Representative Water instead alleges that she was unfairly targeted, or the investigation against her was otherwise tainted, based on her race, she would be required to show that the Committee's actions against her "had a discriminatory effect and [were] motivated by a discriminatory purpose."[261] With respect to discriminatory purpose, "[o]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [race] . . . constitute direct evidence of discrimination."[262] Thus, courts have found equal protection violations only where a decisionmaker expressed a clear intent to discriminate *with respect to the decision at issue*.[263] Further, "[r]emarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination."[264] Thus, even where courts have acknowledged the existence of "deplorable and reprehensible" racial comments, they have dismissed equal protection claims where there was no connection between the comments and the action or decision complained of.[265]

As a threshold matter, none of the racial comments alleged here were connected in any way to the Waters matter. Rather, the comments were more akin to the type of "stray remarks" in an office setting that, when "unrelated to the decisional process, are insufficient to demonstrate that [the defendant] relied on illegitimate criteria, even when such statements are made by the decisionmaker in issue."[266]

It is also important to note that neither the staff member who made the inappropriate comments was not involved at the ISC stage, although she was involved in the preparations for the ASC hearing (which never occurred). The Outside Counsel

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[261] *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quotation omitted).

[262] *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999).

[263] *See id.* at 1359 (example of a statement indicating discriminatory purpose would be "Fire Earley—he is too old.").

[264] *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir.1998); *cf. Gonzalez-Droz v. Gonzalez-Colon*, 660 F3d 1, 15 (4th Cir. 2011) (where a medical board investigator was alleged to have exhibited bias against a doctor whom he was investigating, court held that "[c]ertainly, 'a biased decisionmaker [is] constitutionally unacceptable.' But [respondent's] duties as the Board's investigative officer do not involve decisionmaking. A person who investigates and presents an agency's case, unlike a decisionmaker, does not have to be neutral.").

[265] *See Club Retro v. Hilton*, 568 F.3d 181, 213 (5th Cir. 2009) ("As deplorable and reprehensible as the use of racial profanity is, particularly in the context of intrusive displays of official police authority, plaintiffs have not alleged that any defendant made a statement that he targeted Club Retro because it was minority-owned and attracted a mixed-race and mixed-ethnicity crowd."); *Black Spotted Horse v. Else*, 767 F.2d 516, 517 (8th Cir. 1985) (dismissing a Fifth Amendment equal protection claim based on racial statements because "the connection between the physical injury and the claimed racial prejudice is not close enough").

[266] *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989).

found no evidence that e the staff member at issue made any decisions that determined the outcome of the matter.

Indeed, the Chief Counsel, despite his awareness of all of the alleged comments, concluded that "the [ISC] acted honorably in making their decision and reporting the case out."[267] He also testified that he did not have any basis to believe that any racial bias or insensitivity by any staff members affected the Committee's investigation of Representative Waters.[268] Further, he believed that the recommital was the best option for the ASC as well.[269] Accordingly, although the Outside Counsel finds the statements by the former staff member, if accurate, entirely inappropriate. There is no reason to believe that the ultimate decisions in this matter—the adoption of an SAV by the ISC, and the decision to recommit by the ASC—were motivated by the comments or any bias they allegedly reflected. Outside Counsel thus recommends that the Waters Committee ultimately find that the alleged racial remarks made by a staff member do not rise to the level of a Constitutional violation.[270]

IV. CONCLUSIONS AND RECOMMENDATIONS REGARDING DUE PROCESS ANALYSIS

For the foregoing reasons, it is our opinion that Representative Waters and the Committee failed to raise any viable due process violations, nor did Outside Counsel identify any additional due process violations not raised by either Representative Waters or the Committee. As such, the Outside Counsel recommended, and the Waters Committee unanimously voted to consider the matter through the normal course.

V. FACTUAL FINDINGS REGARDING SUBSTANTIVE ALLEGATIONS

A. Background and Summary of Factual Findings

On September 7, 2008, the United States Department of Treasury ("Treasury") and the Federal Housing Finance Agency ("FHFA") placed two government-sponsored entities (the "GSEs"), the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), into conservatorship. At that time, OneUnited Bank, a minority depository institution ("MDI") headquartered in Boston, Massachusetts, held substantial investments in the GSEs preferred stock. Due to the effect of the Conservatorship on the value of the GSEs' preferred stock, OneUnited incurred unrealized losses on its investments that effectively wiped out all of OneUnited's Tier 1 capital, and, according to the bank executives, threatened the existence of the bank.

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[267] Chief Counsel Dep. at 85.

[268] Chief Counsel Dep. at 88.

[269] *Id.*

[270] *See Stewart v. Harrah's Illinois Corp.*, 2000 U.S. Dist. LEXIS 10413, at *60-61 (N.D. Ill., July 18, 2000) ("Although [the officer's statement . . . is undoubtedly offensive, it is insufficient to show that race motivated Stewart's arrest or the charges brought against him. The record clearly reflects the existence of probable cause to arrest and charge Stewart—the single remark, unrelated to those actions, does not establish that racial animus was the motivating factor for [the officer's] actions.").

Representative Waters' husband was a former member of the OneUnited Board and, as a condition of his service, was required by Massachusetts law to purchase stock in OneUnited. On December 31, 2007, Representative Waters' husband owned stock in OneUnited that accounted for less than 0.5% of the outstanding stock in the bank. The stock was valued at approximately $350,000 and accounted for somewhere between 4.6% and 15.2% of Representative Waters' and her husband's combined net worth. By the end of September 2008, the stock was valued at approximately half that amount.

On September 9, 2008, in the midst of the 2008 financial crisis and the day after the GSEs were placed into the Conservatorship, OneUnited executives contacted several Members of Congress, including Representative Waters and the Chairman of the Financial Services Committee, seeking assistance with arranging a meeting with Treasury to discuss the Conservatorship. The evidence shows that OneUnited's Chairman and Chief Executive Officer ("CEO") expressed to Representative Waters that he was speaking on behalf of MDIs generally. Further, the bank's senior counsel, who was also the Chair-Elect of the Board of Directors of the National Bankers Association[271] (the "NBA") and Chair of the NBA's Legislative Affairs Committee, indicated that he was meeting with her in his capacity as Chair-Elect of the NBA.

After the conversations with OneUnited's CEO and Senior Counsel, Representative Waters agreed to assist with arranging a meeting with Treasury, and placed a telephone call to the then-Secretary of the Treasury to arrange a meeting with several senior Treasury officials and with what she believed were representatives from the NBA. The evidence supports the conclusion that at the time Representative Waters placed her call to the then-Treasury Secretary she believed she was acting on behalf of the NBA.

The meeting with Treasury took place on September 9, 2008. OneUnited was the only NBA bank personally represented at the meeting that was attended by high ranking Treasury officials and bank regulators, as well as staffers working for Representative Waters, the Chairman of the Financial Services Committee and a staffer for a Massachusetts Senator. While recollections of the meeting attendees varied, no witness believed the meeting was called specifically on behalf of OneUnited, but rather it appeared to be a meeting to discuss the conservatorship on minority banks in general.[272] During this time period in 2008, the impact of the conservatorship on minority banks was not widely known. The NBA had begun a survey that had not yet been completed. However, one FDIC official shared with regulators following the meeting that FDIC research indicated that only two minority banks were going to be impacted. OneUnited was one of those two banks. During the meeting, following a general discussion of the conservatorship, OneUnited's CEO used OneUnited as an example of the conservatorship on minority banks and explicitly requested that Treasury pay $50 million to OneUnited for the purchase, or "buy back", of its shares of Freddie Mac

[271] The NBA is a trade association founded in 1927 that represents minority and women owned banks. *See http://nationalbankers.org/profile.asp* (last visited August 15, 2012).

[272] This is consistent with internal Treasury emails, which referred to the meeting as the "Minority Bankers Association Meeting" and did not include any reference to OneUnited. (*See* Bates Nos. COE.WAT.OC.012646-02662.)

and Fannie Mae. The Treasury officials and bank regulators told the attendees at the meeting that they did not have the legal authority to grant OneUnited's request.

Soon after the September 9, 2008, meeting, the then-Treasury Secretary placed a telephone call to Representative Waters in which he expressed his concern to Representative Waters that he had made the meeting available to all MDIs, but OneUnited was the only MDI represented at that meeting.

Sometime in September 2008, Representative Waters learned that OneUnited requested $50 million from Treasury and determined that she should not assist OneUnited with that request because her husband's investment in and former association with the bank created a conflict of interest.[273] Sometime after Representative Waters made this determination, she spoke with the Chairman of the Financial Services Committee about her husband's past relationship with the bank, and expressed concern that this relationship created a conflict of interest. The Chairman, who told the Committee that he was unaware of Representative Waters' husband's financial interest in the bank, counseled Representative Waters to not assist OneUnited, and said that he would take care of it. While the exact date of this conversation is not clear in the record, it likely occurred sometime between September 9 and September 20, 2008.

Following the Treasury meeting, OneUnited executives continued to ask for help from both Representative Waters' office and from the Chairman of the Financial Services Committee. Despite Representative Waters' discussion with the Chairman of the Financial Services Committee, her Chief of Staff ("COS") continued to have contact with OneUnited related to the bank's request for assistance from Treasury. Outside Counsel did not discover any evidence that Representative Waters was aware of her COS's continued contact with OneUnited, but determined that her COS was acting within the scope and course of his employment.

On October 3, 2008, The Emergency Economic Stabilization Act of 2008 ("EESA") was enacted. EESA established the Troubled Asset Relief Program ("TARP"). The Chairman of the Financial Services Committee advocated for the inclusion of a provision within EESA that specifically granted Treasury the authority to assist small minority and community banks, such as OneUnited, in restoring their capitalization. OneUnited ultimately received approximately $12 million in TARP funds and a tax credit waiver from the FDIC that was worth approximately $20 million. OneUnited also raised approximately $17 million in private capital. Without the private capital, TARP funds and tax waiver, OneUnited would not have been able to remain adequately capitalized and believed it would have faced imminent threat of failure.

B. Representative Waters' Background

Representative Waters was elected to the House of Representative in 1990, and has represented the 35th district of California since that time. She is currently the most senior African-American Member of the Financial Services Committee and is the Ranking Member

[273] As discussed, *infra*, n.481, following the Treasury meeting, Representative Waters' COS did not convey to Representative Waters that OneUnited had specifically requested $50 million from Treasury.

of the Subcommittee on Capital Markets and Government Sponsored Enterprises. Representative Waters also serves on the House Committee on the Judiciary. In addition, she is involved with Congressional Democratic Leadership, and serves as a Chief Deputy Whip and as a member of the Steering & Policy Committee. She is also an influential member of the Congressional Black Caucus, where she served as the former Chairwoman. Representative Waters is married to a former U.S. Ambassador to the Commonwealth of the Bahamas, and, among other of her legislative and policy concerns, has a long history of advocating for diversity and inclusion of women and minority and specifically for assisting small and minority owned banks generally.[274] She also has a history of working with minority associations including the NBA, the National Association of Women and Minority Law Firms, the National Association of Securities Professionals, and the Minority Auto Dealers.[275]

C. OneUnited Bank

OneUnited is a privately-held, minority-owned bank incorporated in Massachusetts. OneUnited's headquarters are located in Boston, and the bank has offices in Miami and Los Angeles. OneUnited is a designated Community Development Financial Institution ("CDFI"). According to its website, OneUnited is the "first Black internet bank and the largest Black owned bank in the country."[276] The bank's stated mission is "to be the premier banking institution for urban communities across America."[277]

1. Senior Management

OneUnited has three members of senior management that are relevant to this review. The first is the CEO and Chairman of the Board. He began serving as Chairman of the Board between 1995 and 1996, and became the CEO between 2006 and 2007.[278] The CEO and Chairman of the Board has contributed $1,000 to Representative Waters via the Citizens for Waters campaign fund in 2002, 2003 and 2005, for a total of $3,000, although he testified that he did not recall making the contributions and believed his wife likely made them on his behalf.[279]

The second relevant individual in management at OneUnited is the President and Chief Operating Officer ("COO") of OneUnited. She is married to the CEO and Chairman, and has been with OneUnited since 1994. She has served as the President and COO for approximately six years.[280] Like her husband, she has also contributed to

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[274] *See* Rep. Waters Dep. at 15.

[275] *See* NBA President Dep. at 15-16; 7/5/12 Rep. Waters COS Dep. at 74.

[276] https://www.oneunited.com/about-us/ (last visited August 14, 2012).

[277] *Id.*

[278] *See* OU CEO Dep. at 7.

[279] *See id.* at 21-22.

[280] *See* OU COO Dep. at 6.

Representative Waters' campaign fund. In addition, Representative Waters testified before the ISC that the couple hosted a fundraiser for her at their home in Malibu, California.[281]

Finally, the third relevant individual is the Senior Counsel at OneUnited, who, during the relevant time period, also served as the Chair-Elect of the NBA and Chair of the NBA's Legislative Affairs Committee. He has been serving as OneUnited's Senior Counsel since 1997.[282]

2. Board of Directors

The Board of Directors of OneUnited currently consists of ten members, including the CEO and the COO, as well as a lobbyist and expert in the banking field, who was also a witness in this matter.[283] The minimum and maximum number of board members is set by OneUnited's bylaws and may increase or decrease as needed.[284] Board members serve for one-year terms and are elected on an annual basis.[285] The Board meets once per month and board members are compensated on a per diem basis for each meeting attended.[286]

3. Representative Waters' Husband's Service on the OneUnited Board

Representative Waters' husband served on the Board of Directors of OneUnited beginning in 2004, and he resigned from the Board on April 21, 2008.[287] The Chairman and CEO asked Representative Waters' husband to serve on the board after he was recommended by another Board member.[288] Representative Waters' husband told the ISC that he became acquainted with the Chairman and CEO through their attendance at periodic fundraisers in the Los Angeles area.[289] As a board member, Representative Waters' husband participated in Board meetings held on a monthly basis. During his

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[281] *See* Rep. Waters Dep. at 8-9.

[282] *See* OU Counsel Dep. at 5-6.

[283] *See https://www.oneunited.com/about-us/company-profile/board-of-directors/* (last visited August 15, 2012).

[284] *See* OU CEO Dep. at 16.

[285] *See* OU Counsel Dep. at 106.

[286] *See id.* at 105-106.

[287] *See* Amb. Dep. at 6; COE.WAT.OC.014496.

[288] *See* Amb. Dep. at 6; OU COO Dep. at 12.

[289] *See* Amb. Dep. at 13-14.

time as a board member, he declined to receive the ordinary compensation for service on the Board.[290]

Prior to his service on the Board, Representative Waters' husband did not own shares of OneUnited stock.[291] Massachusetts law required him to purchase qualifying common stock of not less than one thousand dollars prior to his service on the Board. *See* Mass. Gen. Laws, ch. 172 § 13 (2009). Due to this requirement, Representative Waters' husband purchased 476 shares of OneUnited Common stock and purchased an additional 3,500 shares of OneUnited Preferred A stock as an investment in the bank itself.[292] As of December 31, 2007, Representative Waters' husband's OneUnited stock accounted for somewhere between 4.6% and 15.2% of his and Representative Waters' combined net worth.[293] Representative Waters' husband's OneUnited holdings equaled less than one-half of one percent of the total of OneUnited shares.[294] In June 2008, Representative Waters' husband's OneUnited stock was valued at approximately $350,000.[295]

D. National Bankers Association

The NBA is a trade association for minority and women-owned banks. Founded in 1927, the NBA advocates on behalf of minority and women-owned banks on legislative and regulatory matters concerning and affecting NBA members and the communities they serve.[296] The NBA currently has a membership of 103 banks in 29 states, two territories and the District of Columbia.[297]

1. NBA Staff

The NBA maintains its offices in Washington, DC. The current president of the NBA also served in that capacity during the relevant time period. The NBA President's primary responsibility is to advocate on behalf of the NBA to Members of Congress, the Executive Branch, and regulatory agencies.[298] The President also functions as the chief

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[290] *See* OU COO p. 41.

[291] *See* Representative Waters 2003 Financial Disclosure Statements.

[292] *See* Amb. Dep. at 19.

[293] These numbers are based on the various ranges for investment values found in Representative Waters' Financial Disclosure Statement for the 2007 calendar year.

[294] *See* COE.WAT.OC.015065.

[295] *See* COE.WAT.OC.015173.

[296] *See* http://nationalbankers.org/profile.asp (last visited August 15, 2012).

[297] *See id.*

[298] *See* NBA President Dep. at 5.

executive officer handling the day-today activities of the NBA. The NBA also employs a full-time special assistant to the President, and one other part-time staff member.

In the early part of 2008, the NBA's former president resigned.[299] The previous president had served in that capacity for over 10 years. After the resignation of the prior president, the NBA was without a president for approximately five months. The current president began working on September 1, 2008.[300] The current president spent his first week on the job at Citizens Bank in Nashville, Tennessee, undergoing training.[301]

2. NBA Board

The NBA is governed by a board of executives consisting of thirteen to fourteen members.[302] The board usually meets four to six times per year and is considered the policy-making body of the NBA. The board determines a plan of action for the NBA. The NBA's governing structure also consists of a Legislative Affairs Committee and an Executive Committee.[303] According to the NBA's bylaws, the purpose of the Legislative Affairs Committee is to further "the interests of minority financial institutions through effective coordination with Congress, Banking regulatory agencies including the Federal Reserve Board, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and the Comptroller of the Currency."[304] The Legislative Affairs Committee is also tasked with "planning and setting up meetings between NBA members and key Members of congress and the administration."[305]

3. OneUnited Officer's Service with NBA

During the relevant time period of this matter, OneUnited's Senior Counsel also chaired the NBA's Legislative Affairs Committee. During his interview before the ISC, he testified that as Chairman of the Legislative Affairs Committee, he set the legislative agenda for the association, and planned and scheduled meetings with NBA member banks and with key Members of Congress and the Administration regarding matters that might be averse to the minority banking industry.[306]

In 2007, OneUnited's Senior Counsel was elected to the Board of Directors of the NBA as Chairman-Elect and served in that capacity from 2007 to 2008. In 2009, he

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[299] *See* OU Counsel Dep. at 14-15.

[300] *See id.* at 15.

[301] *See* NBA President Dep. at 25.

[302] *See id.*

[303] *See id. at* 8.

[304] COE.WAT.OC.014975.

[305] *Id.*

[306] *See* OU Counsel Dep. at 12.

began his term as the Chairman of the Board of Directors.[307] He is currently the NBA's Immediate Past Chairman.[308]

4. Representative Waters' Relationship with NBA

The evidence gathered during the ISC in this matter, as well as by Outside Counsel, demonstrates that Representative Waters has consistently supported the NBA since she has been a member of Congress. In fact, Representative Waters testified that she has worked with the NBA:

> almost since I came to Congress. It's one of the minority organizations that I've always supported. I speak at their national conventions. Various members contact me from time to time. And I'm always interested in the public policy surrounding minority bankers and small bankers and community bankers. So I'm very familiar with the NBA.[309]

Likewise, in his interview with the Outside Counsel, Representative Waters' COS testified that:

> the Congresswoman is the go-to person for many trade associations, specifically trade associations that operate in the minority business space. So whether we're talking about the minority auto dealers, National Bankers Association, national securities professionals, accountants, lawyers, et cetera, she's someone that folks seek out to help gain access to the Federal Government and impact the legislative process.[310]

The current President of the NBA, who is not associated with OneUnited, testified before the ISC that Representative Waters often advocated on behalf of the NBA. He stated that "[w]henever I was trying to get a meeting with Treasury, it was Congresswoman Maxine Waters who I called. Why? Because that was the role she always played."[311] The NBA President explained, "if we call her to say we've got this particular problem, she steps in to do what she can do...going to her is what we always did, you know, and she always responded. She's highly regarded by our bankers for the advocacy role that she's played."[312]

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[307] *See id.* at 9.

[308] *See* http://nationalbankers.org/boardmembers.asp (last visited August 15, 2012).

[309] *See* Rep. Waters Dep. at 15.

[310] 7/5/12 Rep. Waters' COS Dep. at 6.

[311] *See* NBA President Dep. at 16.

[312] *See id.*

OneUnited's Senior Counsel, who was also the NBA Chair-elect and Chair of the Legislative Affairs Subcommittee, stated that the NBA would contact Representative Waters on issues that impacted minority banks.[313] He also testified that in his role as Senior Counsel of OneUnited, he would contact Representative Waters on issues impacting OneUnited because the bank operated a branch in her district.[314] He explained that "we have a sort of long had a close relationship sort of with her. So there are a number of matters that affect her community, of which the bank is an integral part of that community, and it would be logical to sort of go to her on matters that would affect her district."[315]

In the fall of 2008, the NBA lobbied in support of passing the EESA legislation. Due to her role as an advocate for issues impacting the NBA, Representative Waters was contacted by, among other groups, executives of the NBA.[316]

E. Fannie Mae, Freddie Mac and OneUnited

1. OneUnited's Investments in Fannie Mae and Freddie Mac

The evidence demonstrates that as of September 2008, OneUnited had a substantial investment in the preferred stock of the GSEs. As of September 5, 2008, OneUnited held 600,000 shares of Fannie Mae preferred stock, series S; 200,000 shares of Fannie Mae preferred stock, series Q; and 100,000 shares of Fannie Mae preferred stock, series N.[317] As of September 5, 2008, OneUnited held 800,000 shares of Freddie Mac preferred stock, series Z and 125,000 shares of Freddie Mac preferred stock, series T.[318] The Chairman and CEO of OneUnited testified that in June 2008, OneUnited "had a larger investment in Freddie and Fannie preferred stock...than we had Tier 1 capital."[319]

The Director of the Division of Supervision and Consumer Protection at the FDIC testified before the ISC that OneUnited increased its holdings of the GSEs' preferred shares in 2008, leading to its overexposure to these shares.[320] In fact, the Director of Division of Supervision and Consumer Protection FDIC also testified that the Area

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[313] *See* OU Counsel Dep. at 18-19.

[314] *See id.* at 20.

[315] *Id.*

[316] *See* Rep. Waters Dep. at 7.

[317] *See* COE.WAT.OC.015014.

[318] *See id.*

[319] OU CEO Dep. at 31.

[320] *See* FDIC Director Dep. at 29.

Director for the FDIC's Boston Area Office told OneUnited Executives that its investment in the shares was high, "because I think it was 100-some odd percent of their capital, over 100 percent of their capital, and that was not good."[321]

While the Chair and CEO of OneUnited believed there may have been discussions between the bank and the FDIC regarding the bank's high concentration of Freddie and Fannie stock, he also indicated that the bank felt the government encouraged banks to invest in Freddie and Fannie by stating they were "safe and sound investments."[322] He also monitored news reports where policymakers extolled the "virtues of Fannie Mae and what they represented, bringing low and moderate income folks into the mainstream and supporting the mission of Fannie Mae."[323] He also testified that the Office of the Comptroller of the Currency ("OCC") provided a low risk weighting for Fannie Mae, which was another way the government encouraged the investment as a safe investment.[324] Similarly, the President of the NBA testified that "our banks were told this was a good investment to purchase this GSE stock, Fannie Mae."[325]

2. Government Conservatorship of the GSEs

In July 2008, Congress granted the Treasury, the Federal Reserve and the FHFA new authorities with respect to Fannie Mae and Freddie Mac.[326] Treasury, the Federal Reserve and FHFA eventually determined that it was necessary to take action, and on September 7, 2008, FHFA placed the GSEs into conservatorship.[327]

3. Effect of Conservatorship on OneUnited and other Minority and Community Banks

Following the conservatorship, the FDIC "ran reports to try to identify those institutions that would have been impacted by that decision."[328] The Director of the Division of Supervision and Consumer Protection at the FDIC believed that "all of the bank regulators had that information because we wanted to understand the impact of

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[321] *Id.*

[322] *See* OU CEO Dep. at 46.

[323] *Id.*

[324] OU Counsel Dep. at 48.

[325] NBA President Dep. at 13.

[326] *See* Statement by Secretary Henry M. Paulson, Jr. on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers, September 7, 2008 (hereinafter September 2008 Paulson Statement).

[327] *See* September 2008 Paulson Statement.

[328] FDIC Director Dep. at 12-13.

the decision on the banks' capital, so we ran it for a broad universe, all institutions, and we also ran it for the MDIs as well."[329]

After running its reports, the FDIC determined that with respect to MDIs, there were less than five institutions "whose capital was significantly impacted by the placement of Fannie and Freddie into conservatorship."[330] Following the conservatorship, the FDIC "ran reports to try to identify those institutions that would have been impacted by that decision."[331] The Director of the Division of Supervision and Consumer Protection at the FDIC explained that by "significantly impacted" she meant that:

> There are different capital levels that have different percentages. Like 10 percent is well-capitalized, and 2 percent is critically undercapitalized; and when a bank has a 2 percent capital level, then PCA, the prompt corrective action, kicks in, and they've got 90 days to come up with a capital plan...[P]rior to Fannie and Freddie being placed into a – into conservatorship, they were counted as capital; and when we ran our numbers, we noted that there were – I can't remember in terms of the total universe of institutions that were impacted, but I don't think there were a whole, whole lot, but I know for the MDIs there were two that were impacted where the capital levels would have taken them to critically undercapitalized, under the 2 percent level or lower.[332]

One of the two MDIs who would have become critically undercapitalized due to the Conservatorship was OneUnited.[333] The Senior Counsel of OneUnited believed that after the Conservatorship "the bank was in danger of failing because it was operating without capital."[334] Likewise, the President of OneUnited testified before the ISC that OneUnited "had about $50 million invested in Fannie and Freddie preferred, and I think our unrealized loss was about close to $50 million. So...the stock went down to close to zero."[335]

Nonetheless, the two MDIs that were affected by the conservatorship, which includes OneUnited, were not the only small banks affected by the conservatorship. The evidence demonstrates that community banks were also affected, thus the overall community of small and minority banks affected by the conservatorship was greater

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[329] *Id.* at 13.

[330] *Id.*

[331] *Id.* at 12-13.

[332] *Id.* at 13-14.

[333] *Id.* at 14.

[334] OU Counsel Dep. at 72.

[335] OU COO Dep. at 20.

than only the two MDIs. A staff attorney for the Financial Services Committee testified before the Outside Counsel that "there were a few dozen banks that were in a similar situation that OneUnited was in."[336] The staff attorney clarified that these banks were "small community banks."[337] Another Financial Services staffer also testified that around this same time, the Financial Services Committee was made aware that there were "other smaller-sized institutions that were similarly situated" to OneUnited.[338] Representative Waters' COS similarly testified that "the Independent Community Bankers Association sent in a survey that they had that identified, out of a small portion of their banks, 40-plus that had had significant impact by Fannie and Freddie."[339]

F. OneUnited's Reaction to the Conservatorship

In the time leading up to, and immediately after the GSEs were placed into the conservatorship, OneUnited's Senior Counsel and OneUnited's Chairman and CEO contacted several Members of Congress, including Representative Waters, the Chairman of the Financial Services Committee and a Massachusetts Senator, seeking assistance with setting up a meeting with Treasury to discuss the conservatorship. During his meeting with Representative Waters, the Senior Counsel of OneUnited indicated that he was meeting with her in his capacity as Chair-Elect of the NBA. Similarly, the Chairman and CEO of OneUnited expressed that he was approaching her on behalf of MDIs generally.[340] While it is true that the Senior Counsel of OneUnited testified that during the same time period he was also the chairman-elect of the NBA and chairman of the NBA's Legislative Affairs Committee and that he didn't have an "exact recollection of when and how I distinguished the roles," there is no evidence in the record to suggest that Representative Waters had any reason to believe that the two individuals had not approached her on behalf of the NBA and MDIs generally.[341]

1. Initial Outreach Efforts

On August 22, 2008, the Senior Counsel of OneUnited/Chair-Elect of the NBA sent a letter to Representative Waters on OneUnited letterhead attaching a memorandum discussing the issues facing minority banks, Community Development Financial Institutions ("CDFIs") and not-for profits in connection with the recent decline of the stock prices of Fannie Mae and Freddie Mac securities.[342] Even though the letter was written on OneUnited letterhead, in the letter, the Senior Counsel of

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[336] 7/23/12 FSC Staffer #1 Dep. at 12.

[337] *Id.* at 13.

[338] 7/25/12 FSC Staffer #2 Dep. at 17.

[339] 7/5/12 Rep. Waters' COS Dep. at 46.

[340] *See* Rep. Waters Dep. at 18-19.

[341] OU Counsel Dep. at 79.

[342] CSOC.WAT.000707-712, attached hereto as Ex. 22.

OneUnited/Chair-Elect of the NBA indicates that he is the Chairman-Elect of the NBA and in that capacity is asking for a contact to follow-up with the Treasury Department.[343]

A memorandum attached to the August 22, 2008, letter, states that "[t]he recent decline in the value of the preferred stock of Government-Sponsored Entities ("GSEs") creates significant and possibly fatal losses for minority banks, Community Development Financial Institutions ("CDFIs") and not-for-profit organizations."[344] Prior to drafting this letter, the Senior Counsel of OneUnited/Chair-Elect of the NBA testified that he had conversations with a number of NBA member banks, although he could not recall which banks he spoke with, other than Unity Bank and Trust.[345] In addition, the NBA President, who began serving in that capacity in September 2008, stated that many member banks were "concerned" about the conservatorship and would call him.[346] The President also stated that the NBA would usually contact Representative Waters for assistance with such matters, "[b]ecause that was the role she always played."[347] He continued by stating that it "was not uncommon for her to step in and advocate for these banks. And the record is replete with examples of it."[348]

On September 6, 2008, the Senior Counsel of OneUnited/Chair-Elect of the NBA sent a letter directly to the then-Treasury Secretary and copied both Representative Waters and the Chairman of the Financial Services Committee.[349] This letter was written on NBA letterhead and sought to ensure that the interests of minority banks were properly protected in any resolutions reached regarding the Freddie Mac and Fannie Mae conservatorship.[350] The signature block of the letter indicated that it was sent by the "Chair-Elect" of the NBA.[351]

The Chair-Elect testified that he wrote the letter because he believed MDIs as a whole would be affected by the conservatorship.[352] He testified that the basis of the concern arose out of the very strong relationship between the GSEs and minority banks.[353] He stated that the NBA had an agreement with Fannie Mae wherein Fannie

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[343] *See id.*

[344] *Id.*

[345] *See* OU Counsel Dep. at 45-46.

[346] NBA President Dep. at 12-13.

[347] *Id.* at 14-16.

[348] *Id.* at 17.

[349] *See* CSOC.WAT.00714-00715, attached hereto as Ex. 23.

[350] *See id.*

[351] *See id.*

[352] *See* OU Counsel Dep. at 43.

[353] *See id.*

Mae would "provide funds to the association and Fannie Mae would encourage certain member banks to use their products and services."[354] He continued to state that it was a "partnership, a way for the banks and Fannie and Freddie to really promote the government's agenda of affordable housing. Many minority banks, again, operate in low-to-moderate income areas. In fact, the government sort of encouraged all banks, including minority banks, to invest in Fannie and Freddie."[355] He ultimately testified that, while he only specifically recalled the name of one NBA member bank that he had spoken to that had significant exposure due to the conservatorship, he believed he had spoken with other NBA members banks regarding their Fannie and Freddie exposure prior to sending this letter.[356]

Ultimately the letter requested a resolution that would assist all minority banks, and did not specifically mention OneUnited. Rather, it stated that "we are not asking for minority banks to receive a windfall from this resolution. Rather we are simply seeking a return of the money we invested in the GSEs. In other words, each minority bank would demonstrate the amount of funds it invested into the preferred stock of the GSEs, and be assured of receiving that amount in return as part of any resolution you develop."[357] When Representative Waters received this letter, she had no reason to assume that it was written to assist any particular bank, but rather that it was written on behalf of the NBA and its member banks.

The ISC in the prior Congress focused on the fact that when this letter was sent, the NBA's board had not approved the letter and the President of the NBA was unaware that the letter was sent until several months after it was sent. However, the Chair-Elect testified that prior to sending the letter he discussed the substance of the letter with a fellow member of the Legislative Affairs Subcommittee.[358] Further, after a news article was published by the Boston Globe in March 2009, in which this letter was discussed, the NBA Board met to discuss the matter and concluded that the Chair-Elect had acted within his authority as both the Chair-Elect and the Chair of the Legislative Affairs Committee. The Board concluded that the actions taken by the Chair-Elect were "consistent with practices and authorities granted him by the association."[359]

2. Discussions with Representative Waters and Other Members

The NBA and OneUnited reached out to several members of Congress at the time of the conservatorship. For instance, the Chairman of the Financial Services Committee

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[354] *Id.* at 44.

[355] *Id.* at 45.

[356] *See id.* at 26.

[357] CSOC.WAT.00714-715, attached as Ex. 23.

[358] *See* OU Counsel Dep. at 57.

[359] COE.WAT.OC.013565, attached hereto as Ex. 24.

received the September 6, 2008, letter from the NBA and also received a separate letter on the same date from a Massachusetts State Senator.[360] Prior to receipt of the letter by the Massachusetts State Senator, he also received a call from her in which she stated that "there was a terrible problem with OneUnited," and that they were "about to lose the only black bank we had."[361] Even though the call from the Massachusetts State Senator was about OneUnited, the Chairman of the Financial Services Committee told her that "it is not just our problem here; it is a National issue."[362]

After speaking with the State Senator, the Chairman of the Financial Services Committee contacted his special counsel, who was a former legislator and colleague from Boston and said "hey, let's work on this and see what we can do."[363] In addition, the Chairman of the Financial Services Committee also spoke to two Representatives who represented districts in Massachusetts and served on the Financial Services Committee as well.[364] The Chairman of the Financial Services Committee testified that initially he thought "the only thing we could do was for them to get the same kind of tax relief that everybody else got. It wasn't until the TARP thing came up that it became possible to think of some other source of help."[365] He also noted that a number of banks, in addition to OneUnited, brought the issue of GSE preferred shares to his attention. Specifically he stated that "it wasn't just the African American banks. I talked to the Massachusetts Bankers Association and others, as chairman of the committee, and Members came to me. So it was one of the most common topics of conversation. Because again, remember, with the banks, when they lose the value of their preferred

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[360] The Massachusetts State Senator sent a letter on September 6, 2008, to the then-Treasury Secretary, and copied Representative Waters and the Chairman of the Financial Services Committee. The Chair-Elect of the NBA testified that he had spoken with the State Senator regarding the critical deficiency in OneUnited's capital following the conservatorship. (OU Counsel Dep. at 53.) However, he testified that he did not know if she wrote a letter to anybody and did not recall seeing one. (OU Counsel Dep. at 54.) Unlike the September 6, 2008, letter from the NBA Chair-Elect, the September 6, 2008, letter from the Massachusetts State Senator specifically referred to OneUnited Bank. The prior staff determined that the two letters were textually similar as both letters noted the "substantial" interests held "in the preferred stock of GSES" and both state that they are not seeking "a windfall from the carve out. Rather, we seek a return of their investment." Both letters were sent to the former Treasury Secretary on the same day, and both copied Representative Waters and the Chairman of the Financial Services Committee. As such, the prior Committee staff concluded that the letters were drafted or influenced by the same person or persons. *Compare* COS.MW.FRANK.48 and COS.MW.FRANK.86. Outside Counsel notes the similarities in the letters, but has reached no conclusion regarding the drafter or drafters of the letters, as the issue of importance in this matter is whether Representative Waters or her staff had any reason to believe at this time that the Chair-Elect of the NBA was acting solely on behalf of OneUnited, or whether he was acting, as he stated to be, on behalf of the NBA and its member banks as a whole.

[361] FSC Chair Dep. at 12, 14.

[362] *Id.* at 17.

[363] *Id.* at 18.

[364] *See id.* at 17.

[365] *Id.* at 18.

shares, that becomes a community issue because then their capital is depleted and then they can't lend as much."[366]

The Chairman of the Financial Services Committee had no prior connection to OneUnited, but stated his reason for wanting to assist them was "[t]his was an African American bank, which I think is very important; and I am proud of my record as an advocate of trying to deal with racial inequality. And it was a bank in the State I represented."[367]

The then-Chief of Staff for the Chairman of the Financial Services Committee sent the Massachusetts State Senator's letter to a staffer with the Financial Services Committee who testified that one of the issues in her portfolio is to "look at diversity issues, including ways to promote and to strengthen minority-owned financial institutions."[368] This same staffer testified before Outside Counsel that she has a history of working with Representative Waters' COS on "workforce diversity issues," and they typically communicate about minority-owned financial institutions.[369] The same day the Financial Services Staffer received the letter from the Massachusetts State Senator, she also received the September 8, 2008, letter from the NBA addressing the effect of the conservatorship on MDIs.[370]

Upon receipt of these letters, the Staffer reached out to the State Senator from Massachusetts to try and get a better understanding of the issue. The Staffer testified that the State Senator "did not have details as to the scope of the problem, and she, I believe, suggested that I call and reach out to OneUnited in particular, which I did."[371] The Staffer contacted the Special Counsel of OneUnited/Chair-Elect of the NBA who informed her "that the majority of [OneUnited's] capital was in the form of preferred stock [of the] GSEs."[372]

In terms of determining whether other minority banks were impacted by the GSE preferred stocks, the Staffer testified that:

> We didn't know the scope of the problem, we were, given the financial crisis that was looming and the concerns that if financial institutions were deemed to be vulnerable to capital issues that depositors could have a run on the bank, you know, we didn't have any concrete

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[366] *Id.* at 11.

[367] *Id.* at 15.

[368] FSC Staffer #2 Dep. at 5.

[369] 7/25/12 FSC Staffer #2 Dep. at 22.

[370] *See* FSC Staffer #2 Dep. at 9.

[371] *See id.* at 10.

[372] *Id.* at 10, 23.

> information about other minority-owned financial institutions that were similarly situated, as OneUnited.
>
> But we did understand that some of the issues raised by OneUnited and by the National Bankers Association of the possibility of vulnerability because of a likelihood that minority-owned financial institutions may have more of this preferred, type of preferred stock, led me to believe that it was possible that there were other minority-owned financial institutions that could be similarly situated.[373]

The Staffer also indicated that she made several outreaches to get a better sense of the problem and that the "regulators seemed to think there was a small number of institutions that could be vulnerable because of their ownership of preferred stock, but no one had any concrete information to dispute the National Bankers Association or OneUnited's claims or to confirm them."[374]

In addition to the NBA, the Staffer also indicated that the Independent Community Bankers Association ("ICBA") made the Financial Services Committee aware that there were "other community banks, small-sized institutions, which had similar vulnerability."[375]

At the same time that OneUnited's Special Counsel/Chair-Elect of the NBA contacted Representative Waters' office, the Chairman of the Financial Services office, and the Massachusetts State Senator's office, the Chair and CEO of OneUnited contacted a United States' Senator from Massachusetts about the problems OneUnited was having, and the Senator contacted the Treasury Secretary.[376]

Following their outreach efforts on September 6 and 7, 2008, the Chairman and CEO of OneUnited, along with OneUnited's Special Counsel/Chair-Elect of the NBA, traveled to Washington, D.C. on September 8, 2008, and each separately met with Representative Waters. Representative Waters told the ISC that she "remember[ed] coming to my office and being met I think in the hallway by [OneUnited's Special Counsel/Chair-Elect of the NBA]."[377] Representative Waters said that he "was in a panic saying that all the minority banks were in deep trouble" due to the conservatorship "and that they needed to talk with the Secretary about it."[378] Representative Waters further

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[373] *Id.* at 10-11.

[374] *Id.* at 11-12. There is no evidence in the record that at this time the FDIC had shared the results of its inquiry finding that less than five MDIs were affected with anyone other than regulators. Further, as will be discussed below, the NBA did not determine that only a small number of its member banks were affected until a few days after the Staffer made her outreach attempts.

[375] FSC Staffer #2 Dep at 13.

[376] *See* MA Senator's Leg. Dir. Dep. at 7.

[377] Rep. Waters Dep. at 11.

[378] *Id.*

testified that he asked her to "please help get them to the Secretary of the Treasury," and that she told him "sure, let me see what I can do."[379] During this conversation OneUnited's Special Counsel/Chair-Elect of the NBA indicated to Representative Waters that he was meeting with her in his capacity as Chair-Elect of the NBA.[380]

Likewise, Representative Waters' COS also recalled OneUnited's Special Counsel/Chair-Elect of the NBA coming to Representative Waters' office on September 8, 2008, to discuss a meeting with Treasury regarding the conservatorship.[381] Representative Waters' COS testified before the ISC that Representative Waters and OneUnited's Special Counsel/Chair-Elect of the NBA discussed "the fact that they had reached out to the Treasury Department, and that the conservatorship had happened to Fannie and Freddie, and that they hadn't got a response."[382] Representative Waters' COS further stated that OneUnited's Special Counsel/Chair-Elect of the NBA told Representative Waters "that there was a potential for, you know, several minority banks to be negatively impacted by the conservatorship, and they wanted help setting up the meeting."[383] While there is nothing in the record to demonstrate that at the time of this meeting OneUnited's Special Counsel/Chair-Elect of the NBA knew the extent of the impact of the conservatorship on MDIs, there is no evidence in the record to establish that Representative Waters had any reason to doubt what OneUnited's Special Counsel/Chair-Elect of the NBA conveyed to her.

On the same day that OneUnited's Special Counsel/Chair-Elect of the NBA met with Representative Waters, the Chair and CEO of OneUnited also met with her. When meeting with Representative Waters, he indicated that he was speaking on behalf of MDIs generally.[384] In fact, he specifically stated that the conservatorship "was an issue for minority banks, that a lot of minority banks were at risk."[385]

Following her conversations with both OneUnited's Special Counsel/Chair-Elect of the NBA and OneUnited's Chairman and CEO, Representative Waters believed that

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[379] *Id.*

[380] *See id.* at 18-19. The previous Committee raised concerns that OneUnited's officers were not completely honest with Representative Waters, and believed that the officers were acting solely on behalf of OneUnited and not on behalf of either the NBA or minority banks, as they claimed in their meetings with Representative Waters. The Outside Counsel was not given the mandate to investigate the actions of OneUnited, nor does the Outside Counsel believe that it is necessary to take the time to consider the issue as it is not central to the determination of this Matter. However, Outside Counsel notes that even if the two individuals misrepresented themselves during their meetings with Representative Waters, such evidence is exculpatory for Representative Waters.

[381] *See* Rep. Waters' COS Dep. at 21.

[382] *Id.* at 21.

[383] *Id.* at 66.

[384] *See* Rep. Waters Dep. at 18-19.

[385] *Id.*

"all of the minority banks represented by [the NBA] were at risk."[386] She also indicated that neither gentleman ever mentioned OneUnited specifically and that she was unaware of any "particular institutions" affected by the conservatorship; although, she had "heard tales about institutions, something in Texas and something in Louisiana."[387] She also stated that after speaking to these two individuals, she did not "know what their preferred solution was."[388] In fact, she stated that they "didn't ask for anything. They asked to meet with Treasury. They didn't have a solution."[389] At this point in time, the NBA was the only institution that specifically approached her regarding the conservatorship.[390]

During these conversations with both OneUnited's Special Counsel/Chair-Elect of the NBA and OneUnited's Chairman and CEO, Representative Waters stated that her husband's stock holdings were never discussed, nor did she even think about his stock holdings when she agreed to contact the former Treasury Secretary. Moreover, Representative Waters explained her interest in assisting the NBA as follows:

> Let me just tell you this, the way things work around here. Little people, small business people, minorities, don't have access to Treasury, to the Secretaries of any of the agencies. Someone was laughing at one point and told me that the President of the BofA or Wells Fargo, they pick up the phone and they call the Secretary of the Treasury and say, hey, how are you doing? We need to talk about this. Or they walk in the door.
>
> But for small people and minorities, these community bankers, what have you, you don't get to do that. And so, they don't have access. And oftentimes, you will find, whether it's in the Latino Caucus or the Black Caucus or sometimes just rural folks who are trying to get representation for their bankers, they have to step up to the plate for them and they have to open the door and they have to get them access. But it doesn't happen easily. And I do that. I see that it's part of my job.[391]

Following her meetings with OneUnited's Special Counsel/Chair-Elect of the NBA and the Chairman and CEO of OneUnited, Representative Waters called the then-

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[386] *Id.* at 30-31.

[387] *Id.* at 31.

[388] *Id.* at 52.

[389] *Id.*

[390] *See id.* at 55.

[391] *See id.* at 15-16.

Treasury Secretary and requested a meeting on behalf of the NBA. Specifically, Representative Waters stated that she told the then-Secretary:

> That the minority banks that I think we had discussed before appeared to be in trouble and there were representative of the minority banks that were in town and they desperately wanted to come over there and see him and find out what was going on and would he see them, and he said yes.[392]

The former Treasury Secretary testified before the ISC that he was "consumed with" other matters related to the financial crisis during the week of September 8, 2008, but he remembered speaking with Representative Waters and delegating the meeting she requested, although this was not a major matter to him at the time:

> I got to tell you, these calls were so relatively unimportant relative to other things I was doing then. Given what was going on, if I ever explained it to you, on a Richter Scale of sort of a 1 to 10, they would not have even got up to near 1 in terms of everything else that was going on. And so I had hundreds of calls
> ...
> So what hit me, and I can't tell you whether it was on the first call when I called Maxine or whether she called back, so I just can't tell you. But I would say the other thing that hit me was how quickly she was on to that issue. And she really was quite aggressive with me -- and I think in a very appropriate way – saying, the first thing, saying that, you know, there are banks and minority banks that have bought preferred stocks of government-sponsored enterprises thinking they were going to be money good; now...you've taken this step and wiped them out, and so she was concerned about that.
> ...
> My best recollection was she didn't mention the name of a bank. My best recollection is she didn't mention a name of, you know, the NBA. But what she wanted was me personally to meet with a group of minority bankers that were in town and to meet that week.
> And I told her I couldn't but that I would delegate that to someone else. And – and then I had our staff do it, and I can see from the correspondence that [the under-secretary] had the meeting. I had no recollection as to who I delegated that to. In the overall scheme of things, that was just not the big thing to me.[393]

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[392] *See id.* at 11.

[393] Former Treasury Sec. Dep. at 11-13. Many of the significant events of the 2008 financial crisis occurred approximately one week after Representative Waters called the former Treasury Secretary. On September 15, 2008, Lehman Brothers Holdings Inc. filed for Chapter 11 bankruptcy protection. *See http://timeline.stlouisfed.org/index.cfm?p=timeline#* (last visited August 20, 2012). That same day, Bank of America announced its intent to purchase Merrill Lynch & co. for $50 billion. (*Id.*) The next day, on September 16, 2008, the Federal Reserve Board authorized the Federal Reserve Bank of New York to

Representative Waters' COS testified that the meeting had been granted to OneUnited's Special Counsel/Chair-Elect of the NBA, in his capacity as Chair-Elect of the NBA.[394] OneUnited's Special Counsel/Chair-Elect of the NBA was in charge of sending meeting invitations, and then sent the list of attendees to Representative Waters' COS.[395] The Chief of Staff then forwarded the names of the attendees to Treasury for security clearances.[396] According to the COS's testimony before Outside Counsel, Treasury was in receipt of the names of the attendees the evening before the meeting was to occur.[397] Representative Waters told the ISC that she did not discuss her COS's actions related to setting up the meeting, but rather asked him to be responsible for the details.[398]

3. Preparations for the Meeting at Treasury

On September 8, 2008, at 6:31 PM, a Treasury employee sent an email to Representative Waters' COS confirming that the meeting would occur the next day at 11:00 AM.[399] That email confirmed that the Treasury had invited the following attendees to the meeting: then Acting Under Secretary of the Treasury, the Deputy Assistant Secretary for Financial Institutions Policy, a Senior Advisor to the Acting Under Secretary, the Director of the Office of Financial Institutions Policy, the Director of the Division of Supervision and Consumer Protection at the FDIC, the Associate Director, Division of Supervision and Consumer Protection at the FDIC, and the Deputy Comptroller from the Office of the Comptroller of the Currency ("OCC").[400] These individuals testified that the meeting was called to discuss the effect of the conservatorship on minority banks in general.

The Acting Under Secretary told the ISC that the request for the September 9, 2008, meeting "came into my office, but it probably came in that day or the – even the day before. I don't know."[401] The Acting Under Secretary did not remember who asked him to attend the meeting, but stated that the meeting "was a request to meet with

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lend up to $85 billion to the American International Group (AIG) under Section 13(3) of the Federal Reserve Act to prevent its failure. (*Id.*)

394 *See* Rep. Waters' COS Dep. at 23.

395 *See id.*

396 *See id.*

397 *See* 7/5/12 Rep. Waters' COS Dep. at 18.

398 *See* Rep. Waters Dep. at 12.

399 *See* COS.MW.FRANK.50.

400 *See id.*

401 Under Sec. Dep. at 14.

members of the broader community in terms of addressing kind of what we were doing, why we did what we did and the potential impacts on financial institutions."[402]

Further, the Director of the Division of Supervision and Consumer Protection at FDIC, who also attended the meeting, stated that she "got a phone call...the night before to come over to Treasury because there was a concern that several institutions, minority institutions, were impacted by the government's decision to place Fannie and Freddie into conservatorship."[403]

According to Representative Waters' COS, OneUnited's Special Counsel/Chair-Elect of the NBA had the primary responsibility for selecting the meeting attendees other than the representatives from Treasury and the bank regulators.[404] In fact, Representative Waters' COS testified that "in general, when we work with associations, we allow them to decide who the best person or people are to represent their association and represent the issue that they are dealing with at the time. So, I just said, the meeting is tomorrow; let me know who's coming."[405]

There is evidence in the record that the Chairman and CEO of OneUnited, who did not have a role with the NBA, invited a staffer from the Massachusetts Senator's office. "A day or two after" the Chairman and CEO of OneUnited had initially contacted the staffer, he called back and "said that there was a meeting scheduled at the Treasury Department about this issue."[406] In addition to the staffer from the Massachusetts' Senator's office, Representative Waters' COS and a staffer from the Financial Services Committee also attended the meeting. The Financial Services staffer was asked to attend the meeting by the Chairman of the Financial Services Committee.[407]

The additional individuals present at the meeting included the Chairman and CEO of OneUnited,[408] OneUnited's Special Counsel/Chair-Elect of the NBA, and the President of OneUnited. A partner with the law firm of Goodwin Procter LLP, who was Outside Counsel to both OneUnited and the NBA, also attended the meeting. He testified that he believed he "was representing the National Bankers Association" at the Treasury meeting.[409] The NBA had been a pro bono client of his for approximately a

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[402] *Id.*

[403] FDIC Director Dep. at 12.

[404] *See* Rep. Waters' COS Dep. at 67.

[405] *Id.* at 67-68.

[406] MA Senator Leg. Dir. Dep. at 7.

[407] *See* Waters_071912_31, attached hereto as Ex. 25.

[408] Although the Chairman and CEO of OneUnited informed a staffer from the Massachusetts Senator's office that the meeting had been set up, during his testimony before the ISC he stated that he did not recall inviting anyone to the meeting. (OU CEO Dep. at 39.)

[409] NBA Counsel Dep. at 9.

year and a half at the time of the Treasury meeting, and had been Outside Counsel for OneUnited for approximately 10 years.[410]

The only NBA member bank represented at the meeting was OneUnited. While OneUnited's Special Counsel/Chair-Elect of the NBA stated that he considered inviting other NBA members, he "didn't know, again, who was impacted at that time."[411] And while he considered doing a survey of other NBA member banks before sending the September 6, 2008, letter, the "meeting again was done on a moment's notice."[412]

Neither the then Chairman of the NBA nor the President of NBA attended the meeting.[413] The President told the ISC that he did not find out about the meeting until after it occurred, and ultimately asked OneUnited's Special Counsel/Chair-Elect of the NBA why he would "have a meeting at Treasury or anywhere else without consulting me?"[414] Despite the President's displeasure with the actions of OneUnited's Special Counsel/Chair-Elect of the NBA, in March 2009, the NBA Board of Directors determined that all actions taken on behalf of the NBA by OneUnited's Special Counsel/Chair-Elect of the NBA during this time frame were "consistent with practices and authority granted him by the Association."[415] Furthermore, there is no evidence in the record to demonstrate that Representative Waters knew that the President of the NBA was unaware of the request for the Treasury meeting.

4. Meeting at Treasury

Outside Counsel's review determined that the meeting at Treasury was essentially comprised of three parts: 1) a general discussion of the effects of the conservatorship by government officials; 2) a discussion of the impact on OneUnited specifically as an exemplar of the effect the conservatorship could have on minority banks; and 3) a specific request for $50 million by OneUnited as a buyback for its investment in Fannie and Freddie. As will be discussed below, this is the general recollection of the meeting attendees and no one testified that they believed the meeting was called solely for OneUnited.

a. OneUnited's Special Counsel/Chair-Elect of the NBA

OneUnited's Special Counsel/Chair-Elect of the NBA recalled that the Treasury Under-Secretary convened the meeting and "essentially recit[ed] what [the Treasury Secretary] said maybe a day and a half earlier."[416] After the Under-Secretary completed

[410] *See id.* at 7, 9.

[411] OU Counsel Dep. at 65-66.

[412] *Id.* at 67.

[413] *See* NBA President Dep. at 22.

[414] *Id.* at 23.

[415] COE.WAT.OC.013565, attached as Ex. 24.

[416] OU Counsel Dep. at 68.

his presentation, OneUnited's Special Counsel/Chair-Elect of the NBA, who had brought a copy of the NBA's September 6, 2008, letter to Treasury to the meeting "read through the letter[.]"[417] During his testimony before the ISC, OneUnited's Special Counsel/Chair-Elect of the NBA explained that at the meeting he stated that he "was explicitly representing the NBA."[418] In fact, he stated that he did that "on several occasions at the meeting."[419] He testified that the purpose of the meeting was to "ensure that the interests of minority banks are properly protected in any resolution with respect to the disposition of the GSEs."[420] In his capacity as Chair-Elect of the NBA, he also explained that OneUnited was represented at the meeting "as a demonstrative example of the potential – not the potential impact, but the real impact that this could have on three communities, that there may be some other banks that were impacted."[421] Ultimately, he testified that as a result of the meeting he "hope[d] that in case sort of there were any minority banks that were adversely impacted, that, in fact, they would be protected."[422] It was his hope that banks could be protected by demonstrating "the amount of funds it invested in the preferred stock of the GSEs and be assured of receiving that amount in return as any part of any resolution that developed."[423] OneUnited's Special Counsel/Chair-Elect of the NBA said, "[a]t a bare minimum, we urged that the GSE resolution include a provision that any minority bank that would fail due to the investment in the BSE preferred stock would simply have its investment returned."[424]

b. OneUnited's Chairman and CEO

OneUnited's Chairman and CEO testified that he "thought the topic [of the Treasury meeting] was going to be the – that the economic chaos that was going to ensue."[425] He continued by stating that "we just broke the whole economic system, so like we're probably going to be talking about it and trying to discuss what's going to happen."[426] He was specifically asked whether he thought OneUnited would be the sole topic of the meeting, and he responded "No, absolutely not. No, absolutely not.

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[417] *Id.*

[418] *Id.*

[419] *Id.*

[420] *Id.* at 60.

[421] *Id.* at 68.

[422] *Id.* at 61.

[423] *Id.*

[424] *Id.* at 61-62.

[425] OU CEO Dep. at 40.

[426] *Id.*

OneUnited Bank was not going to be the sole topic. The notion was we were going to discuss, you know, the economic issues that had – that were cascading upon us at that point in time."[427] In fact, he explained that OneUnited came up as an example of what was happening in the larger banking community.[428] Although he did state that he believed that "the actions that were taken by the Treasury related vis-à-vis Freddie and Fannie were – you know, were inappropriate, and I feel like we were damaged as a result of those inappropriate actions, and so, therefore, I feel like – that we were owed money, and I asked them for the money that we were owed."[429] He believed that he requested around $40 million and agreed that the specific request would have benefited every shareholder at OneUnited.[430]

c. OneUnited's President

OneUnited's President testified before the ISC that OneUnited's Special Counsel/Chair-Elect of the NBA told her that the purpose of the meeting "was to share with Treasury the impact of the conservatorship by minority banks."[431] She testified that OneUnited's Special Counsel/Chair-Elect of the NBA was there on behalf of the NBA, and that the attorney was present representing the NBA.[432] She confirmed that at the Treasury Meeting OneUnited "asked for our money back."[433] She explained that "I would say for myself what we wanted and what we felt like we were misled in terms of this being an okay security to own by a bank, and we wanted our money back."[434] OneUnited's President acknowledged that she got a "sense from the meeting that there wasn't a sense in the room that banks were significantly impacted by the conservatorship."[435]

d. NBA's Outside Counsel

The attorney who serves as Outside Counsel for both OneUnited and the NBA testified that he was present at the meeting representing the NBA.[436] NBA's Outside Counsel testified that OneUnited's Special Counsel/Chair-Elect of the NBA "spoke on

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[427] *Id.* at 41.

[428] *See id.* at 41-42.

[429] *Id.* at 45.

[430] *See id.* at 43-44.

[431] OU COO Dep. at 26.

[432] *See id.* at 26.

[433] *See id.* at 31.

[434] *Id.*

[435] *Id.* at 38.

[436] *See* NBA Counsel Dep. at 10.

behalf of NBA principally and talked about the concern that – the effect it would have on the NBA on some of their members if they weren't reimbursed for stock."[437] NBA's Outside Counsel then addressed the group regarding "FIRREAS, the 1989 legislation that talks about promoting minority banks."[438] Finally, the Chairman and CEO of OneUnited, and OneUnited's President "focused primarily on OneUnited and OneUnited's own losses with Fannie and Freddie stock."[439] He believed that a little less than half the time of the meeting was spent specifically discussing OneUnited.[440] He further testified that, at the meeting, the representatives from Treasury and the regulators "largely just ask[ed] questions, asking what the scope of the problem was. And I seem to remember them saying something along the lines of they are not sure of the authority under which they would act to provide any such compensation."[441] OneUnited was the only bank he recalled specifically being mentioned.[442]

Following the Treasury meeting, Outside Counsel testified that he walked to Representative Waters' office with the Chairman and CEO of OneUnited, the President of OneUnited, and that OneUnited's Special Counsel/Chair-Elect of the NBA.[443] He testified that he stayed for approximately 15-20 minutes in her office, but Representative Waters was not there and he then left to catch a plane back to Boston.[444]

e. Director of Division of Supervision and Consumer Protection for the FDIC

The Director of Division of Supervision and Consumer Protection for the FDIC told the ISC that OneUnited's Special Counsel/Chair-Elect of the NBA "pretty much led the meeting; and the essence of the meeting was to talk about the impact of placing the GSEs into conservatorship."[445] Since the meeting was called by the NBA she did not think it was odd to have only one member bank present, as she recalled situations where the ICBA, which has thousands of members, call a meeting and only have one person present at the meeting.[446] The Director of Division of Supervision and Consumer Protection for the FDIC explained that OneUnited's Special Counsel/Chair-Elect of the

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[437] *Id.* at 12.

[438] *Id.* at 13.

[439] *Id.*

[440] *See id.* at 25.

[441] *Id.* at 13.

[442] *See id.* at 14.

[443] *See id.* at 19-20.

[444] *See id.* at 27-29.

[445] FDIC Director Dep. at 16.

[446] *See id.* at 41-42.

NBA said that "minority institutions were devastated."[447] She actually asked him how many MDIs were devastated "because I knew, and I didn't want – I wanted to make sure we were working with the same data."[448] He did not know the exact number, and the Director of Division of Supervision and Consumer Protection for the FDIC did not share that information with him, even though she knew the number to be limited.[449]

The Director of Division of Supervision and Consumer Protection for the FDIC testified before the ISC that, after she asked about the scope of the problem, "the meeting kind of shifted, and it turned out to be, you know, here is an instance of one institution that was impacted, and then [the Chairman and CEO of OneUnited] started talking."[450] According to the Director of Division of Supervision and Consumer Protection for the FDIC, he essentially "said that his institution was devastated by this move, and he asked the Treasury for $50 million, which was the impact of the placement on his capital."[451] He did not explain where the money would come from, and the Director of Division of Supervision and Consumer Protection for the FDIC said that the "people in the room just looked at him; it was a really different request."[452] She felt that the request was "almost like open bank assistance, and there's a law that prohibits that."[453]

The Director of Division of Supervision and Consumer Protection for the FDIC did not recall any discussion at the end of the meeting as to follow-up steps, instead, she recalled "everyone was listening politely, and I just remember Treasury people saying, We'll get back to you. Thank you very much. It was more of a polite, listening conversation."[454] Once the meeting concluded, the Director of Division of Supervision and Consumer Protection for the FDIC asked the regulators to stay behind and she informed them that she believed the "number of institutions impacted [was] less than five," and, according to her, the regulators seemed "surprised to be called over there for that."[455]

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[447] *Id.*

[448] *Id.* at 16-17.

[449] *See id.* at 17.

[450] *Id.* at 16.

[451] *Id.* at 17.

[452] *Id.* at 19.

[453] *Id.* at 23.

[454] *Id.* at 19.

[455] *Id.* at 18.

f. Representative Waters' COS

Representative Waters' COS testified before the ISC that the Treasury meeting was "Based on the letter that was sent to [the then-Treasury Secretary] requesting the original meeting, which the Congresswoman followed up on, [and that] the purpose of the meeting was to discuss the impact on minority banks that the conservatorship would have."[456] In describing the meeting, Representative Waters' COS stated that:

> A large chunk of the first 20 minutes was kind of like the introductions, the niceties and everybody introducing themselves. [OneUnited's Special Counsel/Chair-Elect of the NBA] gave the opening statement, basically saying, I'm here as the Chairman-elect, but I want to acknowledge that I'm an executive of OneUnited. And then there was just kind of like a free-flowing conversation. I know there was a significant amount of time that was dedicated, a conversation between the FDIC and [the Chairman and CEO of OneUnited].[457]

He believed that approximately 25-30% of the meeting revolved around OneUnited.[458] He also stated that the FDIC, OneUnited's primary regulator, "seemed fairly familiar about, you know, the content of the conversation, and so there was a discussion about basically how widespread the problem was, and nobody – nobody that was at the table could – could answer that question."[459] Representative Waters' told the ISC that shortly after the meeting, she discussed what took place with her COS. She stated that her COS "tried to identify who all was in the meeting, including FDIC and others who were in the meeting, and that he told me that [the Chairman and CEO of OneUnited] was a little bit heated."[460] Representative Waters said that her COS relayed that the Chairman and CEO of OneUnited "Was saying that they thought that Fannie and Freddie were safe places for the banks to invest, and it turns out that the government misled them in some way, and he was mad that the banks were losing money, that he was losing money."[461]

g. Legislative Director for Massachusetts Senator

The Legislative Director for the Massachusetts Senator who had been contacted on this issue also attended the Treasury meeting. It was his recollection that "the Treasury Department welcomed everybody and gave a brief overview of what they felt

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[456] Rep. Waters' COS Dep. at 24-25.

[457] *Id.* at 70.

[458] *See id.*

[459] *Id.* at 27.

[460] Rep. Waters Dep. at 13.

[461] *Id.* at 47.

the situation was."[462] The Legislative Director said that, after the introduction, "representatives of OneUnited Bank and National Bankers Association made a presentation...about what they felt the situation was...and made their request for Federal assistance and...they then...talked about it briefly, and then that was generally the meeting."[463] He stated that the "topic of the meeting" was that due to the conservatorship, the "investments that OneUnited Bank had made into [the GSE]bonds were essentially worthless; and, as part of that, they were looking for some assistance to make up for that loss."[464]

The Legislative Director also told the ISC that he believed that during the meeting, "there was a reference to other banks having similar problems."[465] He stated that he believed "the Treasury Department's interest in this was the fact that there were many other community banks that had also invested in these bonds and had lost money and that the Federal Government needed to find a response to this in some way."[466] It was his belief that Treasury officials and regulators "were collecting information in order to make the determination of how to proceed."[467] Following the meeting, the Legislative Director "spoke with [OneUnited] briefly."[468] Other than that brief discussion, he did not recall if anyone from the Massachusetts' Senator's office had any other substantive discussion of the issues addressed at the meeting with anyone from OneUnited or the NBA.[469]

h. Financial Services Committee Staffer

A Financial Services Committee staffer who attended the Treasury meeting at the request of the Financial Services Committee Chairman prepared a memorandum for the Chairman entitled "Update on Treasury Meeting with National Bankers Association" following the meeting.[470] The memorandum stated:

> OneUnited Bank had about $25 million in Fannie and $25 million in Freddie and they maintain that the bank is now functioning with effectively no capital. [OneUnited's Special Counsel/Chair-Elect of the NBA] asked Treasury to buy back the preferred GSE stock of MOIs

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462 MA Senator's Leg. Dir. Dep. at 10.

463 *Id.*

464 *Id.*

465 *Id.*

466 *Id.*

467 *Id.*

468 *Id.*

469 *Id.* at 11-12.

470 COS.MW.FRANK.27, attached hereto as 26.

> [Minority Owned Institutions] that may otherwise fail due to overexposure from preferred GSE stock. They estimate that this buy-back could amount to about $74-$100 million to address MOIs' vulnerability from overexposure of GSE preferred stock. FDIC, the primary regulator for OneUnited Bank, indicates that they have already been in contact with the bank to try to devise a plan to address the capital problem and that prompt corrective action, if triggered, would still give the bank about 90 days to address any capital issues. Given the difficulties of raising capital for [MDIs], however, OneUnited Bank argued that it was in serious danger of failing if Treasury decided not to offer some sort of protection of buy-back to it.
>
> Although [OneUnited's Special Counsel/Chair-Elect of the NBA] has framed the problem of having significant exposure of preferred GSE stock as one that is, or could be, affecting the solvency of other MOIs, it is unclear to me whether they [sic] are any other MOIs that are facing the same capital situation as OneUnited right now. During the Treasury meeting, FDIC staff asked [OneUnited's Special Counsel/Chair-Elect of the NBA] directly what information he had on the scope of the problem facing other MOIs and his answer was vague. He responded that he has heard some anecdotal information from other MOIs but that those banks are unlikely to step forward to confirm this information due to the potential public relations problem that it could cause. FDIC staff seemed skeptical that the scope of this problem with MOIs was widespread. Although initially [OneUnited's Special Counsel/Chair-Elect of the NBA and OneUnited's Chairman and CEO] indicated that the problem facing MOIs could likely be solved with $100 million buy-back from the affected institutions, at the close of the meeting, they mentioned a lower amount of $74 million.[471]

In her testimony before the ISC, the Financial Services staffer clarified the "vague" answer provided regarding the other MOIs affected by explaining that at the Treasury meeting OneUnited's Special Counsel/Chair-Elect of the NBA referenced an informal phone survey that had been conducted, but was hesitant to identify the number of institutions that may have been impacted.[472]

i. Meeting Follow-up by the NBA

The day after the Treasury meeting, a follow-up letter was sent from OneUnited's Special Counsel/Chair-Elect of the NBA to the Under Secretary on NBA letterhead. Representative Waters was copied on the letter and it was also emailed to her COS, who subsequently forwarded it to the Financial Services staffer in attendance at the Treasury

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[471] *Id.*

[472] FSC Staffer #2 Dep. at 36.

meeting.[473] This letter memorialized the request made at the meeting whereby the Treasury Department would redeem the Government Sponsored Entities ("GSE") preferred stock held by Minority Depository Institutions ("MDIs") in order to "avert possible failure of one if not several" of NBA's banks.[474] On September 11, 2008, the NBA sent another letter to the Under Secretary disclosing that it had determined that the conservatorship affected only two of its member banks.[475]

5. Conversation with the Former Treasury Secretary Following the Meeting

The day after the Treasury meeting, the former Treasury Secretary contacted Representative Waters and expressed disappointment that more NBA members did not attend the meeting. According to Representative Waters' COS, the former Secretary "said to the Congresswoman...that he thought that it would be larger – a quote, larger meeting, more banks, more minority banks represented."[476] Representative Waters told the ISC that the former Secretary "said something like he expected more bankers to be there."[477]

Representative Waters told the ISC that she "had no expectations" as to how many minority bankers would attend the meeting because she "didn't know who was going to be there."[478] She also stated that she could not recall her exact response to the former Secretary, but she "probably just said I didn't know who was going to be there-who all was going to be there."[479]

Representative Waters' COS testified that following the telephone call with the former Secretary, Representative Waters asked him "who was at the meeting, why is he calling me, and I mean, what's the concern?"[480] The COS replied "these are the people that they asked me to invite, these are the people that I sent over there and that's who was at the meeting."[481]

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[473] *See* COS.WATERS.24, attached hereto as Ex. 27.

[474] *Id.*

[475] COS.MW.FRANK.53, attached hereto as Ex. 28.

[476] Rep. Waters' COS Dep. at 75-76.

[477] Rep. Waters Dep. at 19.

[478] *Id.* at 20.

[479] *Id.*

[480] Rep. Waters' COS Dep. at 76.

[481] *Id.* This answer by Representative Waters' COS did not address the question regarding the concern raised by the former Treasury Secretary. A more accurate response to Representative Waters would have been that OneUnited was the only NBA member bank present at the meeting and that OneUnited specifically asked Treasury for $50 million as a buy-back for its investment in Fannie and

G. Representative Waters' Decision that she should not Assist OneUnited in its Efforts to Directly Obtain Money

Representative Waters testified that at some point following the Treasury meeting, once the TARP legislation began to be drafted, she recognized that OneUnited was specifically seeking money and, because of her husband's former tenure on the Board of OneUnited and his current stock holdings with the bank, she determined that she should not be involved in OneUnited's specific attempt to get money and spoke to the Chairman of the Financial Services Committee about the issue. She testified before the ISC that:

> Q: At any point did you consider your husband's ownership of stock in the bank as a reason to not be involved in OneUnited's--
>
> A: Well, I think at the point that we started to talk about TARP and them actually asking for money, I think that might have been one of my motivations in talking to [the Chairman of the Financial Services Committee] too, that I shouldn't be involved with that.
>
> Q: Why not?
>
> A: Well, as you said, several reasons. TARP was new, they were asking for money. I didn't know or understand the implications of that. And it was at that point that I realized that if they were asking for money that I perhaps should take a distance from that. I would not be involved in that.[482]

This issue was addressed later in her testimony under questioning by one of the Members on the ISC. Representative Waters clarified that she believed the conflict existed if she were to assist OneUnited specifically obtain money pursuant to TARP:

> ISC Member: Okay. You seem to have had a pretty keen understanding that if they were asking for TARP money specifically, that that would create a conflict of interest for you; is that correct?
>
> Ms. Waters: That's right, because you had a singular bank who was now raising that question. That's different then an association asking to meet with the Treasurer under FIRREA.[483]

While the date of his conversation with Representative Waters is not clear,[484] the Chairman of the Financial Services Committee expressed that he was also concerned

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Freddie preferred stock. Had her COS advised her of this request at that time, Representative Waters would have been aware of the potential conflict sooner and any appearances of impropriety could possibly have been avoided.

[482] Rep. Waters Dep. at 26-27.

[483] Rep. Waters Dep. at 53.

about OneUnited and since they were a Massachusetts bank, Representative Waters should stay out of it and he would handle the situation:

> Q: Turning back to your conversation with Representative Waters, was there any reason why you counseled her not to get involved?
>
> A: Yes, because she said [her husband] had been involved with that bank. Well, I take it back because I don't remember when the OneUnited thing because [inaudible] but I did think that because [her husband] had been involved it was better for her not to be involved. She got a little stressed because it is a black bank and she is the senior African-American member on the Committee. I know what it is like to have people come to you and ask you for help in many ways. And so I said in this case, look, I have every interest in helping this bank so why don't you just stay out of it.[485]

Representative Waters' COS also testified that he was aware of this conversation, as he testified before the OCE:

> He became aware of the conversation between Rep. Waters and [the Chairman of the Financial Services Committee] when, as he went through his tasks with Rep. Waters one day following the September meeting, she indicated that he need not work on the minority-bank matters because, as she said, "I spoke to [the Chairman of the Financial Services Committee.] Don't worry about it." He took this to mean that he need not work on the NBA matters that day. He does not remember Rep. Waters making any reference to [the Chairman of the Financial Services Committee] instructing her not to get involved in NBA matters.[486]

Representative Waters' COS's testimony before the ISC differs from the MOI of his interview before the OCE.

> Q: Can you tell us a little bit about the circumstances surrounding how you became aware of that conversation?
>
> A: Yeah. I believe the Congresswoman – they have several kind of fly-by conversations. They talk to each other often about issues that are going on. I think that what happened after the meeting, based on communications, et cetera, and by the fact that we hadn't gotten results from the survey bank, et cetera, that at that time no other banks had basically stepped up and said, look, you know, there's a – we have an issue with this Fannie and Freddie piece. And so I think the conversation that the Congresswoman had was

[484] The Chairman of the Financial Services Committee testified that he believed the conversation took place during the 10-day period following the Treasury meeting, but prior to the first version of the TARP legislation being circulated on September 20, 2008. (9/11/12 FSC Chair Dep. at 14-15.)

[485] FSC Chair Dep. at 23-24.

[486] Rep. Waters' COS OCE MOI.

> basically, look, you know, we were approached by the NBA about this, but at this point it seems like OneUnited has a problem. I don't want to get involved with this on this level. Can you do it? And [the Chairman of the Financial Services Committee] kind of said, stay out of it, I'll take over, or something like that.[487]

In his interview with Outside Counsel, Representative Waters' COS confirmed his OCE testimony that following his conversation with Representative Waters he believed he was not to work on the issue that day.[488] It is critical to Outside Counsel's analysis of this matter that Representative Waters took steps to inform her staff of the conflict that existed. Representative Waters' COS's testimony demonstrates that she informed him of her conversation with the Chairman of the Financial Services Committee. Further, in Representative Waters' press conference on August 2010 she stated:

> There has also been a question about whether or not I instructed my staff not to get involved with OneUnited Bank, and their interest in assessing (sic) TARP funds.
>
> My staff had only been involved in understanding the impact of the financial crisis on small and minority banks broadly and assisting in setting up the meeting with the Treasury Department for, again – again – the National Bankers Association.
>
> I told my chief of staff that I had informed [the Chairman of the Financial Services Committee] about OneUnited Bank's interest, that

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[487] Rep. Waters' COS Dep. at 80. Representative Waters' COS contradicts himself in other ways as well. His ISC testimony suggests that he understood that he could not have involvement with OneUnited because they were the only bank affected by the conservatorship and, therefore, any actions would solely assist OneUnited as opposed to the NBA as a whole. This is contradicted by later testimony where Representative Waters' COS testified that community banks also contacted Representative Waters' office as they too were affected by the conservatorship. However, there is sufficient evidence in the record to support the testimony that while only a small number of minority banks were affected, small community banks were also affected by the conservatorship. Thus, Representative Waters and her staff were permitted to assist the larger community, of which OneUnited is a part. *See, e.g., 2008 Ethics Manual*, at 234 ("It is a principle of 'immemorial observance' that a Member should withdraw when a question concerning himself arises; but it has been held that the disqualifying interest must be such as affects the Member directly, and not as one of a class.")(*citing* John V. Sullivan, Parliamentarian, *Constitution, Jefferson's Manual, and Rules of the House of Representatives, One Hundred Tenth Congress,* H. Doc. 109-157, 109th Cong., 2d Sess. (2007), § 673).

[488] 7/5/12 Rep. Waters' COS Dep. at 53. There is additional evidence in the record, beyond his testimony before the OCE and Outside Counsel, to contradict that Representative Waters' COS believed he was only to abstain from working on the matter that day. The Chief Counsel and Staff Director of the Financial Services Committee testified to having a brief conversation with Representative Waters' COS "in which he mentioned the concern about the conflict." (FSC Chief Counsel Dep. at 17.) She continued to state that "I do remember having a conversation with [Representative Waters' COS] where he proactively indicated that his boss was concerned and taking a step back." *Id.* While the Financial Services Committee's Chief Counsel believed this conversation occurred once they began working on the EESA legislation, she could not be certain of the exact timing of the conversation. (*Id.* at 17-18.)

> we were only concerned about small and minority banks broadly, that [the Chairman of the Financial Services Committee] would evaluate OneUnited's issue and make a decision about how to proceed.[489]

Also during Outside Counsel's interview of Representative Waters' COS, he was asked how Representative Waters was able to continue working on the TARP legislation in light of the concerns she had discussed with the Chairman of the Financial Services Committee. Her COS responded as follows:

> Okay. So two things. One, the TARP – I guess the initial thing that I will say is that the TARP bill was not about OneUnited, right? So the TARP bill was an $800 billion bill that was aimed at shoring up the entire United States financial services system, right, and potentially the world financial system. So, as a general matter, OneUnited or any other individual bank, including large banks like Goldman, Bank of America, J.P. Morgan, were not, I don't think a consideration for any member. The question was, what are we going to do broadly to ensure the stabilization of the financial services community, period.
>
> And so from a "how" perspective or a "why" perspective would the Congresswoman continue to work on the TARP bill is that it's part of her duty and responsibility. She had leadership on the Financial Services Committee. And what she did would have been any meetings, drafts of legislation, proposed amendments, changes to the bill, briefings by the Treasury Department or other entities in the financial services community. She would have participated in those.[490]

During the course of his interview, several emails between Representative Waters' COS with either OneUnited's Special Counsel/Chair-Elect of the NBA and OneUnited's Chairman and CEO regarding specific legislative language were identified,[491] and he was asked whether he believed those were on behalf of OneUnited specifically or coming from the NBA. He stated that "given that there had been multiple people from the NBA all engaged in this issue, I was very comfortable and clear that this was a broad concern of the NBA."[492]

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[489] *See* Tr. of Rep. Waters August 2010 Press Conference.

[490] 7/5/12 Rep. Waters' COS Dep at 40-41.

[491] Those communications will be discussed in detail later in this Report, *infra* section H.1.

[492] 7/5/12 Rep. Waters' COS Dep. at 45-46. This testimony is in conflict with the NBA's letter dated September 11, 2008, on which Representative Waters was copied. COS.MW.FRANK.53. In that letter, the NBA disclosed that only two of its member banks were seriously affected by the conservatorship, so Representative Waters' COS' statement that he was comfortable that this was a "broad concern of the NBA" is belied by the facts in the record, of which he had notice.

Finally, Representative Waters' COS indicated that Representative Waters was not only approached by the NBA, but by community banks as well:

> Also around that time, the Independent Community Bankers Association sent in a survey that they had that identified, out of a small portion of their banks, 40-plus that had had significant impact by Fannie and Freddie, and they needed special consideration within the EESA for their banks as well. And the ABA had significant, and still have significant, letters and correspondence on their web site that they sent to the Financial Services Committee talking about the impact that Fannie and Freddie have on their members, which are from small to large.[493]

Ultimately, Representative Waters' COS was asked what type of involvement with OneUnited and TARP he could work on following Representative Waters' conversation with the Chairman of the Financial Services Committee. He answered as follows:

> Well, I think the matters – as I understood it, the Congresswoman's working knowledge was around this idea that they had been asked for $50 million as a repayment, a buyback. And so, for me, the conversation was that that is a dead issue. If there's to be a response to that ask, that type of ask, that's not something that you're to work on.[494]

> The context within which I was working was a broader context around NBA's ask, the ICBA and the ABA. So I see them as separate things.[495]

H. Continued Communications with OneUnited and Representative Waters' Office

Outside Counsel's review of the evidence determined that following the meeting at Treasury, OneUnited's Special Counsel/Chair-Elect of the NBA and OneUnited's

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[493] *Id.* at 46.

[494] In this testimony, Representative Waters' COS recognizes that Representative Waters was aware of the $50 million request by OneUnited. As discussed earlier, *supra* n. 481, he did not inform her of this request following her phone call with the former Treasury Secretary. Further, he testified that he could not recall any specifics of his conversation with her regarding the Treasury meeting nor could he recall ever informing her of OneUnited's $50 million request. (9/13/12 Rep. Waters' COS Dep. at 22-25.) Representative Waters' testimony on this topic does not assist in clarifying when she actually learned of this request. "I don't know what their preferred solution was. I was not in the meeting where they talked to the Treasury. I'm reading newspaper accounts, and I'm hearing little gossip here and there about what they might have been suggesting. I don't know if that was a legitimate suggestion, if that was something that somebody just made up because they thought that's what happens when a government sponsored agency is under conservatorship. I don't know what would have inspired or driven that kind of conversation." (Rep. Waters Dep. at 51-52.) Thus, the exact date when Representative Waters first learned of this $50 million request by OneUnited is unclear.

[495] 7/5/12 Rep. Waters' COS Dep. at 54-55.

Chairman and CEO continued to contact both Representative Waters' office and the office of the Chairman of the Financial Services Committee. Despite Representative Waters' conversation with the Chairman of the Financial Services Committee, which she conveyed to her COS, unknown to Representative Waters, her COS continued to communicate with executives of OneUnited.

1. OneUnited's Communications with Representative Waters' COS and the Financial Services Committee

On September 11, 2008, at 10:16 pm, OneUnited's Special Counsel/Chair-Elect of the NBA sent an email to Representative Waters' COS and the Massachusetts State Senator who had been involved in this issue, the Chairman and CEO was also copied on this email. The email stated:

> [p]lease see attached American Banker article re: [the Chairman of the Financial Services Committee] and GSE Takeover by Treasury. See asterix [sic] at top of third column: "House Financial Services Committee Chairman...said he does not think any bank will be allowed to fail as a result of the takeover.[496]

Representative Waters' COS forwarded this email to the Financial Services staffer who had been present at the Treasury meeting.

On September 12, 2008, the day after OneUnited's Special Counsel/Chair-Elect of the NBA sent his letter to the Treasury Under Secretary, and copied Representative Waters, informing the Under Secretary that only two NBA member banks were significantly impacted by the conservatorship, OneUnited sent a facsimile to the Chairman of the Financial Services Committee.[497] This document outlined why OneUnited's investment was unique and needed to be protected.[498]

On September 15, 2008, a Financial Services Committee staffer drafted a memo to the Chairman of the Financial Services Committee with the subject "Draft Letter to Treasury about OneUnited Bank."[499] The memo attached a draft letter to Treasury expressing support for the NBA's proposal to redeem the preferred GSE stock of minority owned institutions, and also notes that OneUnited had discussed their problems with two other Representatives from Massachusetts.[500]

In addition to the draft letter, the staffer also attached a chart to the memorandum entitled "A Request for Protection from U.S. Treasury to Avert the Failure

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[496] COS.MW.FRANK.102, attached hereto as Ex. 29.

[497] *See* COS.MW.FRANK.57, attached hereto as Ex. 30.

[498] *See id.*

[499] COS.MW.FRANK.25, attached hereto as Ex. 31.

[500] *See id.*

of OneUnited Bank due to its Investment in GSE Preferred Stock."[501] The chart contained the following three boxes: 1) OneUnited Bank Investment In GSE Preferred Stock; 2) Call Report Data; and 3) A Request for Protection from U.S. Treasury to Avert Failure.[502] OneUnited's Special Counsel/Chair-Elect of the NBA confirmed that OneUnited created the chart, and said "[o]ne of the purposes [of creating the chart] was to detail, at least according to the document, the – sort of capital shortfall that OneUnited faced...due to the loss of capital as a result of the GSE seizure."[503] He testified that the chart was "a request to Treasury for repayment."[504]

The next communication from Representative Waters' COS involving OneUnited did not occur until September 19, 2008, at 12:20 pm when he sent the Financial Services staffer an email with the subject "OU is in trouble." She responded at 12:21 pm stating "depends on scope," and he replied at 12:22 pm "I think it will become a timetable issue."[505] The Financial Services staffer testified before the ISC that she believed Representative Waters' COS was referring to "an issue with trying to act quickly, and I think that they had not heard back from Treasury in terms of whether Treasury was going to implement the National Bankers Association proposal, so it's probably a reference to that."[506] However, when the same staffer was interviewed by Outside Counsel, she testified that she did not recall what she was referring to in this email.[507] Based on the record in this case, Outside Counsel believes it is a reasonable interpretation that this email is a specific reference to OneUnited's call report, which was due at the end of September, and OneUnited's potential failure. During that same interview, the Financial Services Staffer testified that she did not recall if she took any action related to that email.[508]

Staffers are prohibited from taking official acts to aid the personal business or interest of their employing Member. This email can be construed as an official act to assist OneUnited, however, there is insufficient evidence in the record to prove by clear and convincing standards that Representative Waters' COS was aware of Representative Waters' husband's investment at the time this email was sent. To the contrary, during questioning regarding an email sent on September 22, 2008, her COS responded that "I knew that the ambassador had been on the board that he had come off the board. I knew that the Congresswoman had an investment and had gotten rid of that investment.

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[501] COS.MW.FRANK.54, attached hereto as Ex. 32.

[502] *See id.*

[503] OU Counsel Dep. at 86.

[504] *Id.*

[505] COS.MW.FRANK.44, attached hereto as Ex. 33.

[506] FSC Staffer #2 Dep. at 58-59.

[507] 7/25/12 FSC Staffer #2 Dep. at 11.

[508] *See id.* at 12.

I was not conscious at the time that the ambassador still had an investment. So that would not have been a red flag."[509] There is, moreover, no evidence that Representative Waters was aware that her COS sent this email. As such, while there is some evidence in the record to suggest that Representative Waters' COS should have known of the conflict at the time he sent this email, Outside Counsel recommends that the Waters Committee determine that there is insufficient evidence in the record to support by a clear and convincing margin that the sending of this email constitutes a knowing violation of the ethics rules.[510] It is important to note that while the Outside Counsel has raised concerns regarding credibility of certain witnesses, the ultimate findings, recommendations and conclusions of the Outside Counsel are not based on credibility determinations. Rather, the credibility concerns are raised so that credibility determinations can properly be made by the Members of the Waters Committee themselves.

Approximately one hour later, the Financial Services staffer sent an email to the staff director for the Financial Services Committee. In that email she wrote:

> [an individual] with FDIC indicated that FDIC does not have authority to implement NBA proposal. From what he knows, Treasury was "looking underneath sofa cushions" to see if they had authority through one of their programs, which may be one of the reasons that they haven't closed the loop with us on how they can be supportive to date.

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[509] 7/5/12 Rep. Waters' COS Dep. at 63. Outside Counsel questions the credibility of this testimony. While there is no evidence in the record that Representative Waters' COS was involved in any way with Representative Waters' financial disclosures, Representative Waters' COS is also her grandson and, in addition, a year prior to this email being sent Representative Waters publicly disclosed at a Financial Services Subcommittee Hearing that her husband had an investment in the bank. Representative Waters' COS testified that he was aware of the statement from the Subcommittee Hearing, but could not recall if he was aware of it at the time it was made or only became aware of the statement when gathering documents in connection with the Committee's investigation. (9/14/12 Rep. Waters' COS Dep. at 5-6.) In addition, Representative Waters testified that her COS "would have known" about the investment because "everybody knows." (Rep. Waters Dep. at 48.) But there is no evidence in the record that Representative Waters directly disclosed her husband's investment to her COS.

[510] There is Committee precedent in which, after a referral from the OCE, actual violations are found, but determined to not be "knowing" violations and, while the matters are not dismissed, no disciplinary action is recommended, and no additional sanctions are ordered. *See, e.g.*, House Comm. On Ethics, *In the Matter of Allegations Relating to Representative Jean Schmidt*, H. Rep. 112-195, 112th Cong., 1st Sess. (Aug. 5, 2011) (deciding not to dismiss a matter because, despite the Member's "apparent lack of knowledge of this arrangement, it was in fact improper and constituted an impermissible gift." The Committee further found that, because of the Member's lack of knowledge of the improper gift, while she was required to "disclose and repay the improper gift," in accordance with House rules, laws and other standards of conduct, no sanction was necessary); *See* House Comm. On Ethics, *In the Matter of Allegations Relating to Gregory Hill*, H. Rep. 112-194, 112th Cong., 1st Sess. (Aug. 5, 2011) (deciding not to dismiss a matter because, despite the employee's reasonable reliance on W-2s provided to him by the campaign, he was, in fact, paid in excess of the outside earned income limit. The Committee further found that, because of the employee's lack of knowledge of the violation of the earned income limit, while he was required to repay the excess money received, no further action was necessary.)

> As of yesterday, [the FDIC employee] said Treasury had not been in contact with...the FDIC with a conclusion on it. FDIC is willing to work with [the] institution on capital restoration plan but that does not go to implementation of proposal.[511]

The Financial Services staffer recalled a conversation with the Director of FDIC's Office of Legislative Affairs, in which "Treasury and possibly FDIC indicated they wanted to be supportive to minority-owned financial institutions, but it was not clear to us, nor was it clear to them whether they had sufficient authority to implement the National Bankers Association proposal."[512]

2. The EESA Legislative Process Begins

As it became increasingly clear that neither Treasury nor the FDIC had the authority to implement the NBA's proposal to assist minority banks, minority and community banks began to lobby for a legislative solution to the problem.

The Chairman of the Financial Services Committee said that he did not remember specific follow-up activity after the Treasury meeting. Rather, he explained that "there was a constant set of meetings going on about all aspects of this, so I didn't want to stress from all small banks that we had to do something."[513] The Chairman further explained to the ISC that the concerns raised by OneUnited and the NBA were "a small part of a concern expressed by the American Bankers Association, the Independent Community Bank Association, the Mass Bankers who talked to me, a component of ABA. There was just a lot of conversation."[514] The Chairman also stated that "[t]he minority bank concern with GSEs was a subset of a general concern. And we would not have gotten legislation passed and signed that quickly if it had only been minority banks, I guarantee you that."[515] The Chairman said that the issue related to the conservatorship did lead to legislation, but explained that the legislation was necessary because "this is, again, pre-TARP, so there is no money around."[516]

OneUnited's Special Counsel/Chair-Elect of the NBA sought to address the need for a legislative solution when he sent an email on September 19, 2008, at 12:38 pm to Representative Waters' COS, copying the senior legislative assistant for the Representative in whose district in Massachusetts OneUnited is headquartered, and the

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[511] COS.MW.FRANK.43.

[512] FSC Staffer #2 Dep. at 49.

[513] FSC Chair Dep. at 29.

[514] *Id.* at 34.

[515] *Id.* at 35.

[516] *Id.* at 30.

Chairman and CEO of OneUnited.[517] The email proposed a provision in the Continuing Resolution, a temporary appropriations bill, as an alternative back-up strategy in case Treasury did not grant the specific relief OneUnited had requested.[518] The language proposed by OneUnited's Special Counsel/Chair-Elect of the NBA was:

> Provided further, [sic] That, notwithstanding any other provision of law, the Director of Federal Housing Finance Agency, acting as conservator, shall, or shall cause the regulated entities in conservatorship to, immediately redeem at the purchase price paid the preferred stock of such regulated entities in conservatorship which is held by a [U.S. Department of Treasury certified Community Development Financial Institution.][519]

Upon receipt of this email, Representative Waters' COS testified that he would typically have reviewed the email, but would not take any other action.[520] Representative Waters said she was not aware that OneUnited's Special Counsel/Chair-Elect of the NBA was sending emails such as this to her COS, but she was not surprised.[521] She explained:

> Staff, when they are working, when they are considered to be, you know, a key person in the an office, whether it is the chief of staff or someone handling particular issues, they get emails from everywhere. They get emails from people who think they can help them. They get emails from people who are trying to persuade them to help them. They get emails that are informational. This stuff goes on all day long. So I am not surprised that as a chief of staff that someone would not – and even [OneUnited's Special Counsel/Chair-Elect of the NBA] would not email them either informing them about what they are doing and asking advice. It just happens all day every day.[522]

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[517] OneUnited's Special Counsel/Chair-Elect of the NBA testified that "at the time, I was chairman-elect [of the NBA] and chairman of the Legislative Affairs Committee. I was also senior counsel for OneUnited...I don't have [an] exact recollection of when and how I distinguished the roles." (OU Counsel Dep. at 79.) Moreover, several individuals testified before both the ISC and Outside Counsel that OneUnited's Special Counsel/Chair-Elect of the NBA was their point of contact with the NBA. (7/5/12 Waters' COS Dep. at 49-50; NBA Counsel Dep. at 9; FSC Staffer #2 Dep. at 8.) Based on the testimony in the record, Outside Counsel is unable to conclude whether OneUnited's Special Counsel/Chair-Elect of the NBA was acting in his capacity at OneUnited or with the NBA when he sent communications to Representative Waters' COS.

[518] COS.WATERS.31,attached hereto as Ex. 34. This strategy was never adopted, nor is there any evidence that Representative Waters' COS forwarded this email to anyone or otherwise took any action related to the receipt of this email.

[519] COS.WATERS.31.

[520] Rep. Waters' COS Dep. at 40-41.

[521] Rep. Waters Dep. at 34.

[522] *Id.* at 34-35.

Further complicating matters during this time period is the fact that Representative Waters' COS testified before Outside Counsel that the staffer in Representative Waters' office who was assigned to work with the Financial Services Committee was on maternity leave during this time period, so Representative Waters' COS became the point person with the Financial Services Committee until the staffer's return.[523]

The following day, on September 20, 2008, Treasury circulated its first draft of the legislation that would ultimately become the TARP bill. That same day, Mr. Moore forwarded that draft legislation to the Chairman and CEO of OneUnited.[524] The email did not contain any text, and the Chairman and CEO of OneUnited testified that he did not recall receiving the email, but that it was likely sent to him because "probably in these issues in and around, you know, minority banking and inner-city finance and those sorts of issues. I probably know more about those issues than anybody else. Period."[525]

Two days later, on September 22, 2008, Representative Waters' COS received an email from the Chairman and CEO of OneUnited, which forwarded an email from a OneUnited Board member who has been described as a lobbyist and expert in the banking field.[526] In the email, the Chairman and CEO of OneUnited asked Representative Waters' COS to "print this for our meeting."[527] During the course of

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[523] 7/5/12 Rep. Waters' COS Dep. at 30-31.

[524] *See* COS.WATERS.34, attached hereto as Ex. 35.

[525] OU CEO at 64.

[526] *See* CSOC.WAT.000744, attached hereto as Ex. 36. Representative Waters' COS testified that he was "not sure" if he was aware that the individual who was both a OneUnited Board member and a lobbyist, was, in fact, associated with OneUnited. (7/5/12 Rep. Waters' COS Dep. at 51-52.) This testimony is questionable in light of the facts in the record. The record demonstrates that this same individual sent Representative Waters' COS an email on July 16, 2008, requesting a meeting with Representative Waters. In that email, he specifically states that he serves on the board of OneUnited. (*See* Waters_071912_11, attached hereto as Ex. 37.) Representative Waters' COS testified that he received this email, but otherwise could not recall reading it. (9/13/12 Rep. Waters' COS Dep. at 10-11.) Further, the board member testified that he had been in a meeting with Representative Waters' COS where he mentioned that he served on OneUnited's board, and did not think that Representative Waters' COS seemed surprised by that news. (OU Board Member Dep. at 13.) Further, the board member testified to having a long-standing working relationship with Representative Waters and her staff. (*See id.* at 11-12.) Notwithstanding the credibility of Representative Waters' COS, it is important to note that the board member testified that he was never retained to lobby on behalf of OneUnited, and any legislative language he sent to either Representative Waters' COS or staffers of the Financial Services Committee during this time period were pro bono efforts on behalf of either the NBA or other associations, but were not on behalf of OneUnited. (*See id.* at 14, 22-23, 25-26.) Nor did OneUnited ever direct him to draft such legislation or any other proposals on their behalf. (*See id.* at 33-34.)

[527] *See* CSOC.WAT.000744, attached as Ex. 36.

Outside Counsel's review, Outside Counsel was unable to determine that any meeting actually occurred between Representative Waters' COS and the Chairman and CEO of OneUnited. Representative Waters' COS testified before Outside Counsel that he did not recall any such meeting, and also testified that he did not realize that the individual who had drafted the proposed language was affiliated with OneUnited as he only knew him as an expert in the banking field.[528] Likewise, the Chairman and CEO of OneUnited testified that he did not recall sending the email nor did he recall meeting with Representative Waters' COS.[529] Further, Representative Waters testified that she was unaware of any meeting between her COS and the Chairman and CEO of OneUnited around this time, nor had she ever seen this email.[530] The only evidence the Outside Counsel uncovered of a meeting with anyone related to OneUnited at this time period, was a meeting between a staffer from the Financial Services Committee and OneUnited's Special Counsel/Chair-Elect of the NBA.[531] That staffer also could not recall if the meeting was specifically about OneUnited or if other banks were discussed as well.[532] In addition, he could not recall who requested that he meet with OneUnited's Special Counsel/Chair-Elect of the NBA.[533]

The language that was proposed in the email is as follows:

> Provided that, notwithstanding any other provision of law, the Director of the Federal Housing Finance Agency, acting as conservator, shall, or shall cause the regulated entities in conservatorship, to immediately redeem at the purchase price paid the preferred stock of such regulated entities in conservatorship which is held by any Department of Treasury certified community development financial institutions which, as of September 5, 2007, had more than five percent of its total assets invested in the preferred stock of the regulated entities in conservatorship.[534]

Outside Counsel has examined the proposed language and determined that it is not language that is included in the final TARP bill.

Also on September 22, 2008, a Financial Services staffer sent a memorandum to the Chairman of the Financial Services Committee.[535] The subject of the memorandum

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[528] *See* 7/5/12 Waters' COS Dep. at 50-51; 60-61.

[529] *See* OU CEO Dep. at 65.

[530] Waters Dep. at 38.

[531] *See* 7/23/12 FSC Staffer #1 Dep. at 8.

[532] *See id.* at 9.

[533] *See id.* at 8.

[534] CSOC.WAT.000744, at Ex. 36.

[535] *See* COS.MW.FRANK.28, attached hereto as Ex. 38.

was "Update on National Bankers Association's Proposal re: Preferred GSE Stock Buy-back."[536] The memorandum demonstrates that the Chairman of the Financial Services Committee was making good on his promise to Representative Waters that he would assist OneUnited, as minority banks were an important issue to him as well. Specifically, the memorandum stated that Financial Services Committee staff had reached out to:

> Treasury, congressional staff...and...[the former Treasury Secretary's] COS, but we [were]not able to get a firm commitment from them about whether they will pursue National Bankers Association's (NBA) proposal to redeem the GSE preferred stock held by minority depository institutions.[537]

The memorandum further stated that, "while [the former Treasury Secretary] wants to be supportive, [his COS] is not completely sure if Treasury has the administrative authority to implement the exact NBA proposal."[538] The memorandum also notes that "Banks' call report data is due on September 30."[539] It also notes that "without a firm commitment from Treasury to redeem the GSE preferred stock, OneUnited believes the bank will be shut down at the end of the month."[540] Of note is the fact that the memorandum also stated that the Independent Community Bankers of America ("ICBA") "has now raised similar concerts to NBA that some community banks may be considered undercapitalized because of their significant write-downs of GSE preferred stock."[541] The Chairman of the Financial Services Committee testified before the ISC that the:

> Relevance of the [call report data] is, they wanted to see if they could get something done before that, because that would be the day in which, if their capital had been devalued, they would have had to write down the value of loans, and that would have been kind of a drop dead day when negative consequences would have flowed.[542]

Further demonstrating the Chairman of the Financial Services Committee's commitment to this issue is an email from the staff director for the Financial Services

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[536] *Id.*

[537] *Id.*

[538] *Id.*

[539] *Id.*

[540] *Id.*

[541] *Id.*

[542] FSC Chair Dep. at 42.

Committee to Treasury's Office of Legislative Affairs on September 22, 2008, at 11:49 am.[543] The email stated:

> I know you folks are going under for third time but I really need some guidance on what can be done about the National Association proposal. It is [a] huge priority for our minority caucuses who have had other major concerns not to [sic] date accommodated in pending bill. We are talking here about the potential failure of minority institutions that Treasury has a statutory responsibility to promote. [The Chairman of the Financial Services Committee] and [the former Treasury Secretary] spoke personally and the Secretary indicated he was committed to being helpful. I just need to know what that means. If the issue can be dealt with administratively – and will be – that would be very helpful to know. Otherwise there will be recommendations for provisions for this bill.[544]

On September 23, 2008, OneUnited's Special Counsel/Chair-Elect of the NBA sent Representative Waters' COS an email with an attachment entitled "Treasury Request Appendix Final.xls," which was a chart breaking down OneUnited's investment in GSE preferred stock.[545] Representative Waters' COS testified before the ISC that he reviewed the email when he received it, but he did not know why it had been sent to him.[546] OneUnited's Special Counsel/Chair-Elect of the NBA , testified that he did not have a "recollection of the reason why" he sent the chart to Representative Waters' COS and was "not sure I was sending it in or even thinking of it in either" his capacity as chairman-elect of the NBA or senior counsel to the NBA.[547]

Documents produced by Representative Waters' COS demonstrate that after he received the email, he forwarded it to a staffer on the Financial Services Committee.[548] He immediately followed up with the staffer by emailing and asking her "how did the meeting go?"[549] The staffer responded that they "will continue to pursue T acting

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[543] *See* COS.MW.FRANK.39.

[544] *Id.*

[545] CSOC.WAT.001806-1807, attached hereto as Ex. 39.

[546] *See* Rep. Waters' COS Dep. at 42-43.

[547] OU Counsel Dep. at 80.

[548] Waters_071912_75, attached hereto as Ex. 40. The Financial Services Committee already had this information as the same chart had been sent to the Chairman of the Financial Services Committee on September 15, 2008. The document received by Representative Waters' office was identical to the copy sent to the Chairman of the Financial Services Committee, except it was missing the header that stated, "A request for Protection from U.S. Treasury to Avert the Failure of OneUnited Bank due to Its Investment in GSE Preferred Stock." *Compare* Ex. 39 to Ex. 32.

[549] *Id.*

without legislation but [another staffer] and I are also working on drafting CDFI-related language to help them that we could try to possibly add to the bailout bill."[550] In her testimony before Outside Counsel the staffer could not definitely answer who she was referring to in this email when she stated they were trying to "help them" but she did state that at this time they "were trying to help the National Bankers Association, but we were also around this time, I believe, made aware that there were other smaller-size institutions which were similarly situated, so "them" could be referring to the entities that were adversely impacted."[551]

At 4:01 pm on September 23, 2008, OneUnited's Special Counsel/Chair-Elect of the NBA forwarded an email to Representative Waters' COS that contained warrants language options for inclusion in the pending legislation.[552] There is no evidence in the record to demonstrate that her COS forwarded this email to anyone or otherwise acted on this email. Further, Outside Counsel has reviewed the legislative language included in this email and determined that the language is not included in the TARP legislation.

At 4:17 pm on that same day, a staffer on the Financial Services Committee, sent an email about the legislative solution to a member of the Chairman of the Financial Services Committee's personal staff and copied two other staff members from the Financial Services Committee.[553] The email states that the Chairman of the Financial Services Committee "confirmed this afternoon that he wants to address this in the rescue bill. Here's our draft language for your review and comment."[554] The following is the language that was proposed, which formed the basis for what ultimately became EESA section 103(6):

> The Secretary may establish a procedure to purchase the preferred stock of the entities under conservatorship under the manner set forth in the Housing and Economic Recovery Act of 2008 from individual institutions that are certified as community development financial institutions as defined under section 103(5) of the Riegle Community Development and Regulatory Improvement Act of 1994 with total assets of less than $750 million as of the date of the enactment of the Act in which the institutions capitalization rating has been materially impacted by the conservatorship at a sum that shall be determined by the Secretary. In establishing such a procedure, the Secretary shall include a requirement that the financial institution provide nonvoting stock as equity in exchange for the redemption.[555]

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[550] *Id.*

[551] 7/25/12 FSC Staffer #2 Dep. at 17.

[552] *See* CSOC.WAT.01804-001805, attached at Ex. 41.

[553] *See* CSOC.WAT.000456, attached hereto as Ex. 42.

[554] *Id.*

[555] *Id.*

Two days later, on September 25, 2008, OneUnited's Special Counsel/Chair-Elect of the NBA sent an email to Representative Waters' COS with the subject "any update?" The COS responded by asking OneUnited's Special Counsel/Chair-Elect of the NBA to call him in the office.[556] During his testimony before the ISC, Representative Waters' COS stated that he did not recall this email, but it was typical for him to have phone conversations as well as email communication.[557] Similarly, Mr. Cooper testified that he did not know to what he was referring, but speculated that it was "[m]aybe an update on a legislative approach."[558]

On September 28, 2008, Representative Waters' COS sent an email to the staff director and chief counsel for the Financial Services Committee, the deputy chief counsel for the Financial Services Committee, as well as two Committee staffers.[559] This email has been described as the "newly discovered" email that prompted the matter to be recommitted to the ISC during the 111th Congress. In the email, Representative Waters' COS thanks the staff for their work but expresses concern that he has not seen a draft for a couple of days and wants to know the status of provisions they have been working on. He specifically states that "Rep. Waters is under the explicit impression that the contracting language, the small bank language and systemic loan modification approach language is included in the bill. If there is any material or technical changes to the language as last agreed upon, please alert me as soon as possible so that Rep. Waters has an opportunity to weight in. It would not be acceptable to receive a copy after it is final."[560] In addition, he flags two drafting errors. The first involves inserting the word "financial" in section 103(6) of the EESA bill. This change was incorporated into the final bill. He also suggests substituting the word "practicable" for "possible" in Section 107(b), which is a section addressing minority contractors.[561] The staff director and

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[556] CSOC.WAT.001178, attached hereto as Ex. 43.

[557] *See* Rep. Waters' COS Dep. at 43.

[558] OU Counsel Dep. at 82.

[559] *See* COE.WAT.OC.265121, attached hereto as Ex. 44.

[560] *Id.*

[561] *Id.* Both Representative Waters and her COS testified that Representative Waters worked on provisions of the EESA legislation affecting minority institutions and didn't focus on OneUnited. Specifically, her COS stated that "[f]or me a litmus legislatively is not whether or not something will impact one individual or not. The litmus is whether or not it's a good policy and it's broad policy, and whether or not it has a broad impact. And so, even where we ended up with section 103(6), it was never a question for me whether or not OneUnited or any other bank fell into that. The question was whether or not this was a broad category that had a specific need, and the answer to me is yes." (7/2/12 Rep. Waters' COS Dep. at 61.) This testimony is supported by a Treasury Department email from early October 2008 indicating that certain individuals had heard from others that Representative Waters was concerned about opportunities for qualified minority and women-owned businesses to participate in the execution of the TARP program. *See* COE.WAT.OC.013009, attached hereto as Ex. 45.

chief counsel for the Financial Services Committee responds that "Leg Counsel is still working on the most recent draft and that RM or JH will report on the progress."[562]

These efforts by Representative Waters appear to be consistent with her overall efforts in this area. In fact, during his July 5, 2012, interview with Outside Counsel, Representative Waters COS was questioned specifically about this email, and he stated that the language he suggested he believed was a "composite of conversations that I had with NBA, documents I read from ABA and ICBA."[563] One of the Financial Services Committee staffers who received this email testified before Outside Counsel that he had previously worked on legislation with Representative Waters' COS and that it was not unusual for Representative Waters' COS to work on this type of legislation. In this particular instance, he did not recall her COS ever stating that he wanted the changes included in the legislation specifically for OneUnited, nor was there any other indication that he was specifically assisting OneUnited.[564]

Also on September 28, 2008, at 8:15 pm, OneUnited's Special Counsel/Chair-Elect of the NBA sent Representative Waters' COS an email with the subject line "Thank you for all your hard work!"[565] The email did not include any text. In his testimony before the ISC, OneUnited's Special Counsel/Chair-Elect of the NBA testified that he believed that this email was "referring to, again, my understanding of him ...setting up...a meeting with Treasury. I have been in contact with [Representative Waters' COS and the Congresswoman's office over a long period of time, and, you know, the office has always been receptive...taking my calls."[566]

On September 29, 2008, OneUnited's Special Counsel/Chair-Elect of the NBA sent an email to Representative Waters' COS with the subject "Checking in."[567] This was the day before OneUnited's September call report was due to the FDIC, which was a critical date for OneUnited. In the email, OneUnited's Special Counsel/Chair-Elect of the NBA states that "in thinking about next steps, we are prepared to rally our supporters by phone or through direct personal contacts. What is your sense, given that the inevitable 'mental fatigue' will begin to set in around a process that even as we speak

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[562] *Id.*

[563] 7/5/12 Rep. Waters' COS Dep. at 66-67.

[564] 7/23/12 FSC Staffer Dep. at 32-33.

[565] COS.WATERS.52, attached hereto as Ex. 46.

[566] OU Counsel Dep. at 82. Outside Counsel is not able to credit this answer. This email was sent three weeks after the Treasury meeting was held. In the time period since that meeting, OneUnited's Special Counsel/Chair-Elect of the NBA had forwarded several communications to Representative Waters' COS, who allowed himself to appear as a liaison for OneUnited by forwarded many of those communications. Further, the COS had notified a staffer on the Financial Services Committee that "OU is in trouble." Thus, it is questionable that this email was thanking Representative Waters' COS for assisting with the meeting at Treasury.

[567] CSOC.WAT.000771, attached hereto as Ex. 47.

has not been settled."[568] Despite receipt of this email, there is no evidence that Representative Waters' COS took any action on this email, that he forwarded this email to anyone, nor is there any evidence that he communicated directly with Treasury during this time period.[569] Rather, consistent with the earlier conversation between the Chairman of the Financial Services Committee and Representative Waters, there is substantial evidence that the Chairman's office did communicate with Treasury regarding OneUnited.[570]

3. The Legislative Solution

On October 3, 2008, EESA, which established TARP, was signed into law. Section 103(6) of EESA stated:

> In exercising the authorities granted in this Act, the Secretary shall take into consideration –
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> ...
>
> (6) providing financial assistance to financial institutions, including those serving low and moderate income populations and other underserved communities, and that have assets less than $1,000,000,000 that were well or adequately capitalized as of June 30, 2008, and that as a result of the devaluation of the preferred government-sponsored enterprises stock will drop one or more capital levels, in a manner sufficient to restore the financial institutions to at least an adequately capitalized level.[571]

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[568] *Id.*

[569] The only evidence of direct communication between Representative Waters' COS and Treasury is a series of emails in November 2008, where her COS forwards an outline of the NBA's proposed capital purchase program and attempts to assist the NBA set up a meeting with Treasury. The NBA correspondence is from the NBA Chairman and the NBA President. No individuals from OneUnited appear to be involved. A meeting was granted to the NBA after the Thanksgiving holiday.

[570] *See, e.g.*, COE.WAT.OC.012698; COE.WAT.OC.012666, attached hereto as Ex. 48.

[571] At the time the Wall Street Journal began investigating this matter, an email was circulated at the Treasury department about OneUnited. Initially, the Treasury Deputy Assistant Secretary of Public Affairs, states "Apparently this bank is the only one that has gotten money through section 103(6) of the EESA law. And Maxine Waters' husband is on the board of the bank." Later in the chain, the TARP program's deputy director, states that "OneUnited is a CDFI, which permits them to participate in CPP without issuing warrants to Treasury. They are by no means an exception in this regard – there are two other CDFIs that have already been funded under this arrangement." The Treasury Deputy Assistant Secretary Public Affairs further asked whether other banks were approved pursuant to section 103(6), to which the TARP program's deputy director responds "would we say that the CDFIs are approved under 103(6)?" (COE.WAT.OC.012679-012680, attached hereto as Ex. 49.) Whether any banks were specifically approved for TARP funds pursuant to section 103(6) may not be a question that can ultimately be answered because the Interim Assistant Secretary for Treasury for Financial Stability who made the ultimate decisions on the TARP applications testified that the investment committee evaluated all banks on one set of standards, and did not try to determine if a particular bank fit into one section of TARP or another. (Ass. Int. Treasury Sec. Dep. at 16, 21.)

One of the Financial Services Staffers testified that the Financial Services Committee "worked to include a provision in the TARP legislation that would allow Treasury to provide assistance to small-sized institutions, including under-served communities." She further testified that "[a]t the time that we were drafting the provision...we thought that there were up to 40 institutions that were of that size that may have been exposed because of the conservatorship that could have been impacted by that provision."[572]

The Chairman of the Financial Services Committee has publicly taken credit for this provision of the EESA legislation. In fact, he testified that he "urged the regulators to give to OneUnited and to some others because [he] believed that – as I said, economic disparity is a large part of our race problem."[573] He specifically stated that because of this language, he "intervened to urge" OneUnited to apply for TARP funds because "we made them eligible."[574]

OneUnited's Special Counsel/Chair-Elect of the NBA testified that he had worked on the language with many Members of Congress, including the Chairman of the Financial Services Committee and Representative Waters.[575]

I. Recapitalization of OneUnited

Following the government's conservatorship of Freddie and Fannie, OneUnited executives believed that the bank would fail unless it was able to find a way to recapitalize. The evidence in the record demonstrates that less than a month after the creation of TARP, OneUnited was able to raise enough capital to again be restored to an "adequately capitalized" status.

There were three elements to OneUnited's recapitalization efforts: 1) OneUnited needed to raise capital to be adequately capitalized and thus qualified to apply for TARP funds; 2) OneUnited needed to receive a waiver by the FDIC to allow certain tax credits to be counted towards Tier 1 capital; and 3) OneUnited needed to apply for and receive TARP funds.

1. Private Investment

OneUnited raised $17 million in private equity from State Street capital bank. After receiving these funds, the Chairman and CEO of OneUnited sent an email to Representative Waters and her COS, Special Counsel to the Chairman of the Financial Services Committee, a staffer on the Financial Services Committee and the Legislative Director for the Massachusetts' Senator that had been involved in this issue stating: "Thank you for your kindness and consideration in helping us to consummate this

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[572] FSC Staffer #2 Dep. at 107.

[573] FSC Chair Dep. at 53.

[574] *Id.* at 52-53.

[575] OU Counsel Dep. at 94.

transaction....the Bank is now adequately capitalized and we will be applying to the TARP program next week."[576]

Despite this email, the Chairman and CEO of OneUnited testified that he did not receive any help from anyone in Congress with raising private investment funds for OneUnited. Representative Waters testified that she had never seen the email and that she would be very surprised if anyone in her office had assisted since "office staff is not connected with monied sources. They don't raise money."[577] Her COS also stated that he provided no assistance to OneUnited in the raising of private equity.[578] Lending support to this testimony is the testimony of the Financial Services staffer who received this email and testified that the email was "a little confusing to me."[579] She continued by stating "we did insert a provision in the TARP legislation that addresses the situation that OneUnited and other smaller-sized institutions were in because of the conservatorship, so he may be referring to that. He may be referring to something else. I don't know."[580]

2. Tax Relief

The FDIC, as OneUnited's primary regulator, granted OneUnited a waiver to allow certain tax credits to count as capital. There is no evidence that Representative Waters, nor anyone on her staff, ever contacted the FDIC on this issue. In fact, in his deposition with Outside Counsel, Representative Waters' COS specifically denied any involvement with OneUnited's tax waiver request.[581] Further, the Director of Division of Supervision and Consumer Protection for the FDIC's testimony indicates that she recommended to the FDIC Board that the tax waiver be granted to OneUnited.[582]

3. TARP Funds

The FDIC also recommended that OneUnited receive TARP funds. In total 213 minority institutions received TARP funding.[583] There is no evidence that Representative Waters, nor anyone on her staff, ever contacted the FDIC on this issue.

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[576] CSOC.WAT.000791, attached hereto as Ex. 50.

[577] Rep. Waters Dep. at 45.

[578] *See* 7/5/12 Rep. Waters' COS Dep. at 74.

[579] FSC Staffer #2 Dep. at 94-95.

[580] *Id.* at 95. The TARP language likely assisted OneUnited secure its private investment as the TARP funds protected the private investment, however, that alone does not support a finding that anyone on Representative Waters' staff inappropriately assisted OneUnited to obtain its private funding through staff's general work on TARP or even section 103(6).

[581] *See* 7/5/12 Rep. Waters' COS Dep. at 75.

[582] *See* FDIC Director Dep. at 21-22.

[583] *See id.* at 40.

In fact, in his deposition with Outside Counsel, Representative Waters' COS specifically denied any involvement with OneUnited's TARP application.[584] OneUnited's Special Counsel/Chair-Elect of the NBA testified that he discussed OneUnited's TARP application with many members of Congress, including, he believed, Representative Waters' office, but he did not receive assistance from any members.[585] OneUnited ultimately received $12 million in TARP funds on December 19, 2008.

VI. LEGAL ANALYSIS OF SUBSTANTIVE ALLEGATIONS

A. Summary of Legal Analysis

Outside Counsel reviewed Representative Waters' conduct pursuant to the rules and standards of conduct applicable to using a Member's office for personal benefit and pursuant to the rules and standards of conduct generally applicable to contacting administrative agencies of the federal government. The Outside Counsel also reviewed Representative Waters' conduct pursuant to longstanding House precedent holding Members responsible for the oversight and administration of the Member's congressional office. Despite the fact that two and half years ago, the ISC in the Matter of Representative Waters for the 111th Congress determined that there were enough facts in the record to warrant an SAV in this matter, after a review of the facts by Outside Counsel and additional investigation, it is Outside Counsel's conclusion and recommendation to the Waters Committee that it cannot be proved by clear and convincing evidence that a knowing violation of the ethics rules or standards of conduct for Members of the United States House of Representatives occurred.

B. Relevant Rules and Standards of Conduct

1. Use of a Member's Office for Personal Benefit

As a general matter, Members are not barred "from holding assets that might conflict with or influence the performance of official duties."[586] Instead, the House recognizes that "some actual conflicts of interest are inevitable...and are not in themselves necessarily improper or unethical."[587] Under the House rules, Members are

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[584] *See* 7/5/12 Rep. Waters' COS Dep. at 75.

[585] *See* OU Counsel Dep. at 96.

[586] House Bipartisan Task Force on Ethics, *Report on H.R. 3360*, 101st Cong., 1st Sess. 22 (Comm. Print, Comm. On Rules 1989), *reprinted in* 135 *Cong. Rec.* H9253, H9259 (Daily ed. Nov. 21, 1989). Although the term "conflict of interest" may be subject to various interpretations in general usage, under federal law and regulation, this term "is limited in meaning; it denotes a situation in which an official's conduct of his office conflicts with his private economic affair." Robert S. Getz, *Congressional Ethics* 3 (1967); *see also* Bayless Manning, *Federal Conflict of Interest Laws* 2-5 (1964). The ultimate concern "is risk of impairment of impartial judgment, a risk which arises whenever there is a temptation to serve personal interest." Association of the Bar of the City of New York Special Comm. On Congressional Ethics, *Congress and the Public Trust* 39 (1970).

[587] *See* House Comm. On Standards of Official Conduct, *In the Matter of Representative Sam Graves*, H. Rep. 111-320, 111th Cong., 1st Sess. 15 (2009) (internal quotations and citations omitted).

permitted to take official action that results in a personal benefit to the Member, if the potential personal benefit is incidental to the Member's purpose in taking the action.[588] In contrast, a Member is barred from acting if a personal benefit is, or appears to be, one of the Member's reasons for taking the action.[589]

a. Official Action Resulting in Incidental Personal Benefit

There are several House and ethics rules that govern personal interest issues, which will be discussed in turn below.

First, under House Rule III, Members "shall vote on each question put, unless having a direct personal or pecuniary interest in the event of such question."[590] Just as Members may vote on legislation that affects them as members of a class rather than as individuals, they may also generally contact federal agencies on issues in which they, along with their constituents, have an interest.[591] "A constituent need not be denied congressional intercession merely because a Member...may stand to derive some incidental benefit along with others in the same class."[592] However, the 2008 *House Ethics Manual* counsels Members that official actions "such as sponsoring legislation, advocating or participating in an action by a House committee, or contacting an executive branch agency...entail a degree of advocacy above and beyond that involved in voting."[593] For this reason, "a Member's decision on whether to take any such action on a matter that may affect his or her personal financial interest requires added circumspection."[594]

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[588] *House Ethics Manual*, at 314 ("A constituent need not be denied congressional intercession merely because a Member or the staff assistant assigned to a particular issue may stand to derive some incidental benefit along with others in the same class. Thus, Members who happen to be farmers may nonetheless represent their constituents in communicating views on farm policy to the Department of Agriculture. Only when Members' actions would serve their own narrow, financial interests as distinct from those of their constituents should the Members refrain.").

[589] *House Ethics Manual*, at 187. In addition to restrictions against the use of a Member's office for direct personal benefit, there are also a few specific circumstances when a Member must refrain from acting because of a conflict of interest. For example, federal law prohibits Members, officers, and employees from privately representing others before the federal government. 18 U.S.C. § 203. Additionally, the Code of Ethics states that government employees should "engage in no business with the Government, either directly or indirectly which is inconsistent with the conscientious performance of his governmental duties." Code of Ethics for Government Service, section 7.

[590] House Rule III.

[591] (*House Ethics Manual*, House Comm. On Standards of Official Conduct, 110th Congress, 2nd Sess. (2008 ed.) (hereinafter 2008 *House Ethics Manual*) at 314).

[592] *Id.*

[593] *Id.* at 237.

[594] *Id.*

A conflict of interest becomes problematic when a Member uses his position for the purpose of enhancing his personal financial interests or his personal financial interest impairs his judgment in conducting his public duties.[595] Thus, only when a Member's actions would serve his own narrow financial interests, as distinct from those of his constituents, should a Member refrain from acting.[596] "Historically, there is no authority to force a House Member to abstain from voting, and the decision on whether abstention from voting was necessary has been left to individual Members to determine for themselves under the circumstances."[597] While the House has never barred a Member from voting on a matter due to a possible personal benefit, the House has reprimanded Members for taking other action for personal benefit.[598]

Members may take official action that incidentally results in a personal benefit because they are required to make public disclosure of assets, financial interests, and investments.[599] "The House has required public financial disclosure by rule since 1968, and by statute since 1978." (*2008 Ethics Manual* at 251.) The House has determined that incidental conflicts of interest "are best resolved by the political process."[600] Public disclosure of assets, financial interest, and investments is intended to regulate possible conflicts of interest to "provide the information necessary to allow Members' constituencies to judge their official conduct in light of possible financial conflicts with private holdings."[601] Thus, the timely filing of complete and accurate Financial Disclosure Statements is essential to the political process and is fundamental to the House ethics system.[602]

b. Use of Office for Personal Benefit

The House Rules and other standards governing Members' conduct prohibit a Member from using, or appearing to use, his official position for personal benefit.[603]

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595 House Bipartisan Task Force on Ethics, *Report on H.R. 3360*, 101st Cong. 1st Sess. 22 (Comm. Print, Comm. On Rules 1989), *reprinted in* 135 *Cong. Rec.* H9253, H9259 (daily ed. Nov. 21, 1989).

596 *2008 House Ethics Manual*, at 314.

597 *Id.* at 238, *citing 5 Hinds' Precedents of the House of Representatives* §§ 5950, 5952 at 502, 503-04 (1907).

598 *See, e.g.*, Comm. On Standards of Official Conduct, *In the Matter of a Complaint Against Representative Robert L.F. Sikes*, (hereinafter *Sikes*) H. Rep. 94-1364, 94th Cong., 2d Sess. 3 (1976).

599 (House Rule XXVI; Title I of the Ethics in Government Act of 1978 (5 U.S.C. App. §§ 101-111.)

600 House Comm. On Standards of Official Conduct, *In the Matter of Representative Sam Graves*, (hereinafter *Graves Report*) H. Rep. 111-320, 111th Cong., 1st Sess. 15 (2009).

601 *Id.*

602 *Id.* at 15-16.

603 House Rule XXIII, clause 3; Code of Ethics for Government Service, section 5; *see also Sikes*, at 3; *2008 House* Ethics *Manual*, at 187 ("One of the purposes of the rules and standards [of conduct relevant to use of a Member's office for personal benefit] is to preclude conflict of interest issues.")

Under the Code of Ethics for Government Service ("Code of Ethics")[604], a federal official, including a Member, shall:

> Never discriminate unfairly by dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.[605]

Because the Code of Ethics measures a Member's conduct by "what might be construed by reasonable persons," a Member may violate this provision even if the Member's actions merely raise the appearance of impropriety.[606]

The House Rules also prohibit Members from "receiv[ing] compensation and...permit[ing] compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress.[607] A Member would violate this provision if the Member used the Member's "political influence, the influence of his position...to make pecuniary gains."[608]

Moreover, "when considering the applicability of this provision to any activity they are considering undertaking," Members "must also bear in mind that under a separate provision of the code of Official Conduct (House rule 23, cl.2), they are required to adhere to the spirit as well as the letter of the Rule of the House."[609] House Rule XXIII, clause 2, was drafted to "provide the House the means to deal with infractions that rise to trouble it without burdening it with defining specific charges that would be difficult to state with precision."[610] The practical effect of House Rule XXIII,

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[604] 72 Stat., Part 2, B12, H. Res. 175, 85th Cong. (adopted Jul 11, 1958).

[605] Code of Ethics, ¶ 5.

[606] Comm. on Standards of Official Conduct, *In the Matter of Representative Mario Biaggi*, (hereinafter *Biaggi*) H. Rep. 100-56, 100th Cong. 2d Sess. 9 (Feb. 18, 1988) ("While the Committee does not argue, nor can it be determined, that Representative Biaggi would not have interceded on behalf of Coastal in the absence or because of Esposito's gratuities to the congressman, it is nevertheless clear that at a minimum, an appearance is raised that such was the case. Accordingly, the Committee concluded that such improper appearance supports a determination that Representative Biaggi violated clause 5 of the Code of Ethics.").

[607] House Rule XXIII, clause 3.

[608] 114 *Cong. Rec.* 8807 (Apr. 3, 1968) (statement of Representative Price).

[609] *2008 House Ethics Manual*, at 186. In addition to House rule XXIII, clause 3, and Code of Ethics, section 5, Members should also be mindful that official resources, including congressional staff, must be used for official business and should not be used to do the work of private entities.

[610] 114 *Cong. Rec.* 8778 (Apr. 3, 1968); *see also* 114 *Cong. Rec.* 8799 (statement of Representative Teague, member of the House Comm. on Standards of Official Conduct, 90th Cong.).

clause 2, has been to provide a device for construing other provisions of the Code of Official Conduct and House Rules.[611] This rule has been interpreted to mean that a Member or employee may not do indirectly what the Member or employee would be barred from doing directly.[612] In other words, the House Rules should be read broadly, and a narrow technical reading of the House Rules should not overcome its "spirit" and the intent of the House in adopting the rules.[613]

When assessing whether a Member has taken official action for personal benefit, the Committee will take into consideration the nature of the benefit,[614] the people or entities that could benefit from the official action,[615] and the Member's motive in taking the action.[616] A Member may not take official action if the Member is motivated, or appears to be motivated, to take the action by the personal benefit that may accrue to the Member.[617] When determining a Member's motive in taking official action, the Committee asks whether there is "direct evidence that the congressman had any such improper motive."[618]

The House has applied the prohibition on taking official action for personal benefit in situations where the potential personal benefit would accrue to an investment held by the Member.[619] For example, in the Committee's report *In the Matter of a Complaint against Representative Robert L.F. Sikes*, the Standards Committee found

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[611] 2008 *House Ethics* Manual, at 17.

[612] House Select Comm. on Ethics, *Advisory Opinion 4*, Rep. 95-1837, 61-62, 95th Cong., 2d Sess. (1979).

[613] *Id.* House rule XXIII, clause 2, has not only been used as an aid to interpreting other House rules. For example, the Committee has cited the violation of House Rule XXIII, clause 2, several times in recommending expulsion of Members for various reasons. *See, e.g.*, House Comm. on Standards of Official Conduct, *In the Matter of Representative Michael J. Myers*, H. Rep. 96-1387 96th Cong., 2d Sess. 5 (1980) (member convicted of bribery); House Comm. on Standards of Official Conduct, *In the Matter of Representative Raymond F. Lederer*, H. Rep. 97-110 97th Cong., 1st Sess. 16 n.8 (1981) (Member convicted of bribery); *Biaggi*, at 7 (Member convicted of accepting illegal gratuities); House Comm. on Standards of Official Conduct, *In the Matter of Representative James A. Traficant Jr.*, H. Rep. 107-594, 107th Cong., 2d Sess. Vols. 1-VI (July 19, 2002) (Member convicted of conspiring to violate the bribery statute, accepting gratuities, obstructing justice, conspiring to defraud the United States, filing false income tax returns and racketeering).

[614] *See, e.g.*, House Comm. on Standards of Official Conduct, *Investigation of Financial Transactions Participated in and Gifts Accepted by Representative Fernand J. St. Germain*, (hereinafter *St. German*) H. Rep. 100-46, 100th Cong., 1st Sess. 43 (1987).

[615] *Graves*, at 19; *Sikes*, at 28.

[616] *St. Germain*, at 43.

[617] *Id.*

[618] *Id.*

[619] 3 *Deschler's Precedents of the United States House of Representatives*, ch. 12 § 8.4, 1714 (1994).

that when Representative Sikes sought to purchase shares of a privately held bank "which he had been active in his official position in establishing" he failed to observe:

> The standard of ethical conduct...as is expressed in principle in Section 5 of the Code of Ethics for Government Service, and which prohibits any person in Government service from accepting for "himself...benefits under circumstances which might be construed be reasonable persons as influencing the performance of his governmental duties."[620]

The Committee further found that Representative Sikes failed to observe "[t]he standard of ethical conduct that should be observed by Members of the House, as is expressed in principle in the Code of Ethics for Government Service, and which prohibits conflicts of interest and the use of an official position for any personal benefit," when he sponsored legislation to remove a reversionary interest and restrictions on land in which he had a personal financial interest.[621]

2. Contacts with Administrative Agencies of the Federal Government

In most circumstances, arranging for a meeting with an administrative agency is an appropriate use of a Member's official position.[622] The Committee has long recognized that acting as a "go-between" or conduit between a Member's constituents and administrative agencies of the federal government is an important aspect of a Member's representative function.[623] The Constitution guarantees all citizens the right to petition the government for redress of grievances, and a logical point of contact is one's elected representative.[624] Of course, when acting as a conduit between a Member's constituents and administrative agencies of the federal government, a Member's conduct is bound by certain statutory and judicial restrictions.[625] Moreover, when taking any such action, a Member "must also observe certain ethical principles."[626]

Federal law specifically prohibits *ex parte* communications directed to executive or independent agency officials on the merits of matters under their formal

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[620] *Sikes*, at 3.

[621] *Id.* at 4.

[622] *Advisory Opinion No. 1.*

[623] *2008 House Ethics Manual*, at 299.

[624] U.S. Const., amend. I; *see also McCormick v. United States*, 500 U.S. 257, 272 (1991) ("Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator.").

[625] *See, e.g.*, 5 U.S.C. § 557(d); *Pillsbury Co. v. FTC*, 354 F.2d 952, 963 (5th Cir. 1966).

[626] *2008 House Ethics Manual*, at 300; *see also, e.g., Advisory Opinion No. 1.*

consideration.[627] The proscription against *ex parte* communications does not extend to "general background discussions about an entire industry which do not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole."[628] The statute also specifically exempts congressional status requests.[629] "While the prohibitions on *ex parte* communications relative to the merits apply to communications from Members of Congress, they are not intended to prohibit routine inquiries or referrals of constituent correspondence."[630]

In addition to statutory and judicial restrictions on acting as a conduit between a Member's constituents and administrative agencies of the federal government, Congress has also adopted standards that recognize the legitimate role of a Member in assisting constituents, while protecting both the due process rights of parties potentially affected by government action and the ability of agency officials to exercise their responsibilities.[631]

The Committee expressed its longstanding guidance on communicating with executive and independent agencies of the federal government in its Advisory Opinion No. 1. In this opinion, the Committee stated that it is appropriate for a Member to act as a conduit between a Member's constituents and federal government agencies by arranging for interviews or appointments with federal government agencies.[632] The Committee noted that the "overall public interest...is primary to any individual matter and should be so considered."[633] Advisory Opinion No. 1 further set forth the following "self-evident" standards of conduct:

1. A Member's responsibility in this area is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations.

2. Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role.

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[627] 5 U.S.C. § 557(d). Such communications are defined as oral or written communications made without proper notice to all parties and not on the public record, from an interested person outside the agency to a member of the agency, an administrative law judge, or an employee involved in the decision-making process. 5 U.S.C. § 551(14).

[628] House Comm. on Gov't Operations, *Government in the Sunshine Act*, H. Rep. 94-880, 94th Cong., 2d Sess., pt. I, at 20 (1976).

[629] *See* 5 U.S.C. §551(14); *see also* Government in Sunshine Act, S. Conf. Rep. 94-1178, 94th Cong., 2d Sess. 29 (1976).

[630] H. Rep. 94-880, at 21-22.

[631] *See generally 2008 House Ethics Manual*, at 305.

[632] *See Advisory Opinion No. 1.*

[633] *Id.*

3. A Member should make every effort to assure that representation made in his name or by any staff employee conform to his instruction.[634]

The Committee has further stated that a "legislator's expressions of interest" are not sufficient to show that a Member used undue influence" in contacting an administrative agency of the federal government."[635] A finding of influence should not be based on "pure inference or circumstance or, for that matter, on the technique and personality of the legislator."[636] Instead, a finding of undue influence "must be based on probative evidence that a reprisal or threat to agency officials was made."[637]

In the *2008 House Ethics Manual*, the committee further advised: "[w]hen communicating with an agency, Members and staff should only assert as fact that which they know to be true."[638] The *2008 House Ethics Manual* warns Members that "[i]n seeking relief, a constituent will naturally state his or her case in the most favorable terms...Thus, a Member should exercise care before adopting a constituent's factual assertions."[639] For this reason, the *House Ethics Manual* suggests that "[a] prudent approach in any communication would be to attribute factual assertions to the constituent."[640]

A Member should "[n]ever discriminate unfairly by the dispensing of special favors or privileges to anyone."[641] A Member's obligations are to all constituents equally. Considerations such as political support, party affiliation, or campaign contributions should not affect either the Member's decision to provide assistance or the quality of help that is given.[642] While a Member should not discriminate in favor of political supporters, neither should the Member discriminate against them.[643] "The fact that a constituent is a campaign donor does not mean that a Member is precluded from

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[634] *Id.*

[635] House Comm. on Standards of Official Conduct, *Statement in the Matter of James C. Wright, Jr.*, 101st Cong., 1st Sess. 84 (1989).

[636] *Id.*

[637] *Id.*

[638] *2008 House Ethics Manual*, at 307.

[639] *Id.*

[640] *Id.*

[641] Code of Ethics for Government Service, ¶ 1.

[642] *Advisory Opinion No. 1.*

[643] House Comm. on Standards of Official Conduct, *Statement Regarding Complaints Against Representative Newt Gingrich*, 101st Cong., 2d Sess. 66 (1990).

providing any official assistance. As long as there is no *quid pro quo*, a Member is free to assist all persons equally."[644] The Committee has warned that providing official assistance in some instances, such as acting as a conduit between an administrative agency and a donor to the Member's campaign, may "raise an appearance of impropriety."[645] In such instances, the Committee has warned Members to "be aware of the appearance of impropriety that could arise from championing the causes of contributors and take care not to show favoritism to them over other constituents."[646]

In addition to acting as a conduit between a Member's constituents and administrative agencies of the federal government, Members may also assist individuals from outside of the Member's district.[647] However, a Member's ability to provide assistance to individuals from outside of the Member's district is more limited. In particular, the statute establishing the Member's Representational Allowance provides that the purpose of the allowance is "to support the conduct of the official and representational duties of a Member of the House of Representatives with respect to the district from which the Member is elected."[648] This statute does not absolutely prohibit a Member from ever responding to a non-constituent. As the Committee has stated:

> In some instances, working for non-constituents on matters that are similar to those facing constituents may enable the Member to better serve the Member's district. Other times, the Member may serve on a House committee that has the expertise and ability to provide the requested help. Of course, if a Member has personal knowledge regarding a matter or an individual, he or she may always communicate that knowledge to agency officials. As a general matter, however, a Member should not devote official resources to casework for individuals who live outside the district. When a Member is unable to assist such a person, the Member may refer the person to his or her own Representative or Senator.[649]

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[644] *Id.*

[645] *2008 Ethics Manual*, at 309 (*citing* Senate Select Comm. on Ethics, *Investigation of Senator Alan Cranston*, S. Rep. 102-223, 102d Cong., 1st Sess. 11-12 (1991)).

[646] *2008 House Ethics Manual*, at 309.

[647] *Id.*

[648] 2 U.S.C. ¶ 57b; *see also* Comm. on House Admin., U.S. House of Representatives, *Members' Congressional Handbook*, Regulations Governing the Members' Representational Allowance (2001).

[649] *2008 House Ethics Manual*, at 310.

3. Member's Responsibility for Oversight and Administration of Congressional Staff

Members are responsible for the oversight and administration of the Member's congressional office.[650] Under longstanding House precedent, "Members are responsible for the knowledge and acts acquired or committed by their staff within the course and scope of their employment."[651] "Many times Members act through the actions of their staff and, therefore, should be held liable for those actions in certain circumstances."[652] This is because "it would not well serve the House as an institution to allow its Members to escape responsibility by delegating authority to their staff to take actions and hide behind their lack of knowledge of the facts surrounding these actions.[653]

There are several instances where this Committee has held a Member liable and recommended disciplinary findings and sanctions for the actions of the Member's staff.[654] In this instance, such a finding would be appropriate if Representative Waters' COS *knowingly* violated the conflict rules, or if Representative Waters had taken no steps to prevent such conflicts. However, as discussed above, Representative Waters took the affirmative step to inform her Chief of Staff of her conversation with the Chairman of the Financial Services Committee, during which time she determined that neither she, nor her staff, should specifically assist only OneUnited.

4. Clear and Convincing Standard Applicable to Committee Hearings

In conducting our review and formulating our conclusions and recommendations, Outside Counsel was mindful of the clear and convincing evidentiary

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[650] *Gingrich*, at 60.

[651] *See* House Comm. on Standards of Official Conduct, *In the Matter of the Investigation into Officially Connected Travel of House Members to Attend the Carib News Foundation Multinational Business Conferences in 2007 and 2008* (hereinafter *Carib News*), H. Rep. 111-422, 111th Cong., 2d Sess. 122 (2010).

[652] *Id.* at 126.

[653] *Id.* at 125-126.

[654] *See, e.g.*, Comm. on Ethics, *In the Matter of Allegations Relating to Representative Laura Richardson*, H. Rept. 112-642, 112th Cong. 2d Sess. at 93 (August 1, 2012) ("Longstanding precedent of the Committee holds that each Member is responsible for assuring that the Member's employees do not violate this rule, and Members may be held responsible for any violations occurring in his or her office"); Comm. On Standards of Official Conduct, *In the Matter of Representative E.G. "Bud" Shuster*, H. Rep. 106-979, 106th Cong. 2d Sess. 31 (2000) (Member held liable for violations of prohibition on campaign work by official staff arising from lack of uniform leave policy); *Statement Regarding Complaints Against Representative Newt Gingrich*, 101st Cong. 2s Sess. 60, 165-66 (1990) (Member held responsible for violations arising out of presence of political consultant in his office); *In the Matter of Representative Austin J. Murphy*, H. Rep. 100-485, 100th Cong. 1st Sess. 4 (1987) ("a Member must be held responsible to the House for assuring that resources provided in support of his official duties are applied to the proper purposes").

standard that is applicable to Committee Hearings. Specifically, Committee Rule 23(c), which governs Adjudicatory Hearings, states the following:

> The adjudicatory subcommittee shall hold a hearing to determine whether any counts in the Statement of Alleged Violation have been proved by clear and convincing evidence and shall make findings of fact, except where such violations have been admitted by respondent.[655]

While there is no Committee precedent describing this standard, federal case law, while not binding on the Committee, can be used to illustrate what this standard requires. In the Judicial branch, a clear and convincing standard requires that the finder of fact determine that the evidence demonstrates a high probability that the violation occurred.[656]

Upon review of the House and Committee Rules, as well as the evidentiary standard governing this Matter, as will be discussed below, it is the recommendation of Outside Counsel that the record does not contain clear and convincing evidence to prove an ethical violation by Representative Waters.

C. Discussion

1. Representative Waters did not Violate Any Rules or Other Standards of Conduct by Arranging the Meeting with Treasury

Upon the completion of its review, Outside Counsel has concluded and is recommending to the Waters Committee that Representative Waters did not violate any rule or other standards of conduct when she arranged for the September 9, 2008, meeting with Treasury because Representative Waters believed she was arranging the meeting due to the impact of the Conservatorship on a large group of MDIs, and thus any potential personal benefit she may have received from the meeting was only incidental to her purpose in arranging the meeting.

On December 31, 2007, Representative Waters' husband held approximately $350,000 in OneUnited stock.[657] His stock was less than a 0.5% interest in the bank and

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[655] Comm. Rule 23(c).

[656] *See, e.g., Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d. 1348, 1349 n.5 ("The 'clear and convincing' standard is an intermediate standard which lies somewhere in between the 'beyond a reasonable doubt' and the 'preponderance of the evidence' standards of proof. Although an exact definition is elusive, 'clear and convincing evidence' has been described as evidence that 'place[s] in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable'") (citing *Colorado v. New Mexico*, 467, U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 425 (1979)); *see also In re Genetically Modified Rice Litig.*, 666 F.Supp.2d 1004, 1030 (E.D. No. 2009) ("Clear and convincing evidence is evidence that 'instantly tilts the scales in the affirmative when weighed against evidence in opposition; evidence which clearly convinces the fact finder of the truth of the proposition to be proved") (applying Missouri law).

[657] COE.WAT.OC.015272.

accounted for somewhere between 4.6% and 15.2% of his and Representative Waters' combined net worth.[658] On June 30, 2008, Representative Waters' husband's OneUnited stock was still valued at approximately $350,000. However, in September 2008, when the GSEs were placed into conservatorship, OneUnited incurred unrealized losses on their investments in Fannie Mae and Freddie Mac preferred stock that effectively wiped out all of OneUnited's Tier 1 capital and threatened the existence of the bank.[659] Because of this event, Representative Water's husband's investment in OneUnited immediately lost more than half its value,[660] and if the bank failed, he would have lost all of the stock's value.

Immediately after the GSEs were placed into conservatorship, OneUnited executives, one of whom played a dual role and also represented the NBA as the Chair-Elect, asked Representative Waters to arrange a meeting with Treasury, and asked her COS, to coordinate the meeting.[661] In both written and verbal conversations with Representative Waters, the OneUnited executives told her that they were contacting her on behalf of the NBA and that the conservatorship threatened the existence of a large group of MDIs.[662] They further told her that the purpose of the meeting with Treasury would be to discuss the impact of the conservatorship on this large group.[663]

Based upon those representations, Representative Waters called the former Treasury Secretary to request a meeting on behalf of the minority bankers and, once the meeting was granted, asked her COS to coordinate the meeting.[664] The next day, several OneUnited executives, one of whom was also the Chair-Elect and Chair of the Legislative Committee of the NBA, an attorney who served as counsel for both NBA and

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[658] COE.WAT.OC.015207.

[659] *See* OU Counsel Dep. at 32, 72; OU COO Dep. at 20; FDIC Director Dep. at 14.

[660] *See* CSOC.WAT.ONEUN.00000679.

[661] *See* Rep. Waters Dep. at 19, 30-31; Rep. Waters' COS Dep. at 66.

[662] *See* COS.MW.FRANK.48-COS.MW.FRANK.49; Rep. Waters' COS Dep. at 66; Rep. Waters Dep. at 19, 30-31.

[663] *See* Rep. Waters Dep. at 19, 30-31; Rep. Waters' COS Dep. at 66. As discussed *supra*, a Member must "exercise care before adopting a constituents' factual assertions" when communicating with an agency. 2008 House Ethics Manual, at 307. In this case, the record indicates that Representative Waters' told the former Treasury Secretary that the minority banks "appeared" to be in trouble. (Rep. Waters Dep. at 11.) While the former Treasury Secretary stated that "there are banks and minority banks that have bought preferred stocks of government-sponsored enterprises thinking they were going to be good money; now... you've taken this step and wiped them out, and so she was concerned about that." (Former Treasury Sec. Dep. at 12.) Thus the record is not clear that she adopted her constituents statements, or if she attempted to limit her conversation to conveying the information given to her and properly attributing the information to the minority banks. Thus, it is Outside Counsel's recommendation that the Waters Committee determine that the record does not contain clear and convincing evidence to demonstrate a violation by Representative Waters with respect to her call to the Former Treasury Secretary.

[664] *Id.*

OneUnited, Representative Waters' COS, and staffers for the Financial Services Committee and a Massachusetts Senator's staffer met with high ranking representatives from Treasury and various bank regulators.[665]

At the meeting, the Treasury officials had a general discussion of the conservatorship. Special Counsel for OneUnited/Chair-Elect of the NBA and others discussed the overall effect of the conservatorship on minority banking institutions in general. Ultimately, the Chairman and CEO of OneUnited discussed the impact the conservatorship had on OneUnited as an example of the effect on minority banks, but then specifically requested $50 million for OneUnited as a buy-back of its Freddie and Fannie shares of preferred stock. [666]

Based on this evidence, the Outside Counsel is advising the Committee that the rules and standards of conduct related to use of a Member's official position for personal benefit did not bar Representative Waters from arranging the September 9, 2008, meeting. Representative Waters serves on the Financial Services Committee, and in that capacity has a long history of assisting MDIs and working with the NBA.[667] Additionally, the evidence demonstrates that MDIs, including OneUnited, serve Representative Waters' district.[668] Thus, her constituents have an interest in MDIs.[669] Moreover, overwhelming evidence supports the conclusion that, at the time she requested the meeting with Treasury, Representative Waters believed that she was arranging the meeting on behalf of all NBA member banks and not just OneUnited.[670]

Outside Counsel also concluded that when Representative Waters arranged for the September 9, 2008, meeting with Treasury, she did not violate any House Rule or other standard of conduct generally applicable to contacting administrative agencies of the federal government on behalf of constituents. Instead, Representative Waters' conduct to the extent it was limited to requesting a meeting, appeared to conform to the Committee's longstanding guidance on communicating with executive and independent agencies of the federal government on behalf of constituents.

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[665] COS.MW.FRANK.50.

[666] *See, e.g.*, FDIC Director Dep. at 17-23; OU CEO Dep. at 45.

[667] *See* Rep. Waters Dep. at 6, 15; NBA President Dep. at 16; OU Counsel Dep. at 18-20.

[668] *See* OU Counsel Dep. at 20.

[669] *See* Rep. Waters Dep. at 49.

[670] *See* Rep. Waters' COS Dep. at 66; Rep. Waters Dep. at 11, 30-31; Former Treasury Sec. Dep. at 9-10; CSOC.WAT.ONEUN.00000373; COS.MW.FRANK.48; COS.Mw.FRANK.99; COS.MW.FRANK.53.

2. Representative Waters Recognized that she should not take any Official Action to Assist OneUnited to Directly Receive Money

As noted above, Representative Waters, through her husband, had a financial interest in OneUnited.[671] At some point in September 2008, Representative Waters had a conversation with the Chairman of the Financial Services Committee regarding the effect of the Conservatorship on OneUnited.[672] While Outside Counsel is unable to conclusively determine the exact date this conversation took place, based on the testimony in the record, it is Outside Counsel's conclusion that the conversation likely took place sometime in the time period between September 9 and September 20, 2008. During the course of the conversations, the Chairman of the Financial Services Committee was not aware of Representative Waters' financial interest in the bank, but still told Representative Waters that she did not "have to worry about them being abandoned because this is an issue that I care about and it is in my region. So I plan to be very helpful to them, and I recommend that you stay out of it."[673] Representative Waters agreed with the Chairman of the Financial Services Committee's suggestion, and decided that because of her interest in the bank, she "shouldn't be involved with that."[674]

Outside Counsel has determined that Representative Waters' decision that she could arrange for a meeting between representatives of the NBA and Treasury, but should not later advocate to Treasury solely on behalf of a bank in which she had a financial interest was an appropriate interpretation of the rules and standards of conduct relevant to use of a Member's office for personal benefit.

As discussed above, simply having a personal financial interest in the subject matter of the September 9, 2008, Treasury meeting was not sufficient to bar Representative Waters from contacting Treasury to arrange the meeting if that interest was incidental to Representative Waters' purpose in arranging the meeting.[675] However,

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[671] Representative Waters fully and accurately disclosed her interest in OneUnited on her Financial Disclosure Statements. *See* Representative Waters' 2008 Financial Disclosure Statement; *see also* Representative Waters' 2007 Financial Disclosure Statement; Representative Waters' 2006 Financial Disclosure Statement; Representative Waters' 2005 Financial Disclosure Statement. Further demonstrating her attempts to be transparent about her husband's investment in OneUnited, during an October 2007 Financial Services subcommittee hearing, Representative Waters disclosed that her husband was a current board member and a shareholder of OneUnited. She did so both on the record and in a statement she submitted for the record. Representative Waters stated on the record that the she was making the disclosures, regardless of whether she was required to do so, because "I think we should always put it in the record."

[672] *See* FSC Chair Dep. at 19-20; Waters Dep. at 26-27.

[673] FSC Chair Dep. at 19-20.

[674] Rep. Waters Dep. at 53.

[675] *2008 House Ethics Manual*, at 314.Outside Counsel notes that the record does not support by clear and convincing evidence that Representative Waters violated any of the express prohibitions on Members acting due to a conflict of interest. (Rep. Waters Dep. at 11; Former Treasury Sec. Dep. at 9-10.)

once Representative Waters learned that executives of OneUnited were seeking money specifically for only OneUnited bank, she properly recognized that she should not advocate solely on behalf of that bank due to her financial interest.[676]

Representative Waters' husband had previously served on the board of OneUnited, and Representative Waters, through her husband, had a financial interest in OneUnited of approximately $350,000.[677] While his service on the board and ownership of stock, standing alone, do not create a violation, these facts coupled with any actions perceived to be taken solely on behalf of OneUnited create an appearance of impropriety. Representative Waters properly appears to have considered these factors when determining whether her assistance to the bank had the potential to create an appearance of impropriety.[678] Based on the facts of this case, the Outside Counsel concluded that, if Representative Waters assisted the bank in a direct request for financial assistance from Treasury, it would create an appearance of impropriety because reasonable persons might construe these factors as influencing Representative Waters' decision to assist the bank.[679] For these reasons, any such assistance would be contrary to at least the spirit, if not the letter, of the House rules and other standards of conduct relevant to use of a Member's office for personal benefit. However, after careful review of the record in this matter, Outside Counsel concludes and recommends to the Waters Committee that Representative Waters properly recognized that she should not take any official action to assist OneUnited to directly receive money. As such, there is not clear and convincing evidence in the record that Representative Waters violated any House rule or other standard of conduct.

3. Representative Waters' Chief of Staff Communicated Solely on Behalf of OneUnited in Two Circumstances

If Representative Waters was unable to advocate solely on behalf of OneUnited's financial interest, her staff was also barred from advocating solely on behalf of the bank as well.[680] After Representative Waters concluded that she should not advocate on

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[676] *See* FSC Chair Dep. at 19-24; Rep. Waters Dep. at 53.

[677] *See* COS.WATERS.90; CSOC.WAT.ONEUN.0000002; CSOC.WAT.ONEUN.00000001; CSOC.WAT.ONEUN. 571; CSOC.WAT.ONEUN.00000679. Outside Counsel notes that the Chairman and CEO of OneUnited, as well as the President of OneUnited donated money to Representative Waters' campaign and hosted a fundraiser for her as well. (OU COO Dep. at 10-11; OU CEO Dep. at 12; Rep. Waters Dep. at 8-9.) A Member assisting a donor is not, on its own, improper. *See, e.g., McCormick v. United States*, 500 U.S. 257, 272 (1991). However, Members "should be aware of the appearance of impropriety that could arise from championing the causes of contributors and take care not to show favoritism to them over other constituents." *2008 House Ethics Manual* at 309. Outside Counsel has concluded that Representative Waters acted appropriately in connection with any actions she took on behalf of the NBA.

[678] *See* Code of Ethics, section 5; *2008 House Ethics Manual*, at 237.

[679] *See* Code of Ethics, section 5.

[680] *See generally St. Germain*, at 43 (assessing whether a Member, who was the chairman of the Committee on Banking, Finance and Urban Affairs, improperly attempted to influence the Federal Home Loan Bank Board when a staffer for the Banking Committee made telephone calls to the

behalf of OneUnited, her COS continued to have contact with OneUnited executives regarding the legislative solution being sought by minority and community banks. Her COS characterized his communications with the Chairman and CEO of OneUnited and OneUnited's Special Counsel/Chair-Elect of the NBA as "FYI's that I was sent."[681]

While Outside Counsel believes that Representative Waters' COS's level of involvement went beyond that of a passive recipient, it is Outside Counsel's opinion that, with two exceptions discussed below, the evidence does not establish by a clear and convincing standard that he was knowingly acting only on behalf of OneUnited, and not also on behalf of the larger community of minority and community banks.[682] Further, the evidence in the record is unclear as to when the two specific actions that have been identified that were taken solely on behalf of OneUnited[683] occurred with relation to the conversation between Representative Waters and her Chief of Staff. Outside Counsel could not determine from the record whether the two emails sent on behalf of OneUnited by Representative Waters' COS occurred prior to or following the conversation between Representative Waters and her COS. Outside Counsel believes this is an important determination as it represents the clearest instance when Representative Waters' COS should have learned that a conflict existed between Representative Waters and OneUnited. However, as discussed previously, there is evidence in the record to indicate that Representative Waters' COS should have known of the conflict with OneUnited prior to his conversation with Representative Waters.[684] Once her COS became aware of the conflict, he should have refrained from taking any further action solely on behalf of OneUnited.

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chairman of the Bank Board); *see also Carib News* at 125-126 ("it would not well serve the House as an institution to allows its Members to escape responsibility by delegating authority to their staff to take actions and hide behind their lack of knowledge of the facts surrounding these actions.").

[681] Rep. Waters' COS Dep. at. 30.

[682] *See* 7/5/12 Rep. Waters' COS Dep. at 66-67; FSC Chair Dep. at 34-35; FSC Staffer #2 Dep. at 17; *see also* FSC Sr. Policy Dir. at 21 (testified to receiving complaints from many outside groups that TARP would not do enough to help small institutions); FSC Chair's Counsel Dep. at 40 (testified to having conversations with ICBA and Massachusetts Bankers regarding the conservatorship because it was a larger issue than simply a OneUnited issue).

[683] These two actions include the September 19, 2008, email sent by Representative Waters' COS to a staffer on the Financial Services Committee with the subject line "OU is in trouble," and the forwarding of the chart regarding OneUnited's investment in GSEs to a Financial Services Committee staffer on September 23, 2008. *See* COS.MW.FRANK.44; CSOC.WAT.001806-1807. As discussed previously, because OneUnited was part of a larger class of banks affected by the financial crisis, there is no violation of any House Rules or other standards of conduct with respect to assisting the entire class. However, there is nothing in these two email communications to demonstrate, nor is there any other evidence in the record to support, that these emails were sent on behalf of the larger class as opposed to solely being sent on behalf of OneUnited.

[684] Ultimately, the Waters Committee will need to make a credibility determination regarding Representative Waters' COS' testimony regarding his knowledge, or lack thereof, of the conflict between Representative Waters and OneUnited.

At the time the two emails were sent on behalf of OneUnited by Representative Waters' COS, he testified that he could not recall if he was aware of Representative Waters' husband's financial interest in OneUnited at that time.[685] There is evidence in the record to demonstrate that Representative Waters made her COS aware that she should not take any action to specifically assist OneUnited, although the timing of that conversation is not clear from the record. Finally, there is no evidence in the record to indicate that Representative Waters was aware of the communications between her COS and anyone associated with OneUnited. As such, Outside Counsel recommends that the evidence in the record does not support by clear and convincing evidence that Representative Waters failed to exercise proper oversight of her COS.

Outside Counsel's review demonstrates that Representative Waters' COS had the following communications with executives of OneUnited or otherwise took the following actions on behalf of OneUnited:

- September 19, 2008, email to a Financial Services staffer stating that "OU is in trouble."[686]
- September 20, 2008, Representative Waters' COS forwarded the first draft of the legislation that ultimately became the EESA legislation to the Chairman and CEO of OneUnited.[687]
- On September 23, 2008, Representative Waters' COS forwarded an email he received from OneUnited's Special Counsel/Chair-Elect of the NBA with an attached chart that broke down OneUnited's investment in GSE preferred stock to a Financial Services Staffer.[688] He immediately followed

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[685] Rep. Waters' COS Dep. at 14-15. Outside Counsel is troubled by this testimony in light of the fact that, as discussed above, at a subcommittee hearing in 2007 Representative Waters' disclosed her husband's investment in OneUnited. In addition, Representative Waters' COS is also her grandson, Representative Waters testified that he would have known of the investments, and the investments are disclosed in Representative Waters' financial disclosure statements.

[686] This email can be construed as an official act to assist OneUnited. During questioning regarding an email sent on September 22, 2008, her COS responded that "I knew that the ambassador had been on the board, that he had come off the board. I knew that the Congresswoman had an investment and had gotten rid of that investment. I was not conscious at the time that the ambassador still had an investment. So that would not have been a red flag." (7/5/12 Rep. Waters' COS Dep. at 63.) However, as discussed, *supra* n.685, Outside Counsel is troubled by this testimony in light of other evidence in the record regarding the disclosure of Representative Waters' husband's investment. Nonetheless, there is no evidence that Representative Waters was aware that her COS sent this email.

[687] While the Chairman and CEO of OneUnited was not also an officer of the NBA, because OneUnited is both a member bank of the NBA and the largest African-American bank in the country, it is Outside Counsel's conclusion and recommendation to the Committee that the evidence can support an interpretation that the forwarding of this legislation to a OneUnited executive was done as part of his actions to assist all minority and community banks at this time.

[688] Waters_071912_75, attached as Ex. 40.

up with the staffer by emailing and asking her "how did the meeting go?"[689] The staffer responded that they "will continue to pursue T acting without legislation but [another staffer] and I are also working on drafting CDFI-related language to help them that we could try to possibly add to the bailout bill."[690]

- On September 25, 2008, Representative Waters' COS instructed OneUnited's Special Counsel/Chair-Elect of the NBA to call him so that he could provide an update to OneUnited's Special Counsel/Chair-Elect of the NBA.[691]

- On September 28, 2008, Representative Waters' COS sent an email to the Staff Director and Chief Counsel for the Financial Services Committee in which he sought an update on the draft legislation on behalf of Representative Waters. He also requested that certain changes be made to the sections affecting minority banks and minority contractors.[692]

- On September 28 and 29, 2008, Representative Waters' COS received unsolicited emails from OneUnited's Special Counsel/Chair-Elect of the NBA thanking him for all his "hard work" and "checking in" respectively. There is no evidence that Representative Waters' COS forwarded these emails or otherwise took any action in response to their receipt.

Outside Counsel has determined, and recommends to the Waters Committee, that it is not possible to determine by a clear and convincing standard when the conversation between Representative Waters and her COS regarding her conflict with OneUnited occurred. Nonetheless, there is evidence in the record to allow the Waters Committee to determine that Representative Waters' COS should have known of the conflict prior to that conversation. Regardless, following that conversation, Representative Waters' COS was clearly on notice of the conflict that existed and knew that he could not assist OneUnited in its own narrow attempt to secure funding. However, because credibility determinations are left to the Waters Committee and the

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[689] *Id.*

[690] *Id.* The Financial Services Staffer testified before Outside Counsel that at the time of this email the Financial Services Committee was trying to help both the NBA and also smaller-size institutions that were similarly situated. (7/25/12 FSC Staffer #2 Dep. at 17.) As discussed supra nn. 685-686, Outside Counsel questions the credibility of Representative Waters' COS with respect to his testimony regarding whether he was aware of Representative Waters' husband's investment in OneUnited.

[691] The testimony in the record supports the conclusion that this conversation may have been about the "legislative approach," which was drafted to assist minority and community banks in general and necessarily OneUnited. (OU Counsel Dep. at 82.)

[692] Outside Counsel has concluded, and recommends to the Committee, that the testimony in the record supports the fact that Representative Waters' COS determined that he was acting in this email for "a broad category that had a specific need," and not solely on behalf of OneUnited. (7/5/12 Rep. Waters' COS Dep. at 61.)

timing of that conversation is unclear, the Outside Counsel recommends that the two actions taken by her COS solely on behalf of OneUnited cannot be proven by a clear and convincing standard to rise to the level of a knowing violation of House rules or other standards of conduct relevant to using a Member's office for personal benefit.

Representative Waters' COS is the most senior person on her staff. Once Representative Waters arranged for the meeting with Treasury, she instructed her COS to coordinate with OneUnited's Special Counsel/Chair-Elect of the NBA regarding the meeting, and the COS "was the main point of contact [with Treasury] after the Congresswoman spoke to the former Treasury Secretary."[693] As previously discussed, there was nothing inappropriate about Representative Waters arranging this meeting. However, sometime after the meeting, around the time the TARP legislation was being discussed, Representative Waters had a conversation with the Chairman of the Financial Services Committee regarding the fact that she should not assist OneUnited's attempt to receive money. The first draft of the legislation that ultimately became the EESA bill was not circulated until September 20, 2008, and it is Outside Counsel's determination that the evidence in the record supports that the conversation likely occurred prior to that date.

While Outside Counsel's review has not determined when or how Representative Waters learned of OneUnited's specific request for money, once Representative Waters learned of this request and determined she had a conflict in assisting OneUnited in its attempt to receive money from Treasury for its shares of Freddie and Fannie, she should have ensured that her office, including her COS, did not provide continued assistance specifically to OneUnited. Based on the testimony of Representative Waters' COS, she had a conversation with him regarding the fact that she was stepping back from directly assisting OneUnited. However, Representative Waters' COS's testimony that he was only to refrain from working on OneUnited matters for that day strains credibility. As the most senior staffer in Representative Waters' office he owed Representative Waters a duty to clarify that direction before he continued communicating with OneUnited executives. Further, the Chief Counsel of the Financial Services Committee also testified that Representative Waters COS had conveyed to her that he was stepping back from working on OneUnited matters.[694]

If, however, Representative Waters' COS's claim to have misunderstood her directions to avoid assisting OneUnited is to be believed, that fact would only support the conclusion that Representative Waters should have done more to ensure that her entire staff was fully aware of the potential conflict and refrained from any official action to assist OneUnited in its attempt to directly obtain money.[695] There is no evidence in

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[693] Rep. Waters' COS Dep. at 21.

[694] *Compare* 7/5/12 Rep. Waters' COS Dep. at 53 *with* FSC Chief Counsel Dep. at 17.

[695] Outside Counsel does not believe that Representative Waters was required to refrain from any involvement in the EESA legislation as the record supports the conclusion that the EESA legislation, and particularly provision 103(6), was drafted to assist a larger community of banks, of which OneUnited was a member.

the record to support a finding that Representative Waters was aware of her COS' communications with OneUnited executives. However, it is clear that such communications were normally within the scope of his position, unless, of course, they constituted an impermissible conflict.[696]

4. CONCLUSIONS REGARDING SPECIFIC SUBSTANTIVE ALLEGATIONS AND RECOMMENDATIONS OF OUTSIDE COUNSEL

For the foregoing reasons, it is Outside Counsel's opinion that Representative Waters did not violate any House Rules or other standards of conduct. As such, the Outside Counsel recommends that the Waters Committee find that Representative Waters committed no violations in this Matter.

Furthermore, the Outside Counsel recommends the Waters Committee find that, while Representative Waters' COS's actions in sending the two emails on behalf of OneUnited's private efforts to obtain assistance do violate conflict of interest rules and standards, for which Representative Waters could bear responsibility, there is not sufficient evidence in the record to prove by a clear and convincing standard that Representative Waters' COS was aware of the conflict at the time, although as noted throughout this Report, there is evidence in the record to demonstrate that Representative Waters' COS should have known of the conflict prior to sending the two emails. In addition, Outside Counsel recommends finding that Representative Waters did make an effort to prevent her COS from creating the conflict in the first place, though she was either too late, too unclear, or simply not abided (there is insufficient evidence to prove which it was by clear and convincing evidence). Therefore Outside Counsel recommends that that Waters Committee find that no formal sanction or referral to the floor of the House of Representatives is warranted by the record in this Matter.

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[696] *See* Rep. Waters Dep. at 34-35; Rep. Waters' COS Dep. at 73.

EXHIBIT 1

ONE HUNDRED ELEVENTH CONGRESS

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT
Washington, DC 20515–6328

June 15, 2010

CONFIDENTIAL
Stanley M. Brand
Brand Law Group
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Re: Investigation of Representative Maxine Waters

Dear Mr. Brand:

On June 15, 2010, the investigative subcommittee adopted a Statement of Alleged Violation in the Matter of Representative Maxine Waters. A copy of the Statement of Alleged Violation is enclosed.

Pursuant to Committee on Standards of Official Conduct Rule 22, Respondent is permitted to file with the investigative subcommittee certain written responses to the Statement of Alleged Violation before the investigative subcommittee transmits the Statement of Alleged Violation to the Standards Committee. Please note that pursuant to Committee Rule 22(a)(1), failure to file an answer to the Statement of Alleged Violation within the time prescribed shall be considered by the Committee as a denial of each count.[1]

On May 28, 2010, pursuant to Committee Rule 26(c), the investigative subcommittee provided to the Respondent a copy of the Statement of Alleged Violation that it intended to adopt together with all evidence it intended to use to prove those charges it intended to adopt, including documentary evidence and witness testimony. The investigative subcommittee also provided to the Respondent any exculpatory information, as provided by Committee Rule 25.[2] Pursuant to Committee Rule 26(f), this evidence was made available to Respondent only after you and Respondent each executed and returned to the investigative subcommittee non-disclosure agreements. These non-disclosure agreements are still in effect, and you and Respondent remain bound by their terms.

[1] Please also note that, pursuant to Committee Rule 17A(f)(2), the report by the Office of Congressional Ethics in this matter may be made public on August 6, 2010.

[2] Please note that before making any documents public, the investigative subcommittee redacts certain personal identifier information from the documents. As a courtesy, the investigative subcommittee provided you with unredacted copies of all documents. If in the future you have need to use any documents provided to you by the investigative subcommittee in a manner that may make them available to the public, the investigative subcommittee will provide you with redacted copies.

Should you have any questions, please contact Tom Rust at (202) 225-7103.

Sincerely,

R. Blake Chisam
Chief Counsel/Staff Director

Enclosure

cc: The Honorable Maxine Waters

HOUSE OF REPRESENTATIVES

111TH CONGRESS

2d Session

COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

INVESTIGATIVE SUBCOMMITTEE

IN THE MATTER OF REPRESENTATIVE MAXINE WATERS

STATEMENT OF ALLEGED VIOLATION

Adopted June 15, 2010

STATEMENT OF ALLEGED VIOLATIONS

For the following alleged violations, the Investigative Subcommittee has determined there is "substantial reason to believe that a violation of the Code of Official Conduct, or of a law, rule, regulation, or other standard of conduct applicable to the performance of official duties or the discharge of official responsibilities by a Member, officer, or employee of the House of Representatives has occurred." *See* Rule 19(f), Rules of the Committee on Standards of Official Conduct.

At all times relevant to this Statement of Alleged Violations, Representative Maxine Waters (Respondent) was a Member of the United States House of Representatives representing the 35th District of California. During the 110th Congress, Respondent was Chairwoman of the Housing and Community Opportunity Subcommittee of the Committee on Financial Services.

STATEMENT OF FACTS IN SUPPORT OF ALLEGED VIOLATIONS

I. ONEUNITED BANK'S MEETING WITH THE DEPARTMENT OF THE TREASURY

1. On September 7, 2008, the United States Department of Treasury and the Federal Housing Finance Agency (FHFA) placed the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) into conservatorship (the Conservatorship).

2. OneUnited Bank (OneUnited) held substantial investments in Fannie Mae and Freddie Mac preferred stock.

3. Due to the Conservatorship's impact on the value of Fannie Mae and Freddie Mac stock, OneUnited incurred unrealized losses that effectively wiped out OneUnited's Tier 1 capital and threatened the viability of the bank.

4. Sometime around September 7, 2008, Kevin Cohee, the Chief Executive Officer (CEO) and Chairman of the Board of Directors of OneUnited, contacted Respondent to request a meeting with Treasury officials regarding the impact of the Conservatorship on minority banks.

5. Respondent was "familiar" with Kevin Cohee. Kevin Cohee, and his wife Teri Williams, President of OneUnited, hosted a fundraiser at their home for Respondent. They also contributed to Respondent's campaign on numerous occasions.

6. During the same time period, Robert Cooper, Senior Counsel to OneUnited and Chair-Elect of the National Bankers Association (NBA), contacted Respondent and asked her to arrange a meeting with Treasury officials regarding the impact of the Conservatorship on minority banks. Respondent has a long history of assisting small and minority owned banks generally, and NBA in particular.

7. Respondent called then-Treasury Secretary Henry Paulson on or around September 8, 2008, and requested a meeting on behalf of NBA, which OneUnited was a member of, to discuss the impact of the Conservatorship on minority banks.

8. Then-Secretary Paulson granted Respondent's request by arranging for several senior Treasury officials to meet with NBA. He granted Respondent's request because she was a Member of Congress.

9. Respondent instructed her Chief of Staff, Mikael Moore, who was also her grandson, to follow up with Treasury for the meeting arrangements.

10. On September 9, 2008, Kevin Cohee and Robert Cooper, the CEO of OneUnited and OneUnited's long-time Senior Counsel met with the Treasury officials. No other representatives from NBA or any other NBA member bank were present. Secretary Paulson did not attend the meeting.

11. During the meeting, Kevin Cohee and Robert Cooper discussed the impact of the Conservatorship on OneUnited and requested approximately $50 million dollars from Treasury to compensate OneUnited for unrealized losses it incurred as a result of the Conservatorship.

12. Treasury was unable to grant OneUnited's request because it lacked the legislative authority to do so.

II. RESPONDENT'S PERSONAL INTEREST IN ONEUNITED BANK

13. Respondent's husband, Sidney Williams, served as a member of the OneUnited Board of Directors from January 23, 2004, until April 21, 2008.

14. At all times relevant, Respondent's husband owned 3,500 shares of OneUnited preferred stock and 476 shares of OneUnited common stock.

15. Respondent disclosed her husband's ownership of OneUnited stock on Respondent's Financial Disclosure Statements filed for calendar years 2004, 2005, 2006, and 2007.

16. The actual value of Respondent's husband's OneUnited shares at the end of calendar year 2007 was $352,089.64, which at the time accounted for somewhere between 4.6% and 15.2% of Representative Waters' and her husband's combined net worth as reported in Respondent's Financial Disclosure Statement for 2007, filed in May of 2008.

17. On June 30, 2008, the actual value of Respondent's husband's OneUnited shares was $351,751.68.

18. On September 30, 2008, after the Conservatorship, the actual value of Respondent's husband's OneUnited shares had fallen to $175,000.

19. If OneUnited failed, Respondent's husband's investment in OneUnited would have been worthless.

20. Sometime early in September 2008, Respondent had a discussion with Representative Barney Frank regarding OneUnited and her husband's prior board membership with the bank. At the time of this discussion, Representative Frank did not know that Respondent's husband owned approximately $350,000 worth of OneUnited stock or owned any stock in OneUnited.

21. Representative Frank told Respondent not to get involved and that he would handle the issues related to OneUnited.

22. Respondent agreed to refrain from advocating on behalf of OneUnited.

23. Respondent did not instruct her Chief of Staff, Mikael Moore, to refrain from assisting OneUnited.

III. CONTINUED ASSISTANCE PROVIDED TO ONEUNITED BANK AFTER THE MEETING WITH TREASURY

24. Following the September 9, 2008, meeting with Treasury, Respondent's Chief of Staff, Mikael Moore, was actively involved in assisting OneUnited representatives with their request for capital from Treasury and crafting legislation to authorize Treasury to grant the request.

25. On September 19, 2008, Respondent's Chief of Staff sent an email to a member of Representative Barney Frank's staff. The subject of the email was "O[ne]U[nited] is in trouble." Representative Frank's staffer replied, "depends on scope." Respondent's Chief of Staff responded that "it will become a timetable issue."

26. On September 20, 2008, Respondent's Chief of Staff sent an email to Kevin Cohee, CEO of OneUnited. The subject of the email was "Draft" and attached to the email was draft legislation entitled, "LEGISLATIVE PROPOSAL FOR TREASURY AUTHORITY TO PURCHASE MORTGAGE RELATED ASSETS[.]"

27. On September 22, 2008, Respondent's Chief of Staff received an email from Kevin Cohee. Mr. Cohee requested that Respondent's Chief of Staff print a document for their meeting. The document was draft language for proposed legislation that would give Treasury authority to purchase certain assets that would have applied to OneUnited.

28. On September 23, 2008, Respondent's Chief of Staff received an email from Robert Cooper, Senior Counsel to OneUnited. The subject of the email was, "Fw: Treasury Request Appendix Final.xls," and included a document containing a chart with information regarding OneUnited's shares of Fannie Mae and Freddie Mac stock and OneUnited's request for approximately $50 million from Treasury.

29. On September 25, 2008, Respondent's Chief of Staff received an email from Robert Cooper. The subject of the email was, "Any update?" No message was contained in the body of the email. Respondent's Chief of Staff replied to the email, "Call in the office."

30. On September 28, 2008, Respondent's Chief of Staff received an email from Robert Cooper. The subject of the email was, "Thank you for all your hard work!" No message was contained in the body of the email.

31. On September 29, 2008, Respondent's Chief of Staff received an email from Robert Cooper. The subject of the email was "Checking in[.]" Mr. Cooper wrote, "In thinking about next steps, we are prepared to rally our supporters by phone or through direct personal contacts. What is your sense, given that the inevitable 'mental fatigue' will begin to set in

around a process that even as we speak has not been settled. Obviously, we're trying to get some sort of written commitment from Treasury on an expedited basis prior to the recess for the Jewish holidays and before tomorrow's deadline. Let me know."

IV. ONEUNITED OBTAINED TARP FUNDING

32. On October 3, 2008, the Emergency Economic Stabilization Act (EESA), which established the Troubled Asset Relief Program (TARP), was signed into law. Section 103(6) of EESA provided, "In exercising the authorities granted in this Act, the Secretary shall take into consideration-- (6) providing financial assistance to financial institutions, including those serving low- and moderate-income populations and other underserved communities, and that have assets less than $1,000,000,000, that were well or adequately capitalized as of June 30, 2008, and that as a result of the devaluation of the preferred government-sponsored enterprises stock will drop one or more capital levels, in a manner sufficient to restore the financial institutions to at least an adequately capitalized level[.]"

33. The language in the TARP legislation applied to OneUnited, and Representative Frank stated the language was intended to include OneUnited.

34. OneUnited applied for TARP funding.

35. In connection with its application for TARP funding, OneUnited also raised significant amounts of private capital and applied to the Federal Deposit Insurance Corporation for a tax credit waiver.

36. On October 31, 2008, Respondent's Chief of Staff received an email from the CEO of OneUnited, Kevin Cohee. Mr. Cohee stated, "We are pleased to report that we received $17 Million in private investment today. Thank you for your kindness and consideration in

helping us to consummate this transaction. This is in addition to the investment we received yesterday; the Bank is now adequately capitalized and we will be applying to the TARP program next week."

37. On December 19, 2008, OneUnited received $12,063,000 dollars in TARP funding from Treasury.

38. If OneUnited had not received this funding, Respondent's husband's financial interest in OneUnited would have been worthless. Thus, the preservation of the value of Respondent's husband's investment in OneUnited personally benefitted Respondent.

ALLEGED VIOLATIONS

COUNT I: Conduct in Violation of House Rule XXIII, clause 1

39. Paragraphs 1 through 38 are reincorporated as if set forth fully herein.

40. House Rule XXIII, clause 1 provides:

> A Member . . . shall behave at all times in a manner that shall reflect creditably on the House.

41. OneUnited sought to obtain funding from Treasury and would have failed if it did not receive capital.

42. Respondent's Chief of Staff provided continued assistance to OneUnited in their efforts to obtain legislation that ultimately resulted in OneUnited receiving funding from Treasury.

43. As of September 30, 2008, during the time period when Respondent's Chief of Staff provided this assistance to OneUnited, Respondent's husband's financial interest in

OneUnited, which was worth $350,000 as of June 30, 2008, had declined to approximately $175,000.

44. If OneUnited had not received this funding, Respondent's husband's financial interest in OneUnited would have been worthless. Thus, the preservation of the value of Respondent's husband's investment in OneUnited would personally benefit Respondent.

45. Respondent is responsible for the oversight and administration of her congressional office.

46. Respondent is responsible for the conduct and actions of members of her staff, especially her Chief of Staff, when members of her staff are acting within the scope and course of their employment.

47. Once Respondent realized that she "should not be involved" in assisting OneUnited, Respondent should have instructed her Chief of Staff, Mikael Moore, to refrain from assisting OneUnited. Respondent failed to do so.

48. Respondent's Chief of Staff's continued involvement in assisting OneUnited created an appearance that Respondent was taking official action for Respondent's personal benefit, which did not reflect creditably on the House.

49. Respondent's failure to instruct her Chief of Staff to refrain from assisting OneUnited after Respondent realized that she "should not be involved" violated the House Rule applicable to behaving at all times in a manner that shall reflect creditably on the House; all in violation of House Rule XXIII, clause 1.

COUNT II: Conduct in Violation of the Spirit of House Rule XXIII, clause 3

50. Paragraphs 1 through 49 are reincorporated as if set forth fully herein.

51. House Rule XXIII, clause 2 provides:

> A Member . . . shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof.

52. House Rule XXIII, clause 3 provides:

> A Member . . . may not receive compensation and may not permit compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress.

53. Respondent is responsible for the oversight and administration of her congressional office.

54. Respondent is responsible for the conduct and actions of members of her staff, especially her Chief of Staff, when members of her staff are acting within the scope and course of their employment.

55. The preservation of the value of Respondent's husband's investment in OneUnited would constitute compensation accruing to the beneficial interest of Respondent.

56. Respondent's failure to instruct her Chief of Staff to refrain from assisting OneUnited after Respondent realized that she "should not be involved" was inconsistent with the spirit of the House Rule applicable to receiving compensation by virtue of influence improperly exerted from the position of the Respondent in Congress; all in violation of House Rule XXIII, clause 2.

COUNT III: Conduct in Violation of the Code of Ethics for Government Service, clause 5

57. Paragraphs 1 through 56 are reincorporated as if set forth fully herein.

58. The Code of Ethics for Government Service (72 Stat., Part 2, B12, H. Res. 175, 85th Cong.) (adopted July 11, 1958) provides:

> [A]ny person in Government service should:

. . .

> 5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.

59. Respondent is responsible for the oversight and administration of her congressional office.

60. Respondent is responsible for the conduct and actions of members of her staff, especially her Chief of Staff, when members of her staff are acting within the scope and course of their employment.

61. The preservation of the value of Respondent's husband's investment in OneUnited would constitute a benefit to Respondent.

62. Reasonable persons could construe Respondent's Chief of Staff's continued involvement in assisting OneUnited as the dispensing of special favors or privileges to OneUnited, and accepting the preservation of the value her husband's investment in OneUnited as a benefit under circumstances which might influence the performance of Respondent's governmental duties; all in violation of the Code of Ethics for Government Service, clause 5.

EXHIBIT 2

BRAND LAW GROUP
A PROFESSIONAL CORPORATION
923 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE: (202) 639-9700
TELECOPIER: (202) 737-7565

June 30, 2010

HAND DELIVERED

R. Blake Chisam, Esq.
Chief Counsel/Staff Director
U.S. House of Representatives
Committee on Standards of Official Conduct
HT-2 Capitol Building
Washington, D.C. 20515-6328

Re: Representative Maxine Waters

Dear Mr. Chisam:

Enclosed please find our Motion for a Bill of Particulars and Memorandum of Points and Authorities in Support Thereof, on behalf of Congresswoman Maxine Waters.

Sincerely,

Andrew D. Herman
Counsel for Congresswoman Waters

ADH:mob

UNITED STATES HOUSE OR REPRESENTATIVES
Committee on Standards of
Official Conduct

In the Matter of

REPRESENTATIVE
MAXINE WATERS

MOTION FOR A BILL OF PARTICULARS

Representative Maxine Waters, through counsel, and pursuant to Rule 22(b) of this Committee's Rules, respectfully moves this Committee to furnish her with a bill of particulars as to the Statement of Alleged Violations served upon her on June 15, 2010.[1]

1. As to the Statement of Facts in Support of Alleged Violations, the Respondent requests that the Committee state with particularity:

   a. the relevancy of the Respondent's relationship with her Chief of Staff;

   b. the exact value of Respondent's husband's OneUnited Shares at the end of calendar year 2007 represented as a percentage of Respondent's and her husband's personal wealth;

   c. the relevancy of the calculation of the exact value of Respondent's husband's OneUnited Shares at the end of calendar year 2007 as a percentage of Respondent's and her husband's personal wealth;

   d. the specific date that Respondent discussed assistance of OneUnited with Representative Barney Frank.

2. As to Count One of the Statement of Alleged Violations, the Respondent requests that the Committee state with particularity:

[1] On June 23, 2010, the chair of the Investigative Subcommittee, Rep. Cathy Kastor, granted Respondent's Motion for an Extension of Time With Which to File a Motion for a Bill of Particulars to June 30, 2010.

a. the definition of "reflect creditably" utilized by the Committee and the basis for such definition under House rules, government codes or other precedent;

b. the factual basis for the Committee's conclusion that "OneUnited . . . would have failed if it did not receive capital [from the Department of the Treasury];"

c. the definition of "continued assistance" utilized by the Committee and the basis for such definition under House rules, government codes or other precedent;

d. the specific nature of the "continued assistance" alleged in this matter;

e. the factual basis for the Committee's conclusion that the alleged "continued assistance" was provided to OneUnited and not to a broad range of banks comprising the membership of the National Bankers Association ("NBA");

f. the specific nature of "this funding" that purportedly preserved Respondent's husband's financial interest;

g. the factual basis for the Committee's conclusion that Respondent failed to instruct her Chief of Staff "to refrain from assisting OneUnited;"

h. the definition of "continued involvement," the basis for such definition under House rules, government codes or other precedent and if the Committee's use of that term differs from its use of "continued assistance;"

i. the specific nature of the "continued involvement" alleged in this matter.

3. As to Count Two of the Statement of Alleged Violations, the Respondent requests that the Committee state with particularity:

a. the definition of "compensation" utilized by the Committee and the basis for such definition under House rules, government codes or other precedent;

b. the definition of "beneficial interest" utilized by the Committee and the basis for such definition under House rules, government codes or other precedent;

c. the definition of "influence improperly exerted" utilized by the Committee and the basis for such definition under House rules, government codes or other precedent;

d. the specific nature of the "influence . . . exerted from the position of the Respondent in Congress" in this matter;

e. the rationale underlying the Committee's conclusion that the "preservation of the value of Respondent's husband's investment in OneUnited would constitute compensation accruing to the beneficial interest of Respondent."

4. As to Count Three of the Statement of Alleged Violations, the Respondent requests that the Committee state with particularity:

a. the definition of "discriminate unfairly" utilized by the Committee and the basis for such definition under House rules, government codes or other precedent;

b. the definition of "special favors or privileges" utilized by the Committee and the basis for such definition under House rules, government codes or other precedent;

c. the definition of "favors or benefits" utilized by the Committee and the basis for such definition under House rules, government codes or other precedent;

d. the specific nature of the Respondent's actions that purportedly "discriminate[d] unfairly;"

e. the specific nature of the "special favors or privileges" and "favors or benefits" purportedly dispensed by Respondent.

An Oral Hearing is requested on this Motion.

Respectfully submitted this 30th day of June, 2010

Stanley M. Brand
Andrew D. Herman
Brand Law Group, PC
923 15th Street, NW
Washington, DC 20005

Counsel for Representative Maxine Waters

CERTIFICATE OF SERVICE

The undersigned declares under penalties of perjury that on June 30th, 2010, I hereby served a copy of the foregoing Motion for a Bill of Particulars, on Blake Chisam, Counsel, House Committee on Standards of Official Conduct:

Andrew D. Herman

UNITED STATES HOUSE OR REPRESENTATIVES
Committee on Standards of
Official Conduct

In the Matter of :
:
REPRESENTATIVE :
MAXINE WATERS :

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF
MOTION FOR A BILL OF PARTICULARS

1. Rule 22(b) of the Rules of Procedure of the Committee on Standards of Official Conduct permits the filing of a Motion for a Bill of Particulars directed to the Statement of Alleged Violations.

2. There can be little dispute that the particulars sought by Respondent are required by the vague and subjective nature of the standards of conduct alleged to have been violated.

3. As detailed by the Memorandum of Points and Authorities in Support of Motion for Bill of Particulars filed by counsel in In the Matter of Representative Charles H. Wilson, H.R. Rep. No. 930, 96th Cong. 2d Sess. at 61-2 (citing Hearings on H. Res. 18 and Similar Measures before House Comm. on the Rules, Creating a Select Committee on Standards and Conduct, 90th Cong. 1st Sess. at 21), "when you have a code of ethics, unless it is criminal law, you **have admittedly said it is going to be in a gray area and subject to all kinds of interpretations.**" (Emphasis added.)

Indeed, as Charles H. Wilson's Memorandum of Points and Authorities cites, this Committee has observed that:

> The Committee is cognizant of the fact that these traditional standards of conduct as expressed in the Code of Ethics for Government Service, and as revealed in House precedents, **are not delineated with any great exactitude, and may therefore prove difficult in enforcement.** The Committee is likewise aware that **because of the generality of these standards their violation is easily alleged, and this may be subject to**

> some abuse. However, this Committee believes it was for the very purpose of evaluating particular situations against existing standards, and of weeding out baseless charges from legitimate ones, that this Committee was created.

In the Matter of Charles H. Wilson, H.R. Rep. No. 96-930 at 61-2 (quoting House Committee on Standards of Official Conduct, Ethics Manual for Members and Employees of the U.S. House of Representatives, H.R. Doc. No 96-134, 96th Cong. 1st Sess. at 8-9 (1979)) (emphasis added). *See also* In the Matter of Representative Robert L.F. Sikes, H.R. Rep. No 1364, 94th Cong. 2d Sess. at 8 (1976).

4. In this matter, the Statement of Alleged Violations relies on the most general standards applied to members of Congress. Count One alleges that Respondent's conduct failed to "reflect creditably on the House" in violation of House Rule XXIII, clause 1; Count Two alleges that Respondent's conduct violated "the spirit" of House Rule XXIII, clause 3 by receiving compensation by virtue of improper influence; Count Three alleges a violation of the Code of Ethics for Government Service, clause 5, by dispensing favors and accepting a benefit for such actions. Of the three counts, only the third can reasonably be described as presenting any specific guidance for a member's conduct.

5. Moreover, the facts cited in the Statement of Alleged Violations are ambiguous and convoluted. In essence, the Statement of Alleged Violations alleges that Respondent violated the aforementioned general standards of conduct by failing to adequately supervise her Chief of Staff's conduct and that such allegedly improper conduct redounded to her benefit by assisting an entity in which Respondent's husband held a financial interest as a member of a class.

6. In sum, the Statement of Allegations against Respondent presents exceedingly general allegations that are premised upon an unclear set of facts. The Respondent therefore requires an explication of the definitions and standards which the

Committee intends to utilize in order to assert any defenses available to her under the House Rules of Conduct and the Code of Ethics for Government Service.

Respectfully submitted this 30th day of June, 2010.

Stanley M. Brand
Andrew D. Herman
Brand Law Group, PC
923 15th Street, NW
Washington, DC 20005

Counsel for Rep. Maxine Waters

CERTIFICATE OF SERVICE

The undersigned declares under penalties of perjury that on June 30th, 2010, I hereby served a copy of the foregoing Memorandum of Points and Authorities In Support of Motion for a Bill of Particulars, on Blake Chisam, Counsel, House Committee on Standards of Official Conduct:

Andrew D. Herman

EXHIBIT 3

ONE HUNDRED ELEVENTH CONGRESS

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT
Washington, DC 20515–6328

July 1, 2010

CONFIDENTIAL
Stanley M. Brand
Brand Law Group
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Re: Investigation of Representative Maxine Waters

Dear Mr. Brand:

On July 1, 2010, the investigative subcommittee adopted an Order and Memorandum in Support of Order in response to the Motion for Bill of Particulars filed by Representative Maxine Waters. A copy of the Order and Memorandum in Support of Order is enclosed.

Pursuant to Committee on Standards of Official Conduct Rule 22, Respondent is permitted to file with the investigative subcommittee certain written responses to the Statement of Alleged Violation before the investigative subcommittee transmits the Statement of Alleged Violation to the Standards Committee. Please note that pursuant to Committee Rule 22(a)(1), failure to file an answer to the Statement of Alleged Violation within the time prescribed shall be considered by the Committee as a denial of each count.[1]

Should you have any questions, please contact Tom Rust at (202) 225-7103.

Sincerely,

R. Blake Chisam
Chief Counsel/Staff Director

Enclosure

[1] Please also note that, pursuant to Committee Rule 17A(f)(2), the report by the Office of Congressional Ethics in this matter may be made public on August 6, 2010.

cc: The Honorable Maxine Waters

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT
INVESTIGATIVE SUBCOMMITTEE

In the Matter of

REPRESENTATIVE MAXINE WATERS,

Respondent.

ORDER

This investigative subcommittee having considered Respondent's Motion for a Bill of Particulars, Memorandum of Points and Authorities, and the entire record herein, hereby finds:

1. Each count of the Statement of Alleged Violation contains a plain and concise statement of the alleged facts of the violation.

2. Each count of the Statement of Alleged Violation includes a reference to the provision of the Code of Official Conduct or law, rule, regulation or other applicable standard of conduct governing the performance of duties or discharge of responsibilities alleged to have been violated.

3. Each count of the Statement of Alleged Violation contains information sufficient to advise Respondent of the allegations against her, and sufficient to afford her a meaningful opportunity to respond to those allegations. Accordingly,

It is by the Investigative Subcommittee this 1st day of July, 2010, ORDERED

That the Motion is DENIED.

Kathy Castor
Chair

Mike Conaway
Ranking Republican Member

Copies to:

Stanley M. Brand, Esq.
Brand Law Group
923 Fifteenth Street, N.W.
Washington, D.C. 20005

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT
INVESTIGATIVE SUBCOMMITTEE

In the Matter of

REPRESENTATIVE MAXINE WATERS,

Respondent.

MEMORANDUM IN SUPPORT OF ORDER

On June 30, 2010, Respondent submitted to the Investigative Subcommittee a Motion for Bill of Particulars with respect to the Statement of Alleged Violation adopted by the subcommittee and transmitted to Respondent on June 15, 2010. By a separate Order, the Investigative Subcommittee denied Respondent's Motion for Bill of Particulars on July 1, 2010. Through this Memorandum the Investigative Subcommittee sets forth the bases for its Order denying Respondent's motion.[1]

STANDARD OF REVIEW

Pursuant to Rule 19(f) of the Rules of the Committee on Standards of Official Conduct (Standards Committee Rules), each count of a Statement of Alleged Violation: (1) "shall relate to a separate violation," (2) "shall contain a plain and concise statement of the alleged facts of such violation," and (3) "shall include a reference to the provision of the Code of Official Conduct or law, rule, regulation or other applicable standards of conduct governing the performance of duties or discharge of responsibilities alleged to have been violated."[2]

Standards Committee Rule 22(b) permits a Respondent to "file a Motion for a Bill of Particulars within 10 days of the date of transmittal of the Statement of Alleged Violation."[3] A Bill of Particulars "is essentially a procedural device used to inform a defendant of the nature of the charge against [her], to enable [her] to prepare a defense, to avoid or minimize danger of surprise at trial, and to enable [her] to plead double jeopardy in the event of subsequent

[1] The investigative subcommittee notes that Respondent requested an "Oral Hearing" on its Motion for a Bill of Particulars. After reviewing Respondents motion and the Memorandum of Points and Authorities in Support of the motion, the investigative subcommittee determined that such a hearing was unnecessary, and thus that request is denied.

[2] Rules of the Committee on Standards of Official Conduct (Standards Committee Rules), Rule 19(f).

[3] Standards Committee Rule 22(b). On June 23, 2010, Respondent requested an extension of time within which to file her Motion for Bill of Particulars, which request was granted by the Chair of the Investigative Subcommittee pursuant to Standards Committee Rule 22(e)(1). Accordingly, Respondent's motion is timely.

prosecution for the same offense."[4] A Statement of Alleged Violation must be sufficiently particularized to advise a Respondent of the allegations against her and to afford her a meaningful opportunity to respond to those allegations.[5] A Motion for a Bill of Particulars may be denied where the Investigative Subcommittee determines that its Statement of Alleged Violation meets this standard.[6]

A Bill of Particulars "is to be distinguished from methods of 'discovery.' In the context of criminal prosecutions, courts have regularly held that government attorneys will not be forced to reveal their entire case in response to a motion of this sort."[7] Additionally, "conclusions of law or legal theories are not a proper subject of" a motion for a Bill of Particulars.[8]

RESPONSE TO INDIVIDUAL REQUESTS

For the reasons set forth below, the Investigative Subcommittee has found that the Statement of Alleged Violation adopted by the Investigative Subcommittee on June 15, 2010, provides Respondent with sufficient notice of the allegations against her and affords Respondent a meaningful opportunity to respond to those allegations. Therefore, Respondent's Motion for a Bill of Particulars is denied.

With respect to each request in Respondent's Motion for Bill of Particulars, the investigative subcommittee finds as follows:

1. Statement of Facts in Support of Alleged Violation

   a. This request is denied because "relevancy" is not a proper subject of a Bill of Particulars.

   b. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraph 16 of the Statement of Alleged Violation. The investigative subcommittee notes that it requested more particularity from Respondent on this point, but Respondent was unable to provide it.

   c. This request is denied because "relevancy" is not a proper subject of a Bill of Particulars.

---

[4] Comm. on Standards of Official Conduct, *In the Matter of Representative Charles H. Wilson*, H. Rep. 96-930, 96th Cong., 2d Sess. at 64 (May 8, 1980) (hereinafter *Wilson*).
[5] Comm. on Standards of Official Conduct, *In the Matter of Representative Jay Kim*, H. Rep. 105-797, 105th Cong., 2d Sess. at 806 (Oct. 8, 1998); *see also* Comm. on Standards of Official Conduct, *In the Matter of Representative Barbara-Rose Collins*, H. Rep. 104-876, 104th Cong., 2d Sess. at 100 (Jan. 2, 1997).
[6] *Id.*
[7] *Wilson*, at 64.
[8] *Id.*, at 65.

d. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraph 20 of the Statement of Alleged Violation.

2. Count I of the Statement of Alleged Violation

a. This request is denied because conclusions of law or legal theories are not a proper subject of a Bill of Particulars and are more properly asserted in a Motion to Dismiss.

b. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraphs 1 to 3 of the Statement of Alleged Violation.

c. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraphs 24 to 31 of the Statement of Alleged Violation.

d. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraphs 24 to 31 of the Statement of Alleged Violation.

e. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraphs 10, 11, 20, 21, 22, 25, 26, 28, and 33 of the Statement of Alleged Violation.

f. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraphs 35 to 38 of the Statement of Alleged Violation.

g. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraphs 9 and 21 to 31 of the Statement of Alleged Violation. The investigative subcommittee additionally notes the following:

i. Respondent's Chief of Staff told the investigative subcommittee that he was the "main point of contact after, after the Congresswoman spoke to Mr. Paulson." (CSOC.WAT.TRANS.000423.)

ii. Paragraph 4 of the Memorandum of the Office of Congressional Ethics' Interview of Respondent's Chief of Staff states, "Representative Waters asked The Chief of Staff to Representative Maxine Waters to follow up with the Treasury Department about the meeting."

iii. Respondent's Chief of Staff told the investigative subcommittee that after the meeting "there was no specific direction" regarding follow up after the meeting. (CSOC.WAT.TRANS.000475.)

iv. Respondent told the investigative subcommittee that after her conversation with Representative Frank, she understood Representative Frank "would certainly take the lead responsibility. What is not easily understood sometimes is how staffs talk to each other, ask each other questions. One Member's staff will call another member's staff if they think they know something or have information they need. And to that extent, I don't know, but I know Frank's office was in charge of this." (CSOC.WAT.TRANS.000675 to 676.)

v. Respondent's Chief of Staff told the investigative subcommittee that Respondent expressed "no concern" after her conversation with Representative Frank. (CSOC.WAT.TRANS.000485.)

vi. Respondent told the investigative subcommittee that the only discussions she had with her Chief of Staff about OneUnited "would have been the day that they came to the office unannounced, alarmed about the situation of minority banks." (CSOC.WAT.TRANS.000000668.)

vii. Respondent's Chief of Staff told the investigative subcommittee that Respondent "wasn't aware" that he was receiving email from OneUnited executives after the meeting. (CSOC.WAT.TRANS.000475.)

viii. Respondent told the investigative subcommittee that she did not know but was "not surprised" that her Chief of Staff was exchanging emails and attending meetings with OneUnited executives after the meeting. (CSOC.WAT.TRANS.000000659, 662, and 665.)

h. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraphs 24 to 31 of the Statement of Alleged Violation.

i. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraphs 24 to 31 of the Statement of Alleged Violation.

3. Count II of the Statement of Alleged Violation

a. This request is denied because conclusions of law or legal theories are not a proper subject of a Motion for a Bill of Particulars and are more properly asserted in a Motion to Dismiss.

b. This request is denied because conclusions of law or legal theories are not a proper subject of a Motion for a Bill of Particulars and are more properly asserted in a Motion to Dismiss.

c. This request is denied because conclusions of law or legal theories are not a proper subject of a Motion for a Bill of Particulars and are more properly asserted in a Motion to Dismiss.

d. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraphs 24 to 31 of the Statement of Alleged Violation.

e. This request is denied because conclusions of law or legal theories are not a proper subject of a Motion for a Bill of Particulars and are more properly asserted in a Motion to Dismiss.

4. Count III of the Statement of Alleged Violation

a. This request is denied because conclusions of law or legal theories are not a proper subject of a Motion for a Bill of Particulars and are more properly asserted in a Motion to Dismiss.

b. This request is denied because conclusions of law or legal theories are not a proper subject of a Motion for a Bill of Particulars and are more properly asserted in a Motion to Dismiss.

c. This request is denied because conclusions of law or legal theories are not a proper subject of a Motion for a Bill of Particulars and are more properly asserted in a Motion to Dismiss.

d. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraphs 24 to 31 of the Statement of Alleged Violation.

e. This request is denied because information related to this request that is sufficiently particularized to advise Respondent of the allegations against her and to afford her a meaningful opportunity to respond is contained in paragraphs 24 to 31 of the Statement of Alleged Violation.

CONCLUSION

In light of the foregoing, the Investigative Subcommittee finds that Respondent's Motion for Bill of Particulars does not state a sufficient basis requiring further particularization of the Statement of Alleged Violation. Accordingly, the Respondent's Motion for Bill of Particulars is denied.

Kathy Castor
Chair

Mike Conaway
Ranking Republican Member

Copies to:

Stanley M. Brand, Esq.
Brand Law Group
923 Fifteenth Street, N.W.
Washington, D.C. 20005

EXHIBIT 4

UNITED STATES HOUSE OR REPRESENTATIVES
Committee on Standards of
Official Conduct

In the Matter of	:
	:
REPRESENTATIVE	:
MAXINE WATERS	:

MOTION TO DISMISS THE STATEMENT OF ALLEGED VIOLATIONS

Representative Maxine Waters, through counsel, and pursuant to Rule 22(c)(1) of this Committee's Rules, respectfully moves this Committee to dismiss the Statement of Alleged Violations served upon her on June 15, 2010. As Comm. Rule 22(c)(2) provides: "A Motion to Dismiss may be made on the grounds that the Statement of Alleged Violation fails to state facts that constitute a violation of the Code of Official Conduct or other applicable law, rule, regulation, or standard of conduct . . . ." As grounds for this Motion, the Respondent states as follows:

1. Counts I-III fail to state facts constituting a violation of the House Rules or Code of Ethics for Government Service because they:

   a. fail to follow or distinguish this Committee's precedent exonerating nearly identical conduct, most recently expressed by In the Matter of Representative Sam Graves, H.R. Rep. No. 320, 111th Cong. (Oct. 29, 2009);

   b. fail to accurately state facts that constitute the violations alleged in Counts I-III.

An Oral Hearing is requested on this Motion. Respondent also asks that the Committee acknowledge this request for an Oral Hearing in ruling on this motion and provide an explanation for such decision should it deny this request.

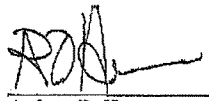
Respectfully submitted this 12th day of July, 2010.

Stanley M. Brand
Andrew D. Herman
Brand Law Group, PC
923 15th Street, NW
Washington, DC 20005

Counsel for Representative Maxine Waters

CERTIFICATE OF SERVICE

The undersigned declares under penalties of perjury that on July 12, 2010, I hereby served a copy of the foregoing Motion to Dismiss the Statement of Alleged Violations, on Blake Chisam, Counsel, House Committee on Standards of Official Conduct:



Andrew D. Herman

UNITED STATES HOUSE OR REPRESENTATIVES
Committee on Standards of
Official Conduct

In the Matter of :
:
REPRESENTATIVE :
MAXINE WATERS :

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS THE STATEMENT OF ALLEGED VIOLATIONS

I. Introduction

In October of last year, this Committee issued In the Matter of Representative Sam Graves, H.R. Rep. No. 320, 111th Cong. (Oct. 29, 2009). The Graves report exonerated the subject of all charges relating to his involvement with a friend and co-investor in renewable fuel cooperatives who appeared at a hearing before a committee on which the Representative served as the Ranking Member. In clearing Representative Graves, this Committee relied on a number of facts, including: that Representative Graves' financial interest was only as a member of a class; that he publicly disclosed his financial interest; that the committee's minority staff made the actual witness selection, with limited input from the Representative; that the committee took no action in relation to the testimony, which related to the industry as a whole; and that the Representative did not personally benefit from the testimony. *See* Graves at 15-20.

On June 15, 2010, this Committee issued a Statement of Alleged Violations ("SAV") relating to Representative Maxine Waters' husband's financial interest in OneUnited Bank, a community development financial institution ("CDFI") that services her district and is a member of the National Bankers Association ("NBA"). In alleging

two violations of House Rules and one of the Code of Government Ethics, the SAV cited: that Representative Waters publicly disclosed her financial interest at issue; that her interest was only as a member of a class; and that her Chief of Staff performed the actions at issue without her direction or knowledge. Moreover, the SAV failed to: identify any actual benefit derived by Representative Waters from her actions; establish that her Chief of Staff undertook any effective actions on behalf of the institution; or conclusively establish that any actions were undertaken on behalf of the bank and not NBA, the trade association for 103 minority and women-owned banks, including OneUnited. Even if the facts as alleged by the SAV were accurate, however, they would not establish the existence of any wrong-doing.

In its analysis of both the legal standards and the underlying factual record at issue this Committee has adopted an approach that is sharply divergent and significantly harsher than the decision rendered in Graves and other relevant precedent. In light of the disparate treatment of Representative Waters the allegations cannot be reconciled with this Committee's precedent. The SAV relating to Representative Waters fails to establish facts constituting a violation and should be dismissed.

II. The SAV Fails to State Facts Constituting a Violation of House Rules or the Code of Government Ethics

Comm. Rule 19(f) mandates that each count of the SAV "shall contain a plain and concise statement of the alleged facts of such violation." This provision is intended to implement House Rule XI, Cl. 3(a)(2) which directs this Committee to make recommendations to the full House only after "notice and hearing" (emphasis added). Comm. Rule 22(c)(2) provides that a "Motion to Dismiss may be made on the grounds that the Statement of Alleged Violation fails to state facts that constitute a violation of the

Code of Official Conduct or other applicable law, rule, regulation, or standard of conduct."

A. The Committee's Analysis of This Matter is Inconsistent With Graves and Other House Precedent and Treats Representative Waters in a Disparate Manner.

The Committee's failure to establish sufficient facts to constitute the alleged violations is demonstrated by reference to its Graves decision issued last year. In exonerating Representative Graves of all allegations, this Committee assessed a number of factors that also apply to this matter. Yet, this Committee now wields many of the same factors that it employed to clear Representative Graves in support of its allegations citing Representative Waters. The Committee has offered no explanation for this disparate treatment.

1. Representative Waters Fully and Accurately Disclosed Her Financial Interest.

In Graves, this Committee emphasized that a Representative's complete and accurate disclosure of his financial interest obviated the Office of Congressional Ethics' ("OCE's") concerns about "conflict of interest." As the Report noted:

> [T]he House Ethics Manual recognizes that some actual conflicts of interests are inevitable: "[s]ome conflicts of interest are inherent in the representative system of government, and are not in themselves necessarily improper or unethical." Instead, Members are required to disclose assets based on the principle that conflicts of interest are best resolved by the political process. "The objectives of financial disclosure are to inform the public about the financial interests of government officials in order to increase public confidence in the integrity of government and to deter potential conflicts of interest.

Graves at 16 (citing House Ethics Manual at 251) (footnotes omitted). This Committee explained that **public disclosure is the "preferred method of regulating possible conflicts on interest."** (Emphasis added.)

Graves cites two additional ethics provisions with approval:

> [P]otential conflicts of interest are best deterred through disclosure and the discipline of the electoral process. Other approaches are flawed both in terms of their reasonableness and practicality, and threaten to impair, rather than to protect, the relationship between the representative and the represented.

House Commission on Administrative Review of the 95th Congress, House Ethics Manual at 251 (quotation omitted); and:

> A Member may often have a community of interests with the Member's constituency, and may arguably have been elected because of and to serve these common interests, and thus would be ineffective in representing the real interests of the constituents if the Member was disqualified from voting on issues touching those matters of mutual concern.

House Ethics Manual at 250.

In light of this guidance, this Committee's report stressed that Representative Graves and his wife had fully disclosed their interest in the entities in which the congressional witness was also an investor. Graves at 16. This Committee also noted that "the evidence shows that the House disclosure rules were effective, because this issue was immediately covered by the press." Id.

In this matter, the SAV acknowledges that "Respondent disclosed her husband's ownership of OneUnited stock on Respondent's Financial Disclosure Statement filed for calendar years 2004, 2005, 2006, and 2007." SAV ¶ 15. Representative Waters also disclosed her interest in a 2007 public hearing where Representative Barney Frank and Federal Deposit Insurance Corporation Director of Resolutions Sandra Thompson were present. See Preserving and Expanding Minority Banks: Hearing Before the Subcomm. On Oversight and Investigations of the H. Comm. on Financial Services, 110th Cong. 21-22 (2007)

Surprisingly, the SAV fails to acknowledge, as this Committee did in exonerating Graves, at 16, that Representative Waters' financial disclosures were similarly effective, because her meeting request on behalf of the National Bankers Association ("NBA") "was immediately covered by the press." See, e.g., Susan Schmidt, Waters Helped Bank Whose Stock She Once Owned, WALL STREET JOURNAL, March 12, 2009, at A6; Eric Lipton & Jim Rim Rutenberg, A Representative, Her Ties and a Bank Meeting, N.Y. TIMES, March 13, 2009, at A1; Binyamin Applebaum, Lawmaker Tried to Aid Bank Partly Owned by Her Husband, WASHINGTON POST, March 14, 2009, at A3. Nor does it offer any explanation – particularly in light of the clear guidance cited above – why Representative Graves' disclosure was sufficient to exonerate him while, disparately, Representative Waters' repeated, public disclosures were not.

2. Representative Waters' Financial Interest was Held as a Member of a Class.

In Graves, the Committee found that "Representative Graves' putative interest was not an interest unique to him but was instead an interest that he held as part of a large class of investors." This Committee relied on this determination to hold that he did not receive any improper financial benefit from his co-investor's testimony. Graves at 17.

Although the report does not provide a citation for this conclusion, long-standing precedent establishes that actions taken by a Member that may affect her interests as part of a larger class of shareholders do not violate House rules or ethical standards. In 1976, this Committee found that "where the subject matter before the House affects a class rather than individuals, the personal interest of Members who belong to the class is not such as to disqualify them from voting." See In the Matter of a Complaint Against Rep. Robert L.F. Sikes, H. Rep. 94-1364, 94th Cong., 2d Sess. 15 (1976) (quoting Cong Rec.

H 11594, 11595 (daily ed. Dec. 2, 1975) (rejecting point of order to disqualify Members holding New York City securities from voting on a bill to provide federal guarantees for those securities)).

In this matter, Representative Waters' husband's assets comprised privately held stock in OneUnited Bank consisting of approximately 0.10% all outstanding shares. This certainly compares favorably to what Graves describes as the Representative's wife's "minimal" ownership of the two companies at issue, totaling 0.17% and 0.125% respectively. Graves at 16. Remarkably, nowhere in the SAV does this Committee distinguish Representative Waters' similar "minimal" ownership or explain why it treats her personal interest as a member of a class differently than Representative Graves' identical interest.

Thus, even if this Committee were to hold that Representative Waters derived some benefit as a member of the class of shareholders of OneUnited, as a result of her actions – an allegation Respondent strongly denies – it would not be sufficient to establish an ethics violation, according to this Committee's analysis in Graves. Id. at 18 (exonerating Representative Graves from all charges, "even if Mr. Hurst's testimony benefited only the two companies in which Mrs. Graves was invested, [the Graves'] personal financial interest in either investment would have been affected as members of a class of investors and not as individuals.").

Instead, the SAV focuses on the value of the OneUnited shares as a percentage of Representative Waters' and her husband's combined net worth. See SAV ¶ 16. Given that in Graves this Committee did not deem the percentage of net worth relevant to the

analysis, this finding relating to Representative Waters should be similarly irrelevant to the allegations.

3. **Neither Representative Waters Nor Her Chief of Staff Took Any Tangible Action on Behalf of Either OneUnited Bank or the NBA.**

In Graves, this Committee found that neither the Representative nor his committee "took any action in relation to Mr. Hurst's recommendations." Graves at 17. In reaching its decision, this Committee necessarily held that the invitation issued by the committee's minority staff was not an "action." This Committee also noted that "the final decision as to which individual was invited was left up to, and actually made the minority staff." Id. at 19. Ultimately, this Committee concluded that Representative Graves' involvement with the selection of the witness was not impermissible." Id.

In this matter, the SAV asserts that the following events involving Representative Waters' Chief of Staff constituted "active[] assit[ance]" for purposes of the alleged violations:

a. an exchange totaling three emails with Representative Frank's staff member, alerting them about a constituent's [OneUnited's] concerns;

b. forwarding of a publicly-available draft of legislation, drafted by the Treasury Department and distributed widely by the Financial Services Committee, to Kevin Cohee, CEO of OneUnited;

c. unsolicited receipt of an email from Mr. Cohee, requesting that the Chief of Staff print a document drafted at the request of another member's staff, in preparation for Mr. Cohee's meeting with that member's staff; Representatives Waters' office did not respond;

d. unsolicited receipt of an email from the Robert Cooper, Chairman-Elect of the NBA with the attachment of document requested by the Treasury Department; Representatives Waters' office did not respond;

e. an exchange of two emails with the Mr. Cooper relating to "Any update?";

f. unsolicited receipt of an email from Mr. Cooper titled "Thank you for all your hard work!"; Mr. Cooper testified that this was a general thank you and not connected to any specific actions by Representative Waters' office; see CSOC.WAT.TRANS.000579; Representative Waters' office did not respond;

g. unsolicited receipt of an email from Mr. Cooper titled "Checking in."; Representative Waters' office did not respond. SAV ¶¶ 26-31.

This list comprises the entirety of the actions by Representative Waters' office alleged by the SAV to constitute a violation.

There are numerous, significant flaws with the SAV's "active assistance" allegation. First, in light of Graves, the SAV is silent on how exactly these actions constituted "impermissible . . . involvement." After all, and as discussed above, the Committee's own guidance acknowledges that Representative Waters' fully disclosed financial interest as a member of a class would not have disqualified her from involvement in these issues. Nor does the SAV allege that Representative Waters performed or had knowledge of any of her Chief of Staff's actions.

Compare this specific approach to this Committee's conclusory analysis in Graves exonerating him, in part, because "Representative Graves gave limited input as to who the minority staff should select to testify." Graves at 19. The Committee reached this conclusion without citing its own guidance that in matters relating to a member's

financial interest "advocating or participating in an action by a House committee . . . requires added circumspection." House Ethics Manual at 237. Instead, the Committee cleared Representative Graves, in part, because his involvement was "limited" and his staff performed the bulk of the work at issue.

Here, in contrast, after the initial contact with Secretary Paulson (which is not the subject of any of the alleged violations), the SAV lists no activity by Representative Waters. Indeed, the only "action" that the SAV alleges Representative Waters performed was an omission: failing to "instruct[] her Chief of Staff . . . to refrain from assisting OneUnited." SAV ¶ 45. Even this allegation is contradicted by the record. To wit, Representative Waters' Chief of Staff told the OCE that Representative Waters had spoken to Representative Frank and subsequently told her Chief of Staff not to worry about OneUnited. As the OCE interview noted, she told him that, "'I spoke to Barney. Don't worry about it.' The Chief of Staff to Representative Waters interpreted that he need not work on the NBA issues that day." OCE Report 09-2121__000020. He also informed this Committee in September of October of 2008, "[Representative Waters] appeared to be very . . . comfortable that . . . whatever the issue was, if there was to be a resolution, that Barney would take . . . a look at it and make a decision . . . as the Chairman, whether or not it was something he wanted to get involved with." CSOC.WAT.TRANS.000485. This refutes this Committee's allegation that Representative Waters failed to instruct her Chief of Staff to refrain from assisting OneUnited. Other than that single, alleged omission, the SAV elucidates no other actions taken by Representative Waters.

In light of the blithe analysis performed by this Committee in Graves, e.g., simply stating that "Representative Graves gave limited input" into witness selection, without detailing what that input was (at 19), it is singularly unwarranted for this Committee to charge Representative Waters for the purported actions taken by her Chief of Staff.

Finally, the SAV makes no distinction between actions taken on behalf of OneUnited and for the NBA as a whole. Indeed items (d)-(g) on the above list involved contact with an OneUnited official who also served the NBA's chairman-elect.

In light of the disparate treatment afforded Representative Waters following Graves, these flaws in the purported actions constituting the allegations cannot serve as "plain and concise statement of the alleged facts of such violation" providing "notice" to Representative Waters. The SAV simply fails to proffer any allegations sufficient to constitute an ethics violation.

4. Representative Waters Derived No Benefit from Her Alleged Actions.

In determining that Representative Graves never "actually received a financial benefit" from his co-investor's testimony, this Committee closely examined the subject of the testimony's recommendations and emphasized the lack of "subsequent action" taken by the Small Business Committee. Graves at 17.

In this matter, the SAV adopts a far broader and harsher analysis. In essence, this Committee has decided that without OneUnited's receipt of funds from the Troubled Asset Relief Program ("TARP") on December 19, 2008, "Respondent's husband's financial interest in OneUnited would have been worthless. Thus, the preservation of the value of [the] investment in OneUnited personally benefitted Respondent." SAV ¶¶ 37, 38 (emphasis added).

This conclusion falls far short of the "concise and plain" explanation required of this Committee. First and foremost, the SAV fails to acknowledge that on October 31, 2008, OneUnited received a final private sector investment, which rendered the bank "Adequately Capitalized," and eligible for so-called TARP funds. See SAV ¶¶ 35, 36. This term of art refers to the capital ratio required by the FDIC and identifies the bank as not in danger of failing, even without TARP funding. See generally, Factsheet on Capital Purchase Program, United States Department of the Treasury (March 17, 2009), http://www.financialstability.gov/roadtostability/CPPfactsheet.htm. Indeed, according to the Treasury Department's Factsheet on Capital Purchase Program, "Participation [in the Capital Purchase Program] is reserved for healthy, viable institutions that are recommended by their applicable federal banking regulator." Id. (Emphasis added.) Thus, OneUnited would not have been eligible for TARP funds if it were in danger of failing and would not have failed had it not received such funds.

Accordingly, there is no factual basis for the SAV's assertion that absent TARP funding, OneUnited would have failed. Nor does the SAV assert that Representative Waters or her staff played any part in procuring the private funding that actually allowed OneUnited to continue operating in October of 2009.

Further, although the SAV notes that the value of Representative Waters' husbands' stock was $175,000 in September of 2008 (before the TARP funding), it fails to acknowledge that the value was unchanged after OneUnited received the TARP funds in December. Thus, if TARP funding neither saved OneUnited nor increased its stock value, this Committee cannot establish that Representative Waters received any financial benefit as a result of her alleged actions.

Finally, the SAV does not establish that the House of Representatives took any action in response to Representative Waters' alleged actions. Compare Graves at 17. Although stated neither plainly nor concisely, the SAV apparently contends that Section 103(6) of the EESA, a provision drafted by Representative Frank, benefitted OneUnited. SAV ¶ 42. While Representative Frank may have had OneUnited in mind when he drafted the language, his staffer testified that his office believed that up to 40 institutions could have been "impacted by the proposal." CSOC.WAT.TRANS.000191. In addition, the Deputy Director of the Capital Purchase Program, when asked if OneUnited qualified under this provision, stated that "[w]e don't classify transactions under those subsection. [One United] qualified for the December investment under the established CPP terms, which are used for all participants." CSOC.WAT.JW.00268 (emphasis added).

Most importantly, the SAV does not allege that Representative Waters or her staff took any actions on behalf of OneUnited or the NBA related to the aforementioned funding provisions. In light of the contradictory analysis in Graves and the SAV's omission of these facts, the allegations in the SAV fail to constitute a violation.

B. The Facts as Stated by the SAV Do Not Constitute Violations of House Rules and the Code of Government Ethics.

In light of Graves and the factual flaws detailed above, it is apparent that the SAV fails to assert facts constituting a violation. Moreover, this Committee's denial of Representative Waters' Motion for a Bill of Particulars has denied her full "notice" of which facts constitutes the alleged violations. The only solution for this harsh and disparate treatment is dismissal of these allegations.

1. Count I

House Rule XXIII, cl. 1 provides that "A Member . . . shall behave at all times in a manner that shall reflect creditably on the House." Without a tangible description of what constitutes behavior that "reflect[s] creditably on the House," Count I is simply too vague and ambiguous to be provable. Given the paucity of actions actually taken by Respondent and her office, the SAV literally relies on a handful of e-mails between her Chief of Staff and NBA/OneUnited personnel. Even its lone allegation specific to Representative Waters, that she should have instructed her Chief of Staff to refrain from assisting OneUnited, is refuted by record. Nor does the SAV's "preservation of value" allegation stand up under scrutiny.

In addition to these factual deficiencies, this Committee has provided no explanation as to how Representative Waters' and/or her Chief of Staff's actions failed to reflect creditably on the House or even what actions would constitute such non-creditable action. In light of these factual and legal deficiencies Count I should be dismissed.

2. Count II

House Rule XXIII, cl. 3 provides that "A Member . . . may not receive compensation and my not permit compensation to accrued to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress." As this Committee noted in Graves, "it must be shown that a Member improperly used his or her official position . . . and that the Member received a direct pecuniary benefit that resulted from [the actions]." Graves at 18. This Committee exonerated Representative Graves based on the facts that his co-investor was a legitimate witness, that the Representative had "limited input" into

his selection, and that Representative Graves did not receive "any benefit in connection with Mr. Hurst's testimony." Id.

As detailed above, the SAV plainly fails to establish both how Representative Waters improperly used her official position and/or derived any direct pecuniary benefit from her actions. In light of this Committee's precedent, absence of either factor is sufficient to exonerate her from this allegation.

3. Count III

The Code of Ethics for Government Service (72 Stat., Part 2, B12, H. Res. 175, 85th Cong.) (adopted July 11, 1958) provides;

> [A]ny person in Government service should:
>
> 5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept for himself or his family, favors or benefit under circumstance which might be construed by reasonable persons as influencing the performance of his governmental duties.

In Graves, this Committee held that establishing a violation under this provision "requires a showing that a Member improperly used his or her official position [in acting]." Graves at 20. Again, this Committee relied on Representative Graves' "limited involvement with the witness selection process" and the fact that his co-investor "met all of the reasonable and objective requirements the staff established for a witness." *Id.*

Grave's broad and highly-generalized conclusion poses a stark contrast to the SAV's detailed analysis of the emails at issue in this matter; this Committee cannot proffer any legitimate basis for such disparate treatment.

Nonetheless, the recitation of facts in the SAV does not establish how Representative Waters or her Chief of Staff "discriminate[d] unfairly by the dispensing of special favors

or privileges" to OneUnited or anyone else. The SAV makes no effort to describe how her Chief of Staff's email exchanges were "special favors" or "discriminated unfairly" against others; the SAV simply concludes that this is so. For example, the SAV ignore Representative Water long-standing interest and involvement in matters concerning minority banking issue, including members of the NBA. See, e.g., CSOC.WAT.TRANS.000355-358 (Testimony of Michael Grant, President of NBA, detailing Representative Waters' interest and involvement in minority banking issues). Instead, the SAV simply cites a handful of emails, removes all context and concludes that Representative Waters acted improperly.

In light of the aforementioned issues, the SAV fails to assert facts sufficient to constitute a violation of this provision.

III. Conclusion

The SAV is flawed both factually and legally. This Committee asserts that Representative Waters improperly used her official position to "preserve" her husband's investment in OneUnited Bank. Yet, after its exhaustive investigation it cannot identify a single active step taken by Representative Waters in furtherance of that goal. Given that she was able to arrange a meeting for the NBA with Treasury officials by simply calling Secretary Paulson, where are the imploring emails, phone call, or conversations one would expect to see of if she were attempting to procure funds for OneUnited? The SAV's reliance on her purported failure to ask her Chief of Staff to refrain from acting – an assertion actually refuted by his testimony – is the only action cited by the SAV. This is simply insufficient to state facts constituting the alleged violation.

Legally, this Committee has ignored its own admonition, cited in Graves, that:

> [P]otential conflicts of interest are best deterred through disclosure and the discipline of the electoral process. Other approaches are flawed both in terms of their reasonableness and practicality, and threaten to impair, rather than to protect, the relationship between the representative and the represented.

Graves at 15.

The stark differences in the Committee's lax approach to Graves and its harsh analysis in this matter create both the appearance and actuality of a double standard. Indeed the disparate approach to the two cases, which share so many similarities, is inexplicable. As such, Respondent simply request that this Committee to follow its own guidance in this area and dismiss the alleged violations.

Respectfully submitted this 12th day of July, 2010.

Stanley M. Brand
Andrew D. Herman
Brand Law Group, PC
923 15th Street, NW
Washington, DC 20005

Counsel for Rep. Maxine Waters

CERTIFICATE OF SERVICE

The undersigned declares under penalties of perjury that on July 12, 2010, I hereby served a copy of the foregoing Memorandum of Points and Authorities in Support of the Motion to Dismiss the Statement of Alleged Violations, on Blake Chisam, Counsel, House Committee on Standards of Official Conduct:

Andrew D. Herman

EXHIBIT 5

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT
INVESTIGATIVE SUBCOMMITTEE

In the Matter of:	)
REPRESENTATIVE MAXINE WATERS,	)
Respondent.	)

ORDER

This investigative subcommittee having considered Respondent's Motion to Dismiss, Memorandum of Points and Authorities, and the entire record herein, hereby finds:

1. Count I of the Statement of Alleged Violation states facts that constitute a violation of the Code of Official Conduct, or another applicable law, rule, regulation, or standard of conduct.

2. Count II of the Statement of Alleged Violation states facts that constitute a violation of the Code of Official Conduct, or another applicable law, rules, regulation, or standard of conduct.

3. Count III of the Statement of Alleged Violation states facts that constitute a violation of the Code of Official Conduct, or another applicable law, rule, regulation, or standard of conduct. Accordingly,

It is by the Investigative Subcommittee this 15th day of July, 2010, ORDERED

That the Motion is DENIED.

Kathy Castor
Chair

Mike Conaway
Ranking Republican Member

Copies to:

Stanley M. Brand, Esq.
Brand Law Group
923 Fifteenth Street, N.W.
Washington, D.C. 20005

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT
INVESTIGATIVE SUBCOMMITTEE

In the Matter of	)
REPRESENTATIVE MAXINE WATERS,	)
Respondent.	)

MEMORANDUM IN SUPPORT OF ORDER

On July 12, 2010, Respondent submitted to the Investigative Subcommittee a Motion to Dismiss the Statement of Alleged Violation adopted by the subcommittee on June 15, 2010,[1] and a Memorandum of Points and Authorities in Support of that motion.[2] By a separate Order, the Investigative Subcommittee denied Respondent's Motion to Dismiss on July 15, 2010. Through this Memorandum the Investigative Subcommittee sets forth the bases for its Order denying Respondent's motion.[3]

STANDARD OF REVIEW

Pursuant to Standards Committee Rule 19(f), upon the completion of its inquiry:

> [A]n investigative subcommittee, by a majority vote of its members, may adopt a Statement of Alleged Violation if it determines that there is substantial reason to believe that a

[1] Motion to Dismiss the Statement of Alleged Violations (hereinafter Motion).
[2] Memorandum of Points and Authorities in Support of Motion to Dismiss the Statement of Alleged Violations (hereinafter Mem. in Supp.)
[3] Respondent has requested an oral hearing on this matter and has requested "that the Committee acknowledge this request for an Oral Hearing in ruling on this motion and provide an explanation for such decision should it deny this request." Motion at 2. Respondent made a similar request as part of her Motion for Bill of Particulars. Motion for Bill of Particulars at 4. In ruling on Respondent's Motion for Bill of Particulars, the Investigative Subcommittee denied Respondent's request for an oral hearing as unnecessary. Memorandum in Support of Order at 1, fn.1. Respondent has not cited any precedent or rule that might permit the Investigative Subcommittee to hold an oral hearing on this matter. However, even if there were such precedent, the Investigative Subcommittee would still deny the request in this case. An oral hearing would only be necessary if Respondent's Motion raised an issue that the Investigative Subcommittee viewed to be a "close call." Respondent has raised no such issue in this Motion. For this reason, the Investigative Subcommittee views such a hearing to be unnecessary, and thus Respondent's request for an oral hearing is denied.

> violation of the Code of Official Conduct, or of a law, rule, regulation, or other standard of conduct applicable to the performance of official duties or the discharge of official responsibilities by a Member . . . has occurred.[4]

Standards Committee Rule 22(c)(2) provides that a Respondent may file a motion to dismiss a Statement of Alleged Violation, which may be based on only two possible grounds: (1) that the Statement of Alleged Violation fails to state facts that constitute a violation of the Code of Official Conduct, or other applicable law, rule, regulation, or standard of conduct; or (2) that the Standards Committee lacks jurisdiction to consider the allegations contained in the Statement of Alleged Violation.

ANALYSIS

For the reasons set forth below, the Investigative Subcommittee has found that the Statement of Alleged Violation adopted by the Investigative Subcommittee on June 15, 2010, states facts that constitute violations of the Code of Official Conduct or other applicable laws, rules, regulations, or standards of conduct and that the Standards Committee has jurisdiction over the allegations in the Statement of Alleged Violation. Therefore, Respondent's Motion to Dismiss is denied.

I. The Statement of Alleged Violation Is At Best Only Superficially Similar to *Graves*.

Respondent's primary argument in support of her Motion is that the Investigative Subcommittee's "analysis of both the legal standards and the underlying factual record at issue . . . is sharply divergent and significantly harsher than the decision rendered in Graves[.]"[5] Respondent's reliance on superficial similarities between the facts in the Statement of Alleged Violation and the Standards Committee's decision in *In the Matter of Representative Sam Graves* (hereinafter *Graves*) betrays a fundamental misunderstanding of the Standards Committee's decision in *Graves* and the violations alleged in this case.

[4] Standards Committee Rule 19(f).
[5] Mem. in Supp. at 2.

A. The Factual Allegations in the Statement of Alleged Violation Are Not Similar to the Facts in *Graves*.

While the facts as stated in the Statement of Alleged Violation in this matter share superficial similarities to the facts in *Graves*, there are several material factual differences between Respondent's case and *Graves*.

In *Graves*, the Standards Committee determined that Representative Graves, who was the Ranking Member of the Small Business Committee, did not violate either House Rule XXIII, clause 3, or paragraph 5 of the Code of Ethics for Government Service (Code of Ethics), when he invited a person, who was invested in the same renewable fuel cooperatives as Representative Graves' wife, to testify on behalf of an industry group before a Small Business Committee hearing regarding renewable fuels.[6] The Standards Committee further found no evidence that any party took any action as a result of, or as a follow up to, the witness' testimony.[7] As such, the sole allegation of any action at issue in *Graves* was the invitation to the witness to testify at the hearing.

In contrast, the Statement of Alleged Violation asserts that the day after the Department of Treasury and the Federal Housing Finance Agency took action that threatened the viability of OneUnited Bank (OneUnited), a bank on whose board Respondent's husband had previously served and in which Respondent's husband held a significant investment, Respondent arranged for a meeting between executives from OneUnited and officials at the Department of Treasury.[8] At the meeting between the OneUnited executives and Treasury officials, the executives asked Treasury for $50 million in funding for OneUnited.[9] Treasury officials informed the executives that Treasury was not legally authorized to provide such funding.[10] Following this direct request for funding by OneUnited executives, Respondent determined that it would be ethically improper for her to advocate on behalf of OneUnited.[11] Despite previously instructing her Chief of Staff to work with the OneUnited executives, Respondent failed to instruct her Chief of Staff that he

[6] *Graves*, at 18-20.
[7] *Id.* at 11.
[8] Statement of Alleged Violation at ¶¶ 1-10, 13-14.
[9] *Id.* at 11.
[10] *Id.* at ¶¶ 12.
[11] *Id.* at ¶¶ 20-22.

should not advocate on behalf of the bank.[12] Respondent's Chief of Staff in fact continued to advocate on behalf of the bank, even after Respondent determined that she could not do so.[13] Respondent's Chief of Staff's assistance to OneUnited included attending meetings about a legislative solution to OneUnited's financial problems with OneUnited executives, exchanging emails and telephone calls with the OneUnited executives about a legislative solution to OneUnited's financial problems, and communicating with other congressional staffers regarding a legislative solution to OneUnited's financial problems.[14] Following Respondent's Chief of Staff's continued assistance, OneUnited raised $17 million in private funding, which the bank's Chief Executive Officer thanked Respondent's Chief of Staff for his assistance in raising.[15] OneUnited also received $12,063,000 in funding from the Treasury.[16]

Given the material differences between the factual allegations in the Statement of Alleged Violation and the facts in *Graves*, Respondent's heavy reliance on *Graves* is misplaced. Instead, the allegations in the Statement of Alleged Violation are more comparable to the facts in the Standards Committee's report *In the Matter of a Complaint against Representative Robert L.F. Sikes* (hereinafter *Sikes*).[17] In *Sikes*, the Standards Committee found that Representative Sikes sought to purchase shares of a privately held bank "which he had been active in his official position in establishing[.]"[18] As a result, the Standards Committee found that Representative Sikes failed to observe:

> The standard of ethical conduct . . . as is expressed in principle in Section 5 of the code of Ethics for Government Service, and which prohibits any person in Government service from accepting for "himself . . . benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties[.]"[19]

The Standards Committee further found that Representative Sikes sponsored legislation to remove a reversionary interest and restrictions on land in which he had a personal financial

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[12] *Id.* at ¶¶ 9, 20-23.
[13] *Id.* at ¶¶ 24-31.
[14] *Id.*
[15] *Id.* at ¶ 36.
[16] *Id.* at ¶ 37.
[17] Comm. on Standards of Official Conduct, *In the Matter of a Complaint Against Representative Robert L.F. Sikes*, (hereinafter *Sikes*) H. Rep. 94-1364, 94th Cong., 2d Sess. (1976).
[18] *Id* at 3.
[19] *Id.*

interest.[20] As a result, the Standards Committee found that Representative Sikes failed to observe "[t]he standard of ethical conduct that should be observed by Members of the House, as is expressed in principle in the Code of Ethics for Government Service, and which prohibits conflicts of interests and the use of an official position for any personal benefit."[21] The precedent in *Sikes* is not just consistent with the Statement of Alleged Violation, but in fact compelled its adoption.

The Investigative Subcommittee notes that despite Respondent's assertion that *Graves* shares similarities to the allegations in the Statement of Alleged Violation, the facts in *Graves* are far more similar to the circumstances surrounding the 2007 public hearing of the Subcommittee on Oversight and Investigations of the House Committee on Financial Services, cited by Respondent as evidence of her disclosure of her interest in OneUnited.[22] Much like the hearing in *Graves*, the 2007 hearing was an oversight hearing of a subcommittee on which Respondent served.[23] The hearing did not address any specific legislation and did not result in any specific action, but instead was "designed to highlight the role of minority- and women-owned banks in the economy and to examine how Federal regulators and Congress can work together to support these financial institutions."[24] An executive of OneUnited testified at the hearing, but as in *Graves*, the executive's testimony was on behalf of an industry group, and did not seek anything for any individual bank.[25] Instead, the OneUnited executive's testimony asked the subcommittee to "forc[e] the banking agencies" to fulfill their statutory duty to assist minority banks under the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA) by: revising capital rules to account for unique issues facing minority banks; revising the Community Reinvestment Act rules to address the "particular environment in which minority banks operate;" and urging regulators to "consider the particular challenges facing minority institutions when making broad policy statements."[26] As with the result in *Graves*, Respondent had properly disclosed her financial interest in OneUnited on her Financial Disclosure

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[20] *Id.* at 4
[21] *Id.*
[22] Mem. in Supp. at 4 (*citing Preserving and Expanding Minority Banks: Hearing Before the Subcomm. On Oversight and Investigations of the H. Comm. On Financial Services*, 110th Cong. 21-22 (2007) (hereinafter 2007 Hearing)).
[23] 2007 Hearing.
[24] *Id.* at 1.
[25] *Id.* at 16-19, 72-73.
[26] *Id.* at 17-18.

Statements, and thus her participation at that hearing did not violate any relevant standards of conduct.

B. The Application of the Relevant Legal Standards in the Statement of Alleged Violation Is Wholly Consistent with the Application of the Legal Standards in *Graves* and Other Relevant Precedent.

Respondent asserts that the Statement of Alleged Violation "cannot be reconciled with this Committee's precedent."[27] Respondent essentially makes three arguments regarding the legal standards in the Statement of Alleged Violation. First, Respondent argues that *Graves* compels a finding that Respondent did not violate the applicable rules regarding conflict of interest.[28] Second, Respondent argues that the "conclusory" analysis of the actions by Representative Graves and his staff and the "disparate treatment afforded" Respondent shows that the Statement of Alleged Violation fails to provide sufficient "notice" to Respondent of the allegations against her.[29] Finally, Respondent argues that the Standards Committee's analysis of the potential for financial gain for Representative Graves as a result of the actions of him and his staff demonstrates "contradictory analysis" in the Statement of Alleged Violation.[30] However, these arguments misstate the actual allegations in the Statement of Alleged Violation, misinterpret the legal standard in *Graves*, and ignore other relevant Standards Committee precedent.

1. *The Statement of Alleged Violation Does Not Assert Violations of Relevant Conflict of Interest Standards.*

Respondent asserts that she fully disclosed her interest in OneUnited which should "obviate[] . . . concerns about 'conflict of interest.'"[31] Respondent further argues that, as in *Graves*, any benefit Respondent actually received would inure to Respondent as a member of a class of shareholders, which "would not be sufficient to establish an ethics violation[.]"[32]

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[27] Mem. in Supp. at 2.
[28] *Id.* at 3-7
[29] *Id.* at 7-10.
[30] *Id.* at 10-12.
[31] *Id.* at 3-4.
[32] *Id.* at 5-6.

However, Respondent's arguments regarding conflict of interest have no bearing on the Statement of Alleged Violation. This is because the Statement of Alleged Violation does not assert that Respondent's actions created a conflict of interest, or even an appearance of conflict of interest, which was the allegation in *Graves*. Instead, the Statement of Alleged Violation asserts that Respondent's actions and inactions: "created an appearance that Respondent was taking official action for Respondent's personal benefit" (Count I); were "inconsistent with the spirit of the House Rule applicable to receiving compensation by virtue of influence improperly exerted from the position of Respondent in Congress" (Count II); and were such that a "[r]easonable person could construe" those actions and inactions "as the dispensing of special favors or privileges to OneUnited, and accepting the preservation of the value of her husband's investment in OneUnited as a benefit under circumstances which might influence the performance of Respondent's governmental duties" (Count III). As such, Respondent's arguments about conflict of interest have no bearing on whether the Statement of Alleged Violation states facts that constitute violations of the Code of Official Conduct, or other applicable laws, rules, regulations, or standards of conduct.

2. *The Acts Taken by Respondent and Her Chief of Staff Are Not Comparable to the Acts Taken by Representative Graves and His Staff.*

Respondent cites to the Standards Committee's conclusion that Representative Graves' involvement with the selection of the witness was "not impermissible" and then asserts that "the SAV is silent on how exactly [Respondent's and her Chief of Staff's] actions constituted 'impermissible . . . involvement'" and further asserts that "the SAV [does not] allege that [Respondent] performed or had knowledge of any of her Chief of Staff's actions."[33]

However, Respondent's attempt to compare the allegations in the Statement of Alleged Violation to the facts in *Graves* is without merit.

[33] *Id.* at 7-8.

a. The Statement of Alleged Violation explains why the actions of Respondent and her Chief of Staff were improper.

Contrary to Respondent's claims, the Statement of Alleged Violation is not "silent on how exactly" the actions of Respondent and her Chief of Staff "constituted 'impermissible . . . involvement[.]'" To the contrary, the Statement of Alleged Violation plainly and concisely states that the actions by Respondent and Chief of Staff were improper because they "created an appearance that Respondent was taking official action for Respondent's personal benefit[.]"

As the Standards Committee noted in *Graves*, the House recognizes that "some actual conflicts of interest are inevitable . . . and are not in themselves necessarily improper or unethical."[34] Under House rules, a Member is not barred from taking an official action that may result in a personal benefit to the Member, if the potential for a personal benefit is incidental to the Member's purpose in taking the action.[35] However, a Member may not take official action if a personal benefit is, or appears to be, one of the Member's reasons for taking action.[36]

Under the Code of Ethics for Government Service (Code of Ethics),[37] a federal official, including a Member, should:

> Never discriminate unfairly by dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.[38]

Because the Code of Ethics measures a Member's conduct by "what might be construed by reasonable persons," a Member may violate this provision even if the Member would have

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[34] *See* House Comm. on Standards of Official Conduct, *In the Matter of Representative Sam Graves*, (hereinafter *Graves*) H. Rep. 111-320, 111th Cong., 1st Sess. 15 (2009) (internal quotations and citations omitted).
[35] An official action that incidentally results in a personal benefit creates a real, but permissible conflict of interest. *See Graves*, at 15. This is distinguishable from official actions that appear to result in a personal benefit, but do not. *Id.* Official action that results in such an *appearance of a conflict of interest* is only precluded under very narrow circumstances. *See e.g.*, House Rule XXVII, clause 4 (when a Member, officer or employee has an agreement for future employment or is negotiating for future employment, the Member, officer or employee must "recuse himself or herself from any matter in which there is a conflict of interest or an appearance of conflict of interest" related to such future employment).
[36] House Rule XXIII, clauses 2 and 3; Code of Ethics for Government Service, section 5.
[37] 72 Stat., Part 2, B12, H. Res. 175, 85th Cong. (adopted Jul. 11, 1958).
[38] Code of Ethics for Government Service, section 5.

taken the same official action without a potential personal benefit, if the Member's actions raise the appearance of impropriety.[39]

The House Rules also prohibit Members from "receiv[ing] compensation and . . . permit[ing] compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress."[40] A Member would violate this provision if the Member used the Member's "political influence, the influence of his position . . . to make pecuniary gains."[41]

Moreover, "when considering the applicability of this provision to any activity they are considering undertaking," Members "must also bear in mind that under a separate provision of the Code of Official Conduct (House Rule 23, cl.2), they are required to adhere to the spirit as well as the letter of the Rules of the House."[42] House Rule XXIII, clause 2, was drafted to "provide the House the means to deal with infractions that rise to trouble it without burdening it with defining specific charges that would be difficult to state with precision."[43] The practical effect of House Rule XXIII, clause 2, has been to provide a device for construing other provisions of the Code of Official Conduct and House Rules.[44] This rule has been interpreted to mean that a Member or employee may not do indirectly what the Member or employee would be barred from doing directly.[45] In other words, the House Rules should be read broadly, and a narrow technical reading of the House Rules should not overcome the "spirit" of the rules and the intent of the House in adopting the rules.[46]

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[39] Comm. on Standards of Official Conduct, *In the Matter of Representative Mario Biaggi*, (hereinafter *Biaggi*) H. Rep. 100-56, 100th Cong. 2d Sess. 9 (Feb. 18, 1988) ("While the Committee does not argue, nor can it be determined, that Representative Biaggi would not have interceded on behalf of Coastal in the absence or because of Esposito's gratuities to the congressman, it is nevertheless clear that at a minimum, an appearance is raised that such was the case. Accordingly, the Committee concluded that such improper appearance supports a determination that Representative Biaggi violated clause 5 of the Code of Ethics for Government Service.").

[40] House Rule XXIII, clause 3.

[41] 114 *Cong. Rec.* 8807 (Apr. 3, 1968) (statement of Representative Price).

[42] 2008 *House Ethics Manual*, at 186.

[43] 114 *Cong. Rec.* 8778 (Apr. 3, 1968); *see also* 114 *Cong. Rec.* 8799 (statement of Representative Teague, member of the House Comm. on Standards of Official Conduct, 90th Cong.).

[44] 2008 *House Ethics Manual*, at 17.

[45] House Select Comm. on Ethics, *Advisory Opinion 4*, Rep. 95-1837, 61-62, 95th Cong., 2d Sess. (1979).

[46] *Id.* House Rule XXIII, clause 2, has not only been used as an aid to interpreting other House rules. For example, the Standards Committee has cited the violation of House Rule XXIII, clause 2, several times in recommending expulsion of Members for various reasons. *See e.g.*, House Comm. on Standards of Official Conduct, *In the Matter of Representative Michael J. Myers*, H. Rep. 96-1387 96th Cong., 2d Sess. 5 (1980) (Member convicted of bribery);

The Standards Committee applied these rules to Representative Graves' sole act of inviting a witness to testify on behalf of an industry association at an oversight hearing at which no specific piece of legislation was at issue.[47] The Standards Committee found that by this action Representative Graves did not violate House Rule XXIII, clause 3, because the witness "met all of the reasonable and objective criteria to testify at the hearing, Representative Graves' involvement with the selection of [the witness] was not improper."[48] The Standards Committee further noted that it had not "identified any evidence that Representative Graves received any benefit in connection with [the witness]'s testimony."[49] Similarly, the Standards Committee determined that Representative Graves did not violate paragraph 5 of the Code of Ethics, because the witness "met all of the reasonable and objective requirements the staff established for a witness . . ., Representative Graves' involvement in the witness selection process did not discriminate unfairly against other potential witnesses by dispensing a special favor to [the witness]."[50]

At the conclusion of its investigation, the Investigative Subcommittee applied the same rules related to taking action for personal benefit as it did to Representative Graves. However, in contrast to the limited finding of acts by Representative Graves and his staff, the Statement of Alleged Violation alleges that not only did Respondent invite OneUnited executives to meet with senior Treasury officials, during which meeting the executives requested money for OneUnited specifically, but following the meeting Respondent's Chief of Staff had multiple interactions with OneUnited executives regarding the bank's request to Treasury for funding.[51] The

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House Comm. on Standards of Official Conduct, *In the Matter of Representative Raymond F. Lederer*, H. Rep. 97-110 97th Cong., 1st Sess. 16 n.8 (1981) (Member convicted of bribery); *Biaggi*,, at 7 (Member convicted of accepting illegal gratuities); House Comm. on Standards of Official Conduct, *In the Matter of Representative James A. Traficant, Jr.*, H. Rep. 107-594, 107th Cong., 2d Sess. Vols. I-VI (July 19, 2002) (Member convicted of conspiring to violate the bribery statute, accepting gratuities, obstructing justice, conspiring to defraud the United States, filing false income tax returns, and racketeering).

[47] *Graves* at 18-20.

[48] *Graves*, at 19.

[49] *Graves*, at 19.

[50] *Graves*, at 20.

[51] Respondent also asserts that the Statement of Alleged Violation does not make a distinction between actions taken on behalf of OneUnited and for the National Bankers Association (NBA) as a whole. However, the Statement of Alleged Violation does make such a distinction. The Statement of Alleged Violation asserts that "Respondent called then-Treasury Secretary Henry Paulson on or around September 8, 2008, and requested a meeting on behalf of NBA, which OneUnited was a member of, to discuss the impact of the Conservatorship on minority banks." Statement of Alleged Violation at ¶ 7. The Statement of Alleged Violation asserts that all other actions, other than the initial request for a meeting with Treasury, were on behalf of OneUnited, not the NBA. *Id.* at 24-31.

Investigative Subcommittee concluded that these actions were impermissible because they "created an appearance that Respondent was taking official action for Respondent's personal benefit[.]"[52]

b. The Statement of Alleged Violation explains why Respondent's actions and inactions violated the relevant standards of conduct.

Respondent accurately asserts that the Statement of Alleged Violation does not allege that Respondent had knowledge of any of her Chief of Staff's actions. However, such an allegation would be irrelevant to allegations in the Statement of Alleged Violation. The Statement of Alleged Violation plainly states that "Respondent is responsible for the oversight and administration of her congressional office"[53] and that "Respondent is responsible for the conduct and actions of members of her staff, especially her Chief of Staff, when members of her staff are acting within the scope and course of their employment."[54]

Moreover, these allegations are wholly consistent with Standards Committee precedent finding that Members are responsible for the oversight and administration of their congressional offices.[55] Under longstanding House precedent, "Members are responsible for the knowledge and acts acquired or committed by their staff within the course and scope of their employment."[56] "Many times Members act through the actions of their staff and, therefore, should be held liable for those actions in certain circumstances."[57] This is because "it would not well serve the House as an institution to allow its Members to escape responsibility by delegating authority to their staff to take actions and hide behind their lack of knowledge of the facts surrounding these actions."[58]

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[52] Statement of Alleged Violation at 48.
[53] Statement of Alleged Violation at ¶¶ 45, 53, 59.
[54] *Id.* at ¶¶ 46, 54, 60.
[55] *Gingrich*, at 59-60.
[56] *See* House Comm. on Standards of Official Conduct, *In the Matter of the Investigation into Officially Connected Travel of House Members to Attend the Carib News Foundation Multinational Business Conferences in 2007 and 2008 (hereinafter Carib News)*, H. Rep. 111-422, 111th Cong., 2d Sess 122 (2010).
[57] *Id.* at 126.
[58] *Id.* at 125-126. Respondent asserts that the Standards Committee "cleared Representative Graves, in part, because his involvement was 'limited' and his staff performed the bulk of the work at issue." Mem. in Supp. at 9. However, Representative Graves was not "cleared" because of his limited involvement. To the contrary, the Standards Committee found that Representative Graves did not violate any relevant standard of conduct because his staff's actions in selecting the witness were proper. *Graves*, at 19 ("the Standards Committee concluded that because [the

For example, in *Gingrich*, the Standards Committee held Representative Gingrich responsible for letters mailed by his staff in violation of the Franking Privilege despite his lack of personal knowledge.[59] The Standards Committee concluded that "Representative Gingrich was remiss in his oversight and administration of his congressional office which gave rise to the initiation of the subject improper correspondence."[60]

Similarly, in *Shuster*, the Standards Committee stated, "Members of the House are ultimately responsible for ensuring their offices function in accordance with applicable standards. In this regard, Members must not only ensure that their offices comply with appropriate standards, but also take account in the manner in which their actions *may be perceived*."[61] Representative Shuster's former chief of staff, after she left his employment, continued to provide advisory and scheduling services to the House office. Representative Shuster condoned her conduct through his inaction.[62]

In *Murphy*, Representative Murphy's response to the allegations that he allowed a law firm to use House supplies and property was that he did not know or did not approve of the use.[63] Counsel to the Select Committee argued that "a Member must bear responsibility for the actions which are under his ultimate authority and should not escape liability by attempting to blame his staff."[64] The Committee agreed with this position and held that Representative Murphy was "responsible to the House for assuring that resources provided in support of his official duties are applied to the proper purposes," regardless of his claim that he had no knowledge of their use.[65]

More recently, in *Carib News*, the investigative subcommittee concluded that Representative Rangel acted when he attended a conference through his chief of staff's actions of completing and signing the forms necessary for the approval to attend the conference.[66] The investigative subcommittee explained that Representative Rangel delegated to his chief of staff

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witness] met all the reasonable and objective criteria to testify at the hearing, Representative Graves involvement with the selection of [the witness] was not impermissible[.]").
[59] *Gingrich*, at 56- 60, and 78.
[60] *Gingrich*, at 60.
[61] *Shuster*, at 49 (emphasis added).
[62] *Id.* at 3F-3G.
[63] *Murphy*, at 4.
[64] *Id.* at 85.
[65] *Murphy*, at 4.
[66] *Carib News*, at 126.

the authority to complete and sign the traveler forms on his behalf, and therefore could be held responsible for the knowledge his chief of staff had when completing the forms.[67] Because of this, the investigative subcommittee found that Representative Rangel knowingly accepted an impermissible gift of travel and that he failed to comply with the House travel regulation's requirement when he failed to indicate certain additional sponsors on his post-travel disclosures.[68]

3. The Statement of Alleged Violation Asserts that the Actions of Respondent and Her Chief of Staff Appeared to be for Her Benefit, Not that the Actions Actually Benefitted Her.

With regard to the potential personal gain for Respondent from the actions by Respondent and her staff, Respondent points to the statement in *Graves* "that Representative Graves never 'actually received a financial benefit' from his co-investor's testimony" and then asserts that Respondent "received no benefit from her alleged actions" because "the SAV fails to acknowledge that on October 31, 2008, OneUnited received a final private sector investment which rendered the bank 'Adequately Capitalized,' and eligible for so-called TARP funds."[69] Respondent further asserts that Respondent could not have benefitted because "the value of [Respondent's] husband's stock was . . . unchanged after OneUnited received the TARP funds in December."[70]

However, the key finding in *Graves* was not that Representative Graves did not benefit from the testimony of the witness but that "neither Representative Graves nor Mrs. Graves *could* derive a financial benefit from [the witness]'s testimony."[71] For this reason, whether or not OneUnited received private investment in late October is irrelevant to the allegation that "Respondent's Chief of Staff's continued involvement" in September and early October "in assisting OneUnited created an appearance that Respondent was taking official action for Respondent's personal benefit[.]"[72] The Statement of Alleged Violation does not assert that

[67] *Id.*
[68] *Id.*
[69] Mem. in Supp. at 11. Of course, the Statement of Alleged Violation does acknowledge OneUnited's receipt of private investment. Statement of Alleged Violation, ¶ 35.
[70] Mem. in Supp. at 11.
[71] *Graves* at 17 (emphasis added).
[72] Statement of Alleged Violation, ¶ 48.

OneUnited was ultimately assisted by Respondent's Chief of Staff's actions. Instead, the Statement of Alleged Violation asserts that the appearance of acting for Respondent's narrow financial interest was by itself improper.

Furthermore, the fact that the value of Respondent's shares of OneUnited stock did not change after receipt of TARP funds does not show that Respondent did not benefit from OneUnited's receipt of TARP funds. This retention of value is the benefit Respondent received. As the Statement of Alleged Violation states, "the preservation of the value of Respondent's husband's investment in OneUnited would personally benefit Respondent."[73] The Investigative Subcommittee concluded that OneUnited was under eminent threat of failure, and that Representative Waters, through her husband, had a significant financial interest in OneUnited, which would have been worthless if the bank had failed.[74] For this reason, when Respondent's Chief of Staff took actions that a reasonable person could interpret as being directed at helping to preserve Respondent's financial interest, this created the appearance that Respondent was improperly using official resources for her own narrow financial interest.[75]

II. The Statement of Alleged Violation States Facts that Constitute Violations of the Relevant Legal Standards.

After her reliance on a misplaced reading of *Graves*, most of Respondent's remaining arguments do not assert that the Statement of Alleged Violation fails to state facts that constitute violations of the Code of Official Conduct, or other applicable laws, rules, regulations, or standards of conduct. Instead, Respondent asserts that she believes she can disprove the facts as stated. Of course, such an argument is not a proper basis for a motion to dismiss. A motion to dismiss merely assesses whether a Statement of Alleged Violation states facts that, if proven, would constitute a violation of the Code of Official Conduct, or any other applicable laws, rules, regulations, or standards of conduct. It is only when a Statement of Alleged Violation is heard

[73] Statement of Alleged Violation ¶ 44.
[74] *Id.*
[75] Respondent also asserts that the Investigative Subcommittee's analysis of the value of the OneUnited shares as a percentage of Respondent's and her husband's combined net worth is improper because the Standards Committee did not conduct a similar analysis in *Graves*. Mem. in Supp. at 6. However, such an analysis was unnecessary in *Graves* because the Standards Committee found that it was not possible for Representative Graves and his wife to benefit from the witness' testimony. *See Graves* at 17. Because the Investigative Subcommittee determined that in September 2008 Respondent faced the eminent threat that she and her husband would lose all value in their OneUnited shares, an analysis of Respondent's and her husband's net worth was necessary in the instant case.

by an adjudicatory subcommittee that the facts supporting the Statement of Alleged Violation are weighed against any evidence Respondent puts forward. However, even if Respondent's assertions were the proper basis of a motion to dismiss, she has not presented any facts that disprove any material allegation in the Statement of Alleged Violation.

A. The Statement of Alleged Violation States Facts That Constitute a Violation of Clause 1 of the House Rule XXIII.

The Statement of Alleged Violation sets forth facts that constitute a violation of clause 1 of House Rule XXIII relating to Respondent's failure in the oversight and administration of her staff that resulted in actions that did not reflect creditably on the House.

Under House Rule XXIII, clause 1: "A Member, Delegate, Resident Commissioner, officer, or employee of the House shall behave at all times in a manner that shall reflect creditably on the House." Historically, the Standards Committee has invoked clause 1 to review conduct that encompasses violations of law and abuses of a Member's official position.[76] "Clause 1 was adopted in part, so that the Committee, in applying the Code, would retain the ability to deal with any given act or accumulation of acts which, in the judgment of the committee, are severe enough to reflect discredit on the Congress."[77]

Count I of the Statement of Alleged Violation contains a plain and concise statement of the alleged facts that constitute behavior that fails to reflect creditably on the House in violation of clause 1 of House Rule XXIII. Count I of the Statement of Alleged Violation asserts that "Respondent's Chief of Staff's continued involvement in assisting OneUnited created an appearance that Respondent was taking official action for Respondent's personal benefit, which did not reflect creditably on the House."[78] Count I asserts that "Respondent's failure to instruct her Chief of Staff to refrain from assisting OneUnited after Respondent realized that she 'should not be involved' violated" House Rule XXIII, clause 1.[79]

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[76] 2008 *House Ethics Manual* at 16.
[77] House Comm. on Standards of Official Conduct, *In the Matter of Representative E.G. "Bud" Shuster*, H. Rep. 106-979, 106th Cong., 2d Sess (2000).
[78] Statement of Alleged Violation, ¶ 48.
[79] *Id.*, at ¶ 49.

Respondent does not dispute that Respondent's Chief of Staff took the actions alleged in the Statement of Alleged Violation. Instead, Respondent argues that the "lone allegation specific to [Respondent], that she should have instructed her Chief of Staff to refrain from assisting OneUnited, is refuted by the record."[80] As noted previously, the existence of evidence that does not support the allegations in the Statement of Alleged Violation is not a proper basis of a motion to dismiss. However, even it was, Respondent does not assert any evidence that refutes the allegations that Respondent failed to instruct her Chief of Staff not to advocate on behalf of OneUnited.

Respondent asserts two pieces of evidence in support of her argument that the allegation is refuted by the record. First, Respondent cites to the Memorandum of Interview of the Office of Congressional Ethics' interview of Respondent's Chief of Staff, in which Respondent's "Chief of Staff told OCE that [Respondent] had spoken to Representative Frank and subsequently told her Chief of Staff not to worry about OneUnited."[81] Second, Respondent cites to the transcript of the interview of Respondent's Chief of Staff by the investigative subcommittee counsel, in which "[h]e also informed this Committee in September of [sic] October of 2008 '[Respondent] appeared to be very . . . comfortable that . . . whatever the issue was, if there was to be a resolution, that Barney would take . . . a look at it and make a decision . . as the Chairman, whether or not it was something he wanted to get involved with."[82]

These two pieces of evidence do not refute any allegation in the Statement of Alleged Violation. At best, this evidence suggests that Respondent generally discussed her conversation with Representative Frank with her Chief of Staff and that Respondent told her Chief of Staff that Representative Frank would be deciding whether or not to get involved. Indeed, contrary to Respondent's paraphrase, the Office of Congressional Ethics' Memorandum of Interview does not state that Respondent "told her Chief of Staff not to worry about OneUnited." Instead, the Memorandum of Interview states that Respondent told her Chief of Staff "that he need not work on the minority bank matters" which he "interpreted . . . to mean that he need not work on NBA matters that day."

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[80] Mem. in Supp. at 13.
[81] *Id.* at 9.
[82] *Id.*

Respondent's Chief of Staff's general statements that Respondent was comfortable that Representative Frank was looking at minority bank issues and that Respondent told her Chief of Staff not to work on minority banking issues on one specific day have no bearing on whether Respondent instructed her Chief of Staff not to advocate on behalf of OneUnited and are not sufficient to relieve Respondent of responsibility for the oversight and administration of her office.

Respondent also asserts that "the SAV's 'preservation of value' allegation [does not] stand up under scrutiny."[83] Once again, Respondent does not assert that the allegations in the Statement of Alleged Violation do not state a violation, but only that Respondent believes that there is evidence that is contrary to the assertion in the Statement of Alleged Violation.

The Statement of Alleged Violation asserts that "OneUnited sought to obtain funding from Treasury and would have failed if it did not receive capital."[84] The Statement of Alleged Violation further asserts that "[i]f OneUnited had not received this funding, Respondent's husband's financial interest in OneUnited would have been worthless."[85] Respondent does not deny that OneUnited sought funding from Treasury. Nor does Respondent deny that OneUnited would have failed if it did not receive capital. Finally, Respondent does not deny that her husband's financial interest in OneUnited would have been worthless if OneUnited had not received funding.

Instead, Respondent makes the irrelevant argument that "the SAV fails to acknowledge that on October 31, 2008, OneUnited received a final private sector investment which rendered the bank 'Adequately Capitalized,' and eligible for so-called TARP funds."[86] As stated previously, whether or not OneUnited received private investment in late October has no bearing as to whether "Respondent's Chief of Staff's continued involvement" in September and early October "in assisting OneUnited created an appearance that Respondent was taking official action for Respondent's person benefit[.]"[87] The Statement of Alleged Violation does not assert that OneUnited was ultimately saved from failure by Respondent's Chief of Staff's actions.

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[83] Mem. in Supp. at 13.
[84] Statement of Alleged Violation, ¶ 41.
[85] *Id.* at 44.
[86] Mem. in Supp. at 11.
[87] Statement of Alleged Violation, ¶ 48.

Instead, the Statement of Alleged Violation asserts that the appearance of acting in Respondent's narrow financial interest did not reflect creditably on the House.

B. The Statement of Alleged Violation States Facts that Constitute a Violation of the Spirit of clause 3 of House Rule XXIII.

The Statement of Alleged Violation sets forth facts that constitute a violation the spirit of clause 3 of House Rule XXIII relating to Respondent's failure in the oversight and administration of her staff that resulted in a violation of the spirit of the prohibition on receiving compensation from the use of Respondent's position in Congress.

House Rule XXIII, clause 3, prohibits Members from "receiv[ing] compensation and . . . permit[ing] compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress."[88] A Member would violate this provision if the Member used the Member's "political influence, the influence of his position . . . to make pecuniary gains."[89] Moreover, pursuant to House Rule XXIII, clause 2, Members must adhere to the spirit as well as the letter of the House XXIII, clause 3.[90]

Respondent argues that Count II of the Statement of Alleged Violation fails to state facts that constitute a violation of House Rule XXIII, clause 2, because Count II "plainly fails to establish both how [Respondent] improperly used her official position and/or derived any direct pecuniary benefit from her actions."[91] However, as stated previously, when Respondent invited OneUnited executives to meet with senior Treasury officials, during which meeting the executives requested money for OneUnited specifically, and when following the meeting Respondent's Chief of Staff had multiple interactions with OneUnited executives regarding the bank's request to Treasury for funding, Respondent "created an appearance that Respondent was taking official action for Respondent's personal benefit[.]"[92] This use of official resources violated the spirit of the House Rule that prohibits "receiv[ing] compensation and . . . permit[ing]

[88] House Rule XXIII, clause 3.
[89] 114 *Cong. Rec.* 8807 (Apr. 3, 1968) (statement of Representative Price).
[90] 2008 *House Ethics Manual*, at 186.
[91] *Id.* at 14.
[92] Statement of Alleged Violation at 48.

compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress."

C. The Statement of Alleged Violation States Facts that Constitute a Violation of Paragraph 5 of the Code of Ethics for Government Service.

The Statement of Alleged Violation sets forth facts that constitute a violation of paragraph 5 of the Code of Ethics relating to Respondent's failure in the oversight and administration of her staff that resulted in actions that reasonable persons could construe as Respondent dispensing special favors or privileges to OneUnited and accepting the preservation of the value of her husband's investment in OneUnited as a benefit under circumstances which might influence the performance of her governmental duties.

House rules and other standards governing Members' conduct prohibit a Member from using, or appearing to use, his official position for personal benefit.[93]

Under the Code of Ethics,[94] a federal official, including a Member, should:

> Never discriminate unfairly by dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.[95]

Because the Code of Ethics measures a Member's conduct by "what might be construed by reasonable persons," a Member may violate this provision even if the Member would have taken the same official action without a potential personal benefit, if the Member's actions raise the appearance of impropriety.[96]

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[93] House Rule XXIII, clauses 2 and 3; Code of Ethics for Government Service, paragraph 5; *see also Sikes*, at 3; 2008 *House Ethics Manual*, at 187 ("One of the purposes of the rules and standards [of conduct relevant to use of a Member's office for personal benefit] is to preclude conflict of interest issues.").

[94] 72 Stat., Part 2, B12, H. Res. 175, 85th Cong. (adopted Jul. 11, 1958).

[95] Code of Ethics for Government Service, paragraph 5.

[96] *Biaggi*, at 9 ("While the Committee does not argue, nor can it be determined, that Representative Biaggi would not have interceded on behalf of Coastal in the absence or because of Esposito's gratuities to the congressman, it is nevertheless clear that at a minimum, an appearance is raised that such was the case. Accordingly, the Committee

Respondent argues that Count III of the Statement of Alleged Violation fails to state facts that constitute a violation of paragraph 5 of the Code of Ethics, because Count III "does not establish how Respondent or her Chief of Staff 'discriminate[d] unfairly by dispensing of special favors or privileges' to OneUnited or anyone else."[97] Respondent further argues that the Statement of Alleged Violation "ignore[s] [Respondent's] long-standing interest and involvement in matters concern minority banking issue[s], including members of the NBA."[98]

As stated previously, the Statement of Alleged Violation is consistent with, and compelled by, the Standards Committee's precedent in *Sikes*, in which the Standards Committee found that Representative Sikes violated paragraph 5 of the Code of Ethics when he sought to purchase shares of a privately held bank "which he had been active in his official position in establishing[.]"[99] The Standards Committee further found that Representative Sikes violated paragraph 5 of the Code of Ethics when he sponsored legislation to remove a reversionary interest and restrictions on land in which he had a personal financial interest.[100] In a similar manner, the Statement of Alleged Violation asserts that Respondent's Chief of Staff's continuing assistance to OneUnited, created a circumstance that "[r]easonable persons could construe . . . as dispensing special favors or privileges to OneUnited[.]"[101]

Moreover, the Statement of Alleged Violation does not ignore Respondent's history of working on minority banking issues. To the contrary, the Statement of Alleged Violation specifically notes that "Respondent has a long history of assisting small and minority owned banks generally, and NBA in particular."[102] However, the Code of Ethics measures a Member's conduct by "what might be construed by reasonable persons[.]"[103] Thus, Respondent's history of working on minority banking issues does not alter the conclusion. A Member may violate paragraph 5 of the Code of Ethics even if the Member would have taken the same official action

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concluded that such improper appearance supports a determination that Representative Biaggi violated clause 5 of the Code of Ethics for Government Service.").

[97] *Id.* at 14-15.
[98] *Id.* at 15.
[99] *Sikes* at 3.
[100] *Id.* at 4.
[101] Statement of Alleged Violation at ¶ 62.
[102] *Id.* at 6.
[103] Codes of Ethics, paragraph 5.

without a potential personal benefit, if the Member's actions raise the appearance of impropriety.[104]

CONCLUSION

In light of the foregoing, the Investigative Subcommittee finds that Respondent's Motion to Dismiss does not state adequate grounds to support dismissal of any counts in the Statement of Alleged Violation. Accordingly, the Respondent's Motion to Dismiss is denied.

Kathy Castor
Chair

Mike Conaway
Ranking Republican Member

Copies to:

Stanley M. Brand, Esq.
Brand Law Group
923 Fifteenth Street, N.W.
Washington, D.C. 20005

[104] *Bioggi*, at 9 ("While the Committee does not argue, nor can it be determined, that Representative Biaggi would not have interceded on behalf of Coastal in the absence or because of Esposito's gratuities to the congressman, it is nevertheless clear that at a minimum, an appearance is raised that such was the case. Accordingly, the Committee concluded that such improper appearance supports a determination that Representative Biaggi violated clause 5 of the Code of Ethics for Government Service.").

EXHIBIT 6

ONE HUNDRED ELEVENTH CONGRESS

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT

Washington, DC 20515–6328

August 31, 2010

CONFIDENTIAL
Representative Maxine Waters
2344 Rayburn House Office Building
Washington, DC 20515

Re: In the Matter of Representative Maxine Waters

Dear Colleague:

It appears that you have violated, and are currently in continuing violation of, your confidentiality obligations under both the Rules of the Committee on Standards of Official Conduct (Standards Committee) and the confidentiality agreement (Confidentiality Agreement) you signed on May 28, 2010.

Standards Committee Rule 26(c) provides that:

> Not less than 10 calendar days before a scheduled vote by an investigative subcommittee on a Statement of Alleged Violation, the subcommittee shall provide the respondent with a copy of the Statement Alleged Violation it intends to adopt, together with all evidence it intends to use to prove those charges it intends to adopt, including documentary evidence, witness testimony, memoranda of witness interviews, and physical evidence[.]

However, Standards Committee Rule 26(f) limits the disclosure of materials to a respondent by stating:

> Evidence provided pursuant to paragraph (c) . . . shall be made available to the respondent and respondent's counsel only after each agrees, in writing, that no documents, information, or other materials obtained pursuant to that paragraph shall be made public until – (1) such time as a Statement of Alleged Violation is made public by the Committee if the respondent has waived the adjudicatory hearing; or (2) the commencement of an adjudicatory hearing if respondent has not waived an adjudicatory hearing[.]

In accordance with Standards Committee Rule 26(f), you and your counsel signed the Confidentiality Agreement on May 28, 2010.

Section 1 of the Confidentiality Agreement defined "Confidential Information" as:

> [A]ll Evidence made available to Respondent and/ or to Respondent's Counsel, together with any and all information, facts, conclusions, or inferences in any way based on, drawn, derived, or stemming from, or related to the Evidence, whether oral, written, electronic, or in any other medium, including, but not limited to, memoranda, reports, summaries, other documents, or emails. 'Confidential Information' shall also include any and all Evidence provided to Respondent and/ or Respondent's Counsel after the date hereof, whether pursuant to Committee Rules 25 or 26(e) or otherwise.

Section 2 of the Confidentiality Agreement required that you and your counsel would:

> [M]aintain the confidentiality of the Confidential Information and not disclose it in any way, shape or form to anyone other than Respondent and/or Respondent's Counsel unless such person or persons is/are subject to this Confidentiality Agreement or to an agreement providing the same or substantially similar protection to the Confidential Information ("Other Confidentiality Agreements"), until the Disclosure Date set forth in Section 3 below."

Section 3 of the Confidentiality Agreement defined the Disclosure Date before which you could not disclose Confidential Information as "the commencement of an adjudicatory hearing" unless you "waived an adjudicatory hearing." This provision is consistent with Standards Committee Rule 26(f).

According to Section 5 of the Confidentiality Agreement, the limitations on disclosure in the agreement do not apply, "to such portions of the Confidential Information that were in the possession of the Respondent and/or Respondent's Counsel prior to the date hereof and which were not acquired or obtained from the Investigative Subcommittee or the Committee." However, Section 5 of the Confidentiality Agreement further stated that before you disclosed any such information, you agreed "to notify the Committee in writing at least five (5) days prior to any disclosure and, with that notice, to provide evidence of his or their possession of such information prior to the date hereof."

Under Section 7 of the Confidentiality Agreement you acknowledged and agreed that if you "violated this Confidentiality Agreement, the Investigative Subcommittee may avail itself of any remedy provided in the Committee Rules, including, but not limited to, Committee Rules 19(c)(3) and 26(m)."

On May 28, 2010, after you and your counsel signed the Confidentiality Agreement, the investigative subcommittee provided you and your counsel with a copy of the Statement Alleged Violation it intended to adopt, together with all evidence it intended to use to prove those charges it intended to adopt, including documentary evidence and witness testimony.

On June 15, 2010, the investigative subcommittee adopted a Statement of Alleged Violation and forwarded the Statement of Alleged Violation to you and reiterated that the "non-disclosure agreements are still in effect," and that you "remain[ed] bound by their terms."

On June 22, 2010, the investigative subcommittee provided you with a supplemental disclosure of evidence and again reiterated that the "non-disclosure agreements are still in effect" and that you "remain[ed] bound by their terms."

You have not waived your right to an adjudicatory hearing, and an adjudicatory hearing has not yet commenced. However, it appears that by at least August 13, 2010, you disclosed confidential information that was subject to the Confidentiality Agreement in clear violation of your confidentiality obligations under both the Standards Committee Rules and the Confidentiality Agreement.

On August 13, 2010, you held a press conference in which you disclosed confidential information, including excerpts of approximately twenty-four (24) documents and approximately four (4) interview transcripts, that was subject to the Confidentiality Agreement. Moreover, on that same date, your web site (http://waters.house.gov/) provided a link to a copy of a presentation that contained the confidential information you disclosed at the press conference and that was subject to the Confidentiality Agreement.[1]

In addition to this public disclosure of confidential information that is subject to the Confidentiality Agreement, contemporaneous newspaper articles suggest that additional disclosures may have been made. For example, an August 13, 2010, article in *The Hill*, stated that "[t]hroughout the week, Waters's chief of staff Mikael Moore has provided background to reporters about a trail of e-mail between himself and officials of the bank, OneUnited, which the ethics committee cites as proof that Waters was helping the bank get TARP funds." Moreover, an August 13, 2010, article in *The Washington Post*, described in detail "[s]everal documents released by Waters[.]"

Finally, the Standards Committee has been contacted by a witness, whose executive session transcript was provided to you and was subject to the Confidentiality Agreement, who stated that an investigative reporter has contacted the witness suggesting that the investigative reporter is in possession of the witness' entire executive session transcript. The Committee had not provided the transcript to any other person, including the witness.

[1] Even if some of those documents were in your possession before you received them from the investigative subcommittee, you did not provide the Committee with any notice that you intended to disclose the confidential information that was subject to the Confidentiality Agreement.

It is possible, if not likely, that much of this information will ultimately be publicly disclosed during the adjudicatory subcommittee process. The process provides that the Statement of Alleged Violation is only a set of allegations, not an ultimate finding of a violation of applicable rules, which must be proved by clear and convincing evidence. During this process you will have an opportunity to present your view of the allegations.

However, disclosure of confidential information outside the process in contravention of the rules and the Confidentiality Agreement may interfere with the process, by impairing the ability of Committee staff to present a case and infringing on the confidentiality rights and obligations of other parties, for example. In addition, it could create a perception that the impartiality of the adjudicatory subcommittee members – who have not had access to the evidence in this matter, and will not until an adjudicatory hearing begins – has been influenced by exposing them to evidence in the case.

It appears that your public disclosures were in violation of your confidentiality obligations under both the Standards Committee's Rules and the Confidentiality Agreement.

Accordingly, the Committee advises you that you should honor the terms of the Confidentiality Agreement so long as it remains in force. You should refrain from any future public statements which are not in accord with its confidentiality requirements. To the extent that you have shared confidential information with any parties who may not possess such information under the Standards Committee Rules and the Confidentiality Agreement, you should instruct those sources to destroy any confidential information you have shared with them.

If you or your counsel have any questions about the scope and limitations of the confidentiality provisions of the Standards Committee Rules and/or the Confidentiality Agreement, please contact Blake Chisam, Chief Counsel for the Committee.

Sincerely,

Zoe Lofgren
Chair

cc: Stan Brand, Esq.

EXHIBIT 7

BRAND LAW GROUP
A PROFESSIONAL CORPORATION
923 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE: (202) 662-9700
TELECOPIER: (202) 737-7565

August 25, 2010

VIA E-MAIL & FIRST CLASS MAIL

Representative Zoe Lofgren, Chairwoman
Representative Jo Bonner, Ranking Member
House Committee on Standards of Official Conduct
HT-2, The Capitol
Washington, DC 20515

Re: In the Matter of Representative Maxine Waters

Dear Chairwoman Lofgren and Ranking Member Bonner:

We are writing to you on behalf of our client Representative Maxine Waters to express our concerns about the full Committee's decision to continue its investigation subsequent to the Investigative Subcommittee's transmittal of its Statement of Alleged Violation ("SAV"). Such inquiry violates both this Committee's rules and comparable federal criminal procedures and raises significant questions about the sufficiency of the evidence that the Investigative Subcommittee replied upon when it issued the charges contained in its SAV. Most alarmingly, it calls into question the impartiality and good faith of the Investigative Subcommittee.

On August 17, 2010, Committee Deputy Chief Counsel C. Morgan Kim delivered a document request for additional documents from Rep. Waters' office. The Committee's request relates solely to matters addressed in the previously issued SAV. In the e-mail from Committee Counsel Sheria A. Clarke containing that request, Ms. Clarke indicated that the Committee would issue a subpoena for the requested materials if Rep. Waters did not voluntarily provide the documents. We have also recently learned that the Committee continues to contact and interview witnesses about this matter, including some of Rep. Waters' former staff members.

The Committee's decision to continue its investigation after transmittal of the SAV is a matter of great concern, both under this Committee's own rules and in light of long-standing comparable federal criminal practice and procedure. Rules 19(e) and (f) of the Committee on Standards of Official Conduct govern the Committee's conduct "upon completion of the inquiry." Under Rule 19(e), upon completion the staff is authorized to "draft for the investigative subcommittee a report that shall contain a comprehensive summary of the information received regarding the alleged violations." Rule 19(f) authorizes the investigative subcommittee, again "upon completion of the inquiry," to "adopt an [SAV], if it determines that there is substantial reason to believe that a violation . . . has occurred." Finally, Committee Rule 20 authorizes an investigative subcommittee to "amend its [SAV] anytime before the [SAV] is transmitted to the Committee."

Thus, Committee Rules 19 and 20 plainly establish that an investigative subcommittee must complete its investigation prior to the issuance of the SAV. Indeed, in writing Rule 20 the drafters clearly contemplated a situation where an investigative subcommittee acquires additional information requiring it to amend its SAV before transmission to the full Committee. What the rules do not authorize, however, is the post-issuance investigation that the Committee is currently conducting in this matter.

The Committee's rules are consistent, and indeed appear to be based upon, the proposition under federal rules that "[o]nce a defendant has been indicted, the government is precluded from using the grand jury for the sole or dominant purpose of obtaining additional evidence" against her. *United States v. Moss*, 756 F.2d 329, 332 (4th Cir. 1985) (quotations omitted).

As this Committee has acknowledged, its investigations take place within the "context of criminal prosecutions." *See* Investigative Subcommittee's Order on Motion for a Bill of Particulars and Memorandum in Support of Order (July 1, 2010) at 2 (denying Rep. Waters' Motion for a Bill of Particulars). Certainly, in that "context" the investigative subcommittee process is analogous to the grand jury stage of a criminal prosecution. As such, the Committee's continued investigation for the purpose of gathering evidence for adjudication of the charges contained in the SAV represents an abuse of the Committee's investigative process.

In sum, the Committee's continued investigation, conducted subsequent to the transmittal of its SAV, violates both the Committee's rules and established, comparable federal precedent. These activities are particularly worrisome given the alacrity displayed by the Investigative Subcommittee in transmitting the SAV to this Committee. This rush to judgment (and subsequent efforts to bolster its case) casts doubt on the sufficiency of the investigation underlying the SAV. Even more troublesomely, it calls into question the impartiality and good faith of the Investigative Subcommittee.

To wit, the Investigative Subcommittee issued its SAV on June 15, 2010. On June 30, Rep. Waters filed a Motion for a Bill of Particulars pursuant to Committee Rule 22(b) requesting "an explication of the definitions and standards which the Committee intends to utilize in order to assert any defenses available to her." Memorandum of Points and Authorities in Support of Motion for a Bill of Particulars at 3. Yet, *less than twenty-four hours later*, in derogation of House precedent cited by Rep. Waters compelling the granting of such a motion (*Id.* at 2), the Investigative Subcommittee denied her Motion, holding that the SAV "contains information sufficient to advise Respondent of the allegations against her, and sufficient to afford her a meaningful opportunity to respond to those allegations." Order (July 1, 2010).

On July 12, pursuant to Committee Rule 22(c)(2), Rep. Waters filed a Motion to Dismiss the SAV and a sixteen-page Memorandum of Points of Authorities in support of the Motion. In denying that Motion *three days later*, the Investigative Subcommittee held that the SAV stated facts sufficient to constitute the alleged violations. *See* Order (July 15, 2010). It is also noteworthy that the Investigative Subcommittee denied Rep. Waters' requests for oral hearings on both Motions, describing her requests as "unnecessary" and stating that she had failed to raise any issues that presented a "close call." Memorandum in Support of Order (July 15, 2010) at 2 n.3. Finally, on July 28, the Investigative Subcommittee transmitted its SAV to the full Committee.

The Investigative Subcommittee's dismissive and hastily considered rejections of Rep. Waters' motions leading up to its transmittal of its SAV – particularly in light of the Committee's continued factual investigation subsequent to that transmittal – indicates that the Investigative Subcommittee's actions and motives were less than "unbiased and impartial." *See* Committee Rule 9(e). It is apparent that the Investigative Subcommittee rushed to transmit the SAV prior to the full House of Representatives recessing on July 30. Given that transmittal triggered publication of the charges against her, we must conclude that the Investigative Subcommittee's hasty action was improperly intended to pressure Rep. Waters into accepting a settlement of the charges prior to transmittal and publication or face the inevitable public and political damage that has resulted from such publication during the months preceding her primary and general elections; neither purpose is a valid motivation for a supposedly unbiased and impartial body.

The Committee's continued, post-transmittal investigation is a tacit acknowledgement that, despite the Investigative Subcommittee's rulings to the contrary, the evidence underlying the SAV is wholly insufficient to support the charges contained therein. Indeed, these actions indicate that the Investigative Subcommittee erred in denying both Rep. Waters' Motion for a Bill of Particulars and Motion to Dismiss.

Accordingly, Rep. Waters demands that the Committee cease its post-transmittal inquiry, which it is conducting in violation of both Committee rules and federal criminal procedure. The Committee should also note that Rep. Waters will oppose any attempt to use any evidence acquired post-transmittal of the SAV in an adjudicatory hearing on the charges contained in the SAV.

Sincerely,

Stanley M. Brand
Andrew D. Herman

SMB/ADH

EXHIBIT 8

ONE HUNDRED ELEVENTH CONGRESS

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT

Washington, DC 20515–6328

August 31, 2010

Stanley M. Brand
Andrew D. Herman
Brand Law Group
923 Fifteenth Street, NW
Washington, DC 20005

Dear Messrs. Brand and Herman:

We are writing in response to your letter dated August 25, 2010, regarding the August 17, 2010, letter from the Committee's Deputy Chief Counsel, C. Morgan Kim, requesting your client's Chief of Staff, Mikael Moore, voluntarily provide certain documents in preparation for an adjudicatory hearing in the matter of Representative Maxine Waters.

As you are aware, the current adjudicatory hearing provisions of the Committee's rules have been used in only one matter since they were adopted following the Ethics Reform Act of 1989. Therefore, there is little precedent to look to for the interpretation of the Committee's adjudicatory hearing rules. With that in mind, our aim as we move forward in this matter is to act not only fairly, but also pragmatically.

Notwithstanding the assertions made in your August 25, 2010, letter, an adjudicatory hearing is a new and distinct phase in the disciplinary process. In the adjudicatory hearing phase, Committee counsel bears the burden of proving the allegations in the Statement of Alleged Violation and the burden of proof differs from that in the investigative phase. An adjudicatory hearing involves a fresh look at evidence offered by Committee counsel in support of the allegations charged in the Statement of Alleged Violation. Also, a respondent has the right to cross-examine witnesses and introduce evidence, including testimony, in her defense.

The Committee's rules contemplate that both Committee counsel and a respondent will have the opportunity to prepare their cases in advance of an adjudicatory hearing. For example, Committee Rule 23(f)(1) provides that Committee counsel must identify the evidence and witnesses they intend to offer at an adjudicatory hearing and that a respondent must be afforded the right to review the evidence and witness list at least 15 days before an adjudicatory hearing begins. Similarly, Committee Rule 23(g) provides that a respondent must provide notice of the witnesses the respondent intends to call and evidence the respondent intends to offer at least five days before the hearing. In this regard, Committee Rules 23(d) and 23(h) allow for the issuance of subpoenas to compel the production of documents and testimony that an investigative subcommittee did not acquire or that a respondent seeks to introduce. In addition, Rule 26(e)

explains the process by which evidence that was not provided to the respondent by an investigative subcommittee may be used during an adjudicatory hearing.

As a practical matter, the parties – the respondent and Committee counsel – have both an obligation and a right to prepare their cases to ensure that the matter is as well presented as possible. The institution, the Committee, the respondent and the public deserve no less.

Thus, the assertion in your letter that Committee's rules preclude Committee counsel from seeking to introduce evidence beyond that presented to the investigative subcommittee is not supported by the rules or sound policy.

We believe it is important to note that you were provided materials that the investigative subcommittee intended to use to prove the counts of the Statement of Alleged Violation pursuant to Committee Rule 26(c) on May 28, 2010. You were, pursuant to Committee Rule 26(e), also provided additional materials that may be used to prove the allegations in the Statement of Alleged Violation on June 22, 2010, and August 9, 2010. Thus, you have been in possession of evidence that may be used to prove the allegations in the Statement of Alleged Violation for some time, and you have been on notice that any witness or other individual referenced in those documents may be a potential witness at the adjudicatory hearing.

Each of these disclosures of documents to you was subject to the non-disclosure agreement you and Representative Waters signed, as well as to Committee Rule 26(f). A separate communication regarding the concern the Committee has about Representative Waters' disclosure of information in violation of both the Committee rules and the signed non-disclosure agreement will be sent to Representative Waters by the Chair.

Your letter states that you intend to "oppose any attempt to use any evidence acquired post-transmittal of the SAV in an adjudicatory hearing on the charges contained in the SAV."

The Committee rules fully anticipate that an adjudicatory subcommittee will consider evidence beyond that considered by an investigative subcommittee. Under Committee Rule 23(i), Committee counsel may present any relevant evidence and such relevant evidence shall be admissible unless the evidence is privileged under the rules or precedents of the House of Representatives. Of course, you have the right to object to the admissibility of evidence at the adjudicatory hearing. As a practical matter it would be helpful to understand, at the earliest possible time, whether your specific objections will be based on either the relevance of evidence or on the grounds that such evidence is privileged under the rules or precedents of the House of Representatives so that the parties may focus their attention on evidence that is, in fact, admissible.

Finally, regarding your comments about criminal law precedents, we want to advise you that while the Committee does occasionally look to precedent from both the criminal and civil courts to aid in interpreting its rules, actions taken by Congressional Committees, including the

Standards Committee or any of its subcommittees, are not criminal proceedings and the Committee is not bound by criminal precedent.

Thank you for your time and attention to this matter. Should you have any questions, please do not hesitate to contact Morgan Kim at (202) 225-7103.

Sincerely,

Zoe Lofgren
Chair

Jo Bonner
Ranking Republican Member

cc: The Honorable Maxine Waters
C. Morgan Kim, Deputy Chief Counsel
R. Blake Chisam, Staff Director and Chief Counsel

EXHIBIT 9

ONE HUNDRED ELEVENTH CONGRESS

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT

Washington, DC 20515–6328

SUITE HT–2, THE CAPITOL
(202) 225–7103

October 12, 2010

CONFIDENTIAL
Representative Maxine Waters
2344 Rayburn House Office Building
Washington, DC 20515

Re: In the Matter of Representative Maxine Waters

Dear Colleague:

As you are aware, an adjudicatory subcommittee of the Committee on Standards of Official Conduct (Committee) has been appointed in the above-referenced matter. The purpose of this letter is to inform you of the procedures applicable to proceedings before the adjudicatory subcommittee and to notify you of the expected schedule for those proceedings. In this regard, please find enclosed copies of:

1. The Committee's rules for the 111th Congress;
2. The Rules of the House of Representatives for the 111th Congress; and
3. The Statement of Alleged Violation in the above-referenced matter.

The purpose of an adjudicatory subcommittee is to "hold a hearing to determine whether any counts in the Statement of Alleged Violation have been proved by clear and convincing evidence and [to] make findings of fact, except where such violations have been admitted by respondent."[1] The hearing before the adjudicatory subcommittee is required to be open to the public and may only be closed, in whole or in part, by an affirmative vote of a majority of the adjudicatory subcommittee's members.[2] Any vote to close the hearing must be made in open session.[3]

The quorum required for the adjudicatory subcommittee to conduct "any business" is a majority plus one.[4] Therefore, the required quorum to conduct any business in this matter will consist of six members.

[1] Committee Rule 23(c).
[2] House Rule XI, cl. 3(a)(2); Committee Rule 23(e).
[3] House Rule XI, cl. 3(a)(2).
[4] Committee Rules 23(b) and 9(b).

Committee Rule 26(b) permits you to seek to waive your right to an adjudicatory proceeding. Any such request must be made in writing and be signed by you.[5] A request to waive your right to an adjudicatory hearing, or any part of such proceeding, would be subject to the acceptance of the adjudicatory subcommittee.[6]

The conduct of an adjudicatory hearing is governed generally by Committee Rule 23. In the absence of a waiver of a hearing, the adjudicatory subcommittee will proceed with a hearing pursuant to Committee Rule 23(c). The adjudicatory hearing will convene on **Monday, November 29, 2010**, at 9:00 a.m.

"At an adjudicatory hearing, the burden of proof rests on Committee counsel to establish the facts alleged in the Statement of Alleged Violation by clear and convincing evidence."[7] Committee counsel may, subject to subcommittee approval, enter into stipulations with you or your counsel as to facts that are not in dispute.[8] Committee counsel need not present any evidence regarding any fact stipulated or count that you admit.[9] Since subcommittee approval is required for any stipulations, you and your counsel and Committee counsel must jointly submit any proposed stipulations to the adjudicatory subcommittee in writing by **October 29, 2010**.

At any adjudicatory hearing, the adjudicatory subcommittee "may require, by subpoena or otherwise, the attendance and testimony of such witnesses and production of such books, records, correspondence, memoranda, papers, documents, and other items as it deems necessary."[10] The adjudicatory subcommittee may accept "[d]epositions, interrogatories, and sworn statements taken under any investigative subcommittee direction" into the record of the adjudicatory proceedings.[11]

More generally, Committee Rule 23(i)(1) provides that "[a]ny relevant evidence shall be admissible," unless it is privileged.[12] The Chair of the subcommittee is responsible for ruling on any question of admissibility or relevance of evidence, motion, procedure, or any other matter at an adjudicatory hearing.[13] A witness, witness counsel, or Member of the subcommittee may appeal any ruling to the Members present at that proceeding.[14] A majority vote of the Members present at such proceeding on such an appeal shall govern the question of admissibility and no appeal shall lie to the Committee.[15]

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[5] Committee Rule 26(b).
[6] *Id.*
[7] Committee Rule 23(n).
[8] Committee Rule 23(i)(4).
[9] Committee Rule 23(n).
[10] Committee Rule 23(d).
[11] *Id.*
[12] Committee Rule 23(i)(1). As provided in Committee Rule 23, the procedures set forth in House Rule XI, clause 2(g) and (k) apply to an adjudicatory hearing.
[13] Committee Rule 23(i)(2).
[14] *Id.*
[15] *Id.*

You and your counsel have the right to review the evidence that Committee counsel intends to present at the adjudicatory hearing.[16] Counsel will provide you a copy of these materials no later than **October 18, 2010.**

Pursuant to Committee Rule 23(i)(1), the parties[17] may object to the admissibility of evidence only on the grounds of relevance or privilege under the precedents of the House.[18] Any objections you may have to this evidence, including both exhibits and anticipated witness testimony, must be submitted in writing to the Chair of the adjudicatory subcommittee by **12:00 p.m.** on **October 29, 2010.** You should state the basis for any such objection as fully as possible. Objections not raised at that time will be waived.

Counsel for the Committee and counsel for the Respondent may prepare a joint exhibit list for those exhibits to which each party determines it has no objection.

If you intend to call witnesses as part of your case during the adjudicatory hearing, you must provide the adjudicatory subcommittee with a list of the witnesses you intend to call and summaries of those witnesses' expected testimony.[19] You must also provide copies of any documents or other evidence you will seek to introduce at the adjudicatory hearing. The list of witnesses, summaries of expected testimony, and copies of documents or other evidence you will seek to use during the hearing must, therefore, be received by counsel no later than **November 9, 2010.** Any objections Committee counsel may have to this evidence, including both exhibits and anticipated witness testimony, must be submitted in writing to the Chair of the adjudicatory subcommittee **by November 15, 2010.**

The admissibility of testimony by any witness is subject to the requirements of Committee Rule 23(i)(1), which provides that any relevant evidence "shall be admissible unless the evidence is privileged under the precedents of the House of Representatives." The Chair will make her initial determination regarding the admissibility of testimony by any witness you may seek to call based on the summaries of their expected testimony and any material you provide pursuant to Committee Rule 23(g). You should, therefore, be as detailed, specific, and thorough as possible in any summaries you provide of your witnesses' expected testimony and related materials.

Pursuant to Committee Rule 23(h), you may apply to the adjudicatory subcommittee to issue subpoenas "for the appearance of witnesses or the production of evidence." Any application for a subpoena "shall be granted upon a showing by the respondent that the proposed testimony or evidence is relevant and not otherwise available to respondent." If you choose to apply to the adjudicatory subcommittee for the issuance of a subpoena or subpoenas, your

[16] Committee Rule 23(f)(1).
[17] The term "parties" refers to the respondent and Committee counsel.
[18] The only privileges applicable to adjudicatory proceedings are those recognized under the precedents of the House. Please note that the applicable privileges do not include the Speech or Debate Privilege under Article I, section 6, clause 1 of the United States Constitution. The Speech or Debate Clause states that Senators and Representatives of the House "for any speech or debate in either House, they shall not be questioned in any other place." This privilege can only be asserted during inquires conducted by an entity other than the legislative branch.
[19] Committee Rule 23(g).

application should include a detailed, specific, and thorough summary of the expected testimony of any witnesses and the content and nature of any materials you seek to subpoena. The application for subpoenas "may be denied if not made at a reasonable time or if the testimony or evidence would be merely cumulative."[20] Any application by you for subpoenas must be submitted to the adjudicatory subcommittee by **12:00 p.m. on October 29, 2010.** A subpoena to a witness to appear at a hearing must be served sufficiently in advance of that witness' scheduled appearance to allow the witness a reasonable time, as determined by the Chair, to prepare for the hearing and employ counsel.[21] Any witnesses subpoenaed to testify must be served no later than **November 22, 2010.**

Prior to the start of the adjudicatory hearing, the adjudicatory subcommittee will meet with counsel for the Committee and counsel for the Respondent to address pre-hearing objections to evidence, stipulations proposed by the parties, and any other outstanding procedural issues. A pre-hearing conference, if necessary, will be held at **1:00 p.m. on November 18, 2010.**

Following the pre-hearing conference, each party will be required to provide the Members of the adjudicatory subcommittee with a copy of the party's exhibits that will be admitted into the record. Each party must provide copy of its exhibits to each Member of the adjudicatory subcommittee no later than **5:00 p.m. on November 19, 2010.**

The conduct of the adjudicatory hearing will proceed as set forth in Committee Rule 23(j). The Chair of the adjudicatory subcommittee will open the hearing.[22] The Chair will then recognize Committee counsel and your counsel, in turn, for the purposes of allowing each party to make an opening statement.[23] Opening statements will be limited to 1 hour for each side.

Pursuant to Committee Rule 23(j)(3), "whenever possible," witness testimony and other pertinent evidence shall be presented by Committee counsel first, followed by presentation of testimony and other evidence by the respondent. The Chair may allow rebuttal witnesses.[24] Any witness called at the adjudicatory hearing will be examined first by the party calling the witness, followed by cross-examination by the opposing party.[25] The Chair has the discretion to allow redirect examination and recross examination.[26] Members of the adjudicatory subcommittee may then question the witness under the five-minute rule, unless otherwise directed by the Chair.[27]

The Chair may, in her discretion, allow counsel for either side to describe or summarize evidence admitted in their case, other than the testimony of witnesses testifying in person at the hearing, and to respond to questioning from the members of the adjudicatory subcommittee regarding such evidence.

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[20] Committee Rule 23(h).
[21] Committee Rule 26(k).
[22] Committee Rule 23(j)(1).
[23] Committee Rule 23(j)(2).
[24] Committee Rule 23(j)(3)(iii).
[25] Committee Rule 23(j)(4).
[26] *Id.*
[27] *Id.*

At the conclusion of the presentation of evidence, both sides will be allowed 1 hour for closing arguments.[28] Committee counsel will be permitted to reserve time for rebuttal argument.[29]

Committee counsel and your counsel will each be allowed 6 hours to present their respective cases, exclusive of the time allotted for opening and closing arguments. The 6 hour limitation on presentation of each side's case is subject to reconsideration based upon a reasonable request for additional time. Any objections regarding the procedure for the adjudicatory hearing must be submitted to the adjudicatory subcommittee in writing by October **15, 2010.**

As soon as practicable after the parties' closing arguments, the adjudicatory subcommittee will meet to "consider each count contained in the Statement of Alleged Violation and shall determine by a majority vote of its members whether each count has been proved."[30] A count determined not to have been proved "shall be considered as dismissed by the subcommittee."[31] The adjudicatory subcommittee must report its findings to the Committee.[32]

The adjudicatory hearing will be conducted subject to the Rules of Decorum of the House.[33] Further, the Chair may require all participants to observe strictly and promptly all evidentiary, procedural or other rulings of the Chair and of the adjudicatory subcommittee. The adjudicatory subcommittee expects that any ruling it makes regarding the relevance of proffered evidence, or any line of questioning or argument will be promptly and strictly observed. Any breach of decorum by any of the participants is punishable by the Chair "by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt."[34]

If you have any questions, please have your counsel contact the Committee's Staff Director and Chief Counsel, R. Blake Chisam, at (202) 225-7103.

Sincerely,

Zoe Lofgren
Chair

[28] Committee Rule 23(j)(5).
[29] *Id.*
[30] Committee Rules 23(o) and 10(a)(4).
[31] *Id.*
[32] *Id.*
[33] *See* House Rule XVII and related commentary.
[34] House Rule XI, clause 2(k)(4); Committee Rule 26(m).

cc: Representative Jo Bonner, Ranking Republican Member
R. Blake Chisam, Chief Counsel, Committee on Standards of Official Conduct
C. Morgan Kim, Deputy Chief Counsel, Committee on Standards of Official Conduct
Stanley M. Brand, Esq., Counsel for Respondent
Andrew D. Herman, Esq., Counsel for Respondent

October 13, 2010

The Honorable Maxine Waters
2344 Rayburn House Office Building
Washington, DC 20515

I Arvin Bussey *(please print)* certify that I have received a package from the Committee on Standards of Official Conduct on October 13, 2010.

Arvin Bussey
Signature

10/13/10
Date

COE.WAT.OC.018760

EXHIBIT 10

The Washington Post

Ethics probe of Rep. Waters derailed by infighting, sources say

By R. Jeffrey Smith and Carol D. Leonnig
Washington Post Staff Writers
Thursday, December 16, 2010; 11:01 PM

A lengthy House investigationof Rep. Maxine Waters (D-Calif.) has been derailed by infighting within the politically charged ethics committee over errors in building a case against her, according to congressional sources with direct knowledge of the probe.

The probe, opened in 2009, dissolved this fall and most likely will fall to a newly composed committee and possibly a new investigative staff, the sources said.

The case - one of the most prominent ethics investigations undertaken by the committee - came apart as committee and staff members argued over whether documents should be subpoenaed and when the trial should be scheduled and for how long. They all expected Waters to agree to a negotiated settlement, which she ultimately declined.

At one point, the committee's ranking Republican, Rep. Jo Bonner (Ala.), accused the chairman, Rep. Zoe Lofgren (D-Calif.), of violating House rules. Other complaints and counter-complaints have been flung for months between Lofgren and the professional staff leading the investigation.

On Thursday, the committee's staff director and chief counsel, R. Blake Chisam, notified the House that he is resigning. Because of his closeness to Lofgren, his departure is seen as an indicator that Lofgren might not return as the committee's top Democrat after Republicans take control of the House next year.

At least one committee member, Rep. G.K. Butterfield (D-N.C.), has urged that the entire panel be replaced in the next Congress and that a new investigative team take a fresh look at the allegations.

The breakdown of the Waters inquiry highlights the difficulties that the ethics committee faces in policing House colleagues. The panel sought to restore public confidence in its work during the current Congress, scrutinizing nearly two dozen members for possible transgressions and preparing for several trials. But its staff of 14 was quickly

The Washington Post

Ethics probe of Rep. Waters derailed by infighting, sources say

overwhelmed.

The Waters probe focused on whether the California Democrat, who chairs a House banking subcommittee, had improperly arranged federal help for OneUnited, a minority-owned bank in which her husband had a significant investment. But the investigation followed a twisting path, according to congressional sources, and sometimes missed what many agree in hindsight were important steps.

Last month, Lofgren tried to fire two investigators, and she told others that they had misled her about the probe. But the firings were blocked by Bonner, and the employees remain on paid leave.

The events at issue involved players at the Treasury Department, the Federal Deposit Insurance Corp. and the House Financial Services Committee. The committee is headed by Rep. Barney Frank (D-Mass.), who has acknowledged helping to write legislation that enabled OneUnited to qualify for a $12 million federal bailout.

Lofgren had been pushing for the Waters trial to start in mid-September but staff investigators said that was "impossible," internale-mails show. Then, in September, after asking the staff for an update on its preparations, Lofgren became concerned that it was not ready and urged putting off the trial. Lofgren and Chisam learned that investigators were missing important e-mails from Waters's chief of staff and hoped to request or subpoena them.

At a Sept. 16 meeting, however, investigators told her that they were fully prepared to "begin a hearing immediately," according to sources and a staff e-mail. Staff members complained that Lofgren and Chisam had obstructed their probe.

In conversations with others, Lofgren and Chisam have, in turn, accused the staff of failing to collect needed documents before an investigative subcommittee formally accused Waters of violations in June. They also say that the staff did not disclose in a timely way some of the evidence gaps.

For their part, some staff members said Lofgren repeatedly refused to approve a

The Washington Post

Ethics probe of Rep. Waters derailed by infighting, sources say

request to subpoena Waters in late 2009 and a request early this year to subpoena Frank and his staff. Instead, they said, she repeatedly sought voluntary compliance with evidence requests. Lofgren generally has sought records voluntarily and subpoenaed them only when members did not comply.

As tensions escalated, staff members had begun to distribute updates and recommendations about the probe to all committee members, rather than first clearing them with Chisam and Lofgren.

In an e-mail to Lofgren and other committee members Oct. 13, for example, staff prosecutor Sheria Clarke called Lofgren's efforts to shorten the trial "troubling" and said her decision could compromise the staff's efforts to present a "fair, thorough, and effective" case. The staff wanted 30 hours to present its case, but Lofgren ordered that the charges be presented in six hours, according to congressional and legal sources.

Perhaps the only issue on which all of those involved in the probe agree is that they had expected Waters to concede that she had made mistakes and to accept an admonishment. Her refusal to do so caught everyone by surprise and caused the staff to renew the search for evidence.

Waters's attorneys have said the renewed search was illegal. They have told Waters's g randson and chief of staff, Mikael Moore, who was at the center of her office's interactions with OneUnited, that he need not turn over e-mails subpoenaed in September from a private account. No action has been taken by the committee to enforce the subpoena.

Richard Sauber, an attorney for the suspended staff investigators, Stacey Sovereign and Morgan Kim, said criticisms of his clients' handling of the case are "egregious."

"The Chair of the House Ethics Committee . . . placed my clients on administrative leave without explanation," he said in an e-mailed statement. "Now my clients are subjected to a series of cowardly, anonymous leaks - all in violation of Committee rules - from certain elements of the Committee purporting to blame my clients for a host of transgressions."

The Washington Post

Ethics probe of Rep. Waters derailed by infighting, sources say

Waters attorney R. Stanley Brand said the committee and its staff ignored committee rules and tried to force Waters into a quick settlement. When she refused, they spent months "trying to manufacture a case," he said.

"No amount of backtracking, adjusting of theories or concealment could overcome the truth," Brand said. "There were no violations," and "inevitably the case unraveled."

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Staff writers Kimberly Kindy and Paul Kane and research editor Alice Crites contributed to this report.

View all comments that have been posted about this article.

EXHIBIT 11

10-15-2010

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT
ADJUDICATORY SUBCOMMITTEE

In the Matter of	)
REPRESENTATIVE MAXINE WATERS,	)
Respondent.	)

COMMITTEE COUNSEL'S OBJECTIONS TO THE CHAIR'S PROPOSED ADJUDICATORY HEARING PROCEDURES

On October 12, 2010, the Chair of the adjudicatory subcommittee in the matter of Representative Maxine Waters presented a letter (Chair's Letter) outlining "the procedures applicable to proceedings before the adjudicatory subcommittee[.]"[1] Pursuant to the Chair's Letter, "[a]ny objections regarding the procedure for the adjudicatory hearing must be submitted to the adjudicatory subcommittee in writing by October 15, 2010."[2] Accordingly, Committee Counsel hereby respectfully submits the following objections to the proposed hearing procedures outlined in the Chair's Letter.

LEGAL STANDARD

Pursuant to Committee Rule 1(a): "So far as applicable, these rules and the Rules of the House of Representatives shall be the rules of the Committee and any subcommittee."[3]

"The rules of the Committee may be modified, amended, or repealed by a vote of a majority of the Committee."[4] Further, "[w]hen the interests of justice so require, the Committee,

[1] Chair's Letter at 1.
[2] Chair's Letter at 5.
[3] Committee Rule 1(a).
[4] Committee Rule 1(b).

by a majority vote of its members, may adopt any special procedures, not inconsistent with these rules, deemed necessary to resolve a particular matter before it."[5]

OBJECTIONS

Objection 1

Committee Counsel objects to the Chair's proposed time limit for the adjudicatory hearing. Pursuant to the Chair's proposed schedule, "Committee counsel and [Respondent's] counsel will each be allowed 6 hours to present their respective cases, exclusive of the time allotted for opening and closing arguments."[6] This time constraint is unreasonable and raises serious concerns about the ability of Committee Counsel fairly and fully to present the case voted on by the investigative subcommittee. As the Chair's Letter observed, Committee Counsel has the burden of proving the charges in the statement of alleged violation by clear and convincing evidence. This is not only a higher burden of proof than that applied by the investigative subcommittee in adopting the statement of alleged violation; to protect the rights of the Respondent, evidence presented at the hearing is also subject to an adversarial process which, by its very nature, is time-consuming. As federal courts have long held, because of the high standard of proof – in this case "clear and convincing" – the party on whom the burden rests is entitled to present evidence that meets the standard and does so persuasively.[7]

Providing the party with the burden of proof sufficient time to properly present the party's case is particularly important in a case such as this, where at least one of the counts requires Committee Counsel to present evidence regarding an appearance of impropriety subject to a "reasonable person" standard.[8] A reasonable person standard requires providing full context to the finder of fact, who should be "well-informed about the surrounding facts and circumstances[.]"[9]

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[5] Committee Rule 1(c).
[6] Chair's Letter at 5.
[7] *See, e.g., U.S. v. Gallo*, 543 F.2d 361, 365 (D.C. Cir. 1976) (because of its "heavy burden of proof beyond a reasonable doubt as to all elements of the offense, the government is not to be restricted to a modest quantum of evidence that will support the indictment.") (emphasis added).
[8] *See* Statement of Alleged Violation, Count III.
[9] *In re Sherwin Williams Company*, 607 F.3d 474, 477-478 (7th Cir. 2010) ("our inquiry is 'from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.' . . . [A] reasonable person is

Moreover, as Respondent has previously observed, the facts at issue in this matter are complicated. The investigative subcommittee's work took approximately nine months. What is at issue is not just whether Respondent contacted then-Secretary Paulson to set up a meeting for OneUnited executives with Treasury officials, but also events key to the charges in the statement of alleged violation that occurred long before the Treasury meeting and in the months afterward. Only after being presented with the evidence relating to these issues will the Members of the adjudicatory subcommittee be able to determine the facts *de novo*, and to decide whether each violation in the statement of alleged violation has been proven by clear and convincing evidence. It is unreasonable to expect the adjudicatory subcommittee Members to absorb, let alone decide the facts, in six hours, when they have no background regarding the case and are hearing all the evidence for the first time.

The Chair's Letter further states that "[t]he 6 hour limitation on presentation of each side's case is subject to reconsideration based upon a reasonable request for additional time."[10] During the adjudicatory hearing in the matter of Representative James Traficant, the adjudicatory subcommittee admitted the certified and underlying trial transcripts of Representative Traficant, which trial took seven to eight weeks in federal court. Notwithstanding a full and certified record of seven to eight weeks of testimony subject to a higher burden of proof and strict evidentiary rules, the Committee counsel took an additional three days of hearing time to meet its burden and prove its case under the same clear and convincing standard. Committee Counsel respectfully submits that the Committee does not have access to a full factual development that would be offered by a seven to eight week trial. Therefore, the Chair's proposed time limit is not sufficient to develop fully the facts in this case. Therefore, Committee Counsel requests that Committee Counsel be allowed to present all relevant witness testimony necessary to prove the allegations set forth in the statement of alleged violation and for Committee Counsel to meet its burden of proof. Committee Counsel currently estimates that it will take thirty hours to properly present its case, exclusive of the time allotted for opening and closing arguments.

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familiar with the documents at issue, as well as the context in which they came into being. In addition to being well-informed about the surrounding facts and circumstances, for purposes of our analysis, a reasonable person is a 'thoughtful observer rather than . . . a hypersensitive or unduly suspicious person.' Finally, a reasonable person is able to appreciate the significance of the facts in light of relevant legal standards and judicial practice and can discern whether any appearance of impropriety is merely an illusion.") (internal citations omitted).

[10] Chair's Letter at 5.

Objection 2

Committee Counsel objects to the Chair's unilateral attempt to set time limits for the adjudicatory hearing. Pursuant to the Chair's proposed schedule, "Committee counsel and [Respondent's] counsel will each be allowed 6 hours to present their respective cases, exclusive of the time allotted for opening and closing arguments."[11] Pursuant to Committee Rule 5(e), "[a] subcommittee shall meet at the discretion of its Chair."[12] The Committee Rules, however, are silent as to whether the Chair has the unilateral authority to determine the length of a subcommittee hearing.

Objection 3

Committee Counsel objects to the Chair's unilateral attempt to alter deadlines provided for in the Committee Rules. These deadlines, include: (1) the October 18, 2010, deadline for Committee Counsel to provide a copy of "the evidence that Committee counsel intends to present at the adjudicatory hearing";[13] and (2) the November 9, 2010, deadline for Respondent to provide Committee Counsel with copies of the documents or other evidence Respondent intends to introduce at the adjudicatory hearing and a list of the witnesses Respondent intends to call at the adjudicatory hearing and summaries of the witnesses' expected testimony.[14]

Committee Rule 23(f)(1) requires that Committee Counsel provide Respondent with access to the evidence Committee Counsel intends to use at an adjudicatory hearing and the names of the witnesses Committee Counsel intends to call, and a summary of their expected testimony, no less than fifteen calendar days prior to an adjudicatory hearing.[15] Fifteen days before November 29, 2010, is November 14, 2010, twenty-seven days after the Chair's proposed deadline. Committee Rule 23(g) requires that Respondent provide Committee Counsel with copies of the evidence Respondent intends to use at an adjudicatory hearing and the names of the witnesses Respondent intends to call, and a summary of their expected testimony, no less than

[11] Chair's Letter at 5.
[12] Committee Rule 5(e).
[13] Chair's Letter at 3.
[14] Chair's Letter at 3.
[15] Committee Rule 23(f)(1).

five calendar days prior to an adjudicatory hearing.[16] Five days before November 29, 2010, is November 24, 2010, fifteen days after the Chair's proposed deadline.

Committee Counsel does not, necessarily, object to altering the deadlines in the Committee Rules. Committee Counsel objects to the Chair unilaterally altering the deadlines. Committee Rules do not give the Chair the authority to unilaterally alter the Committee Rules. Instead, Committee Rule 1(b) states, "[t]he rules of the Committee may be modified, amended, or repealed by a vote of a majority of the Committee."[17]

Objection 4

Committee Counsel objects to the proposed deadline for Committee Counsel to provide a copy of the evidence it intends to present at the adjudicatory hearing to the extent that the deadline would prohibit Committee Counsel from introducing evidence not in Committee Counsel's possession on October 18, 2010, but acquired by Committee Counsel more than fifteen days before the adjudicatory hearing. Pursuant to the Chair's proposed procedure, Committee Counsel must provide a copy of "the evidence that Committee counsel intends to present at the adjudicatory hearing" by October 18, 2010.[18] Committee Rule 23(f)(1) requires that Committee Counsel provide Respondent with access to the evidence Committee Counsel intends to use at an adjudicatory hearing and the names of the witnesses Committee Counsel intends to call, and a summary of their expected testimony, no less than fifteen calendar days prior to an adjudicatory hearing.[19] Fifteen days before November 29, 2010, is November 14, 2010, twenty-seven days after the Chair's proposed deadline. Committee Rule 23(f)(1) further provides that "[e]xcept in extraordinary circumstances, no evidence may be introduced . . . in an adjudicatory hearing unless the respondent has been afforded a prior opportunity to review such evidence[.]"[20] To the extent the Chair's proposed deadline would prohibit or exclude, except in extraordinary circumstances, Committee Counsel from introducing evidence not in Committee Counsel's possession on October 18, 2010, but acquired by Committee Counsel more than fifteen days before the adjudicatory hearing, this would be contrary to the Committee Rule

[16] Committee Rule 23(g).
[17] Committee Rule 1(b).
[18] Chair's Letter at 3.
[19] Committee Rule 23(f)(1).
[20] *Id.*

23(f)(1). Committee Counsel further specifically objects to this deadline on the grounds that certain subpoenas issued by the adjudicatory subcommittee are still outstanding.

Objection 5

Committee Counsel objects to the deadlines provided in the Chair's letter that are not provided for in the Committee Rules. These deadlines, include: (1) the October 15, 2010, deadline for submission of objections to the procedure for the adjudicatory hearing;[21] (2) the October 29, 2010, deadline for submission of proposed stipulations;[22] (3) the October 29, 2010, deadline for Respondent to submit objections to Committee Counsel's exhibits and anticipated witness testimony;[23] (4) the November 15, 2010, deadline for Committee counsel to submit objections to Respondent's exhibits and anticipated witness testimony;[24] and (5) the November 19, 2010, deadline for each party to provide copies of its exhibits to each Member of the adjudicatory subcommittee.[25]

The Committee Rules provide for objections made during the course of a public hearing[26] and entering into stipulations if the parties so choose and if such stipulations are approved by the subcommittee.[27] The Committee Rules, however, are silent as to deadlines for objections and submissions of stipulations. The Committee Rules are also silent as to a deadline for providing copies of exhibits to Members of the adjudicatory subcommittee. Any such deadlines are outside the Committee Rules and would thus qualify as a "special procedure" as contemplated by Committee Rule 1(c).[28]

Committee Counsel does not, necessarily, object to creating special procedures for this matter. Committee Counsel objects to the Chair unilaterally creating the special procedures. Committee Rules do not give the Chair authority to unilaterally create special procedures. Instead, Committee Rule 1(c) states, "[w]hen the interests of justice so require, the Committee,

[21] Chair's Letter at 5.
[22] Chair's Letter at 2.
[23] Chair's Letter at 3.
[24] Chair's Letter at 3.
[25] Chair's Letter at 4.
[26] Committee Rule 23(f)(2).
[27] Committee Rule 23(f)(4).
[28] Committee Rule 1(c).

by a majority vote of its members, may adopt any special procedures, not inconsistent with these rules, deemed necessary to resolve a particular matter before it."[29]

Objection 6

Committee Counsel objects to the Chair's proposed procedures to the extent they would allow the subcommittee to accept witness transcripts taken under the investigative subcommittee's direction into the record even if the witness is available to testify. The Chair's Letter states that "[t]he adjudicatory subcommittee may accept '[d]epositions, interrogatories, and sworn statements taken under any investigative subcommittee direction' into the record of the adjudicatory proceedings."[30] Committee Rule 23(j)(3)(i), however, states that "deposition transcripts and affidavits obtained during the inquiry may be used in lieu of live witnesses if the witness is unavailable[.]"[31] To the extent that the Chair's proposed procedures would allow the adjudicatory subcommittee to accept witness transcripts taken under the investigative subcommittee's direction into the record even if the witness is available to testify, this procedure would violate Committee Rule 23(j)(3)(i). Moreover, this procedure would prevent both parties from properly impeaching a witness' testimony for bias, inconsistent statements, motive, prejudice, or character through cross-examinations.[32]

Objection 7

Committee Counsel objects to the proposed "pre-hearing conference" to the extent that conference is not a public hearing. Committee Rule 23(e) states that all hearings of the adjudicatory subcommittee "shall be open to the public unless the adjudicatory subcommittee, pursuant to such clause, determines that the hearings or any part thereof should be closed."[33] Pursuant to House Rule XI, clause 2(g)(1), to hold a closed hearing, the adjudicatory

[29] Committee Rule 1(c).
[30] Chair's Letter at 2.
[31] Committee Rule 23(j)(3)(i) (emphasis added).
[32] It is true that the adjudicatory subcommittee in the matter of Representative James Traficant admitted the underlying trial transcripts of Representative Traficant, which included witness testimony from the trial. However, the underlying trial of Representative Traficant included both direct and cross-examination of witnesses, which permitted the parties to impeach a witness' testimony.
[33] Committee Rule 23(e).

subcommittee must determine in an open session with a majority present that all or a portion of a hearing:

> shall be in executive session because disclosure of matters to be considered would endanger national security, would compromise sensitive law enforcement information, would tend to defame, degrade, or incriminate any person, or otherwise would violate a law or rule of the House.[34]

The Chair's proposed procedures are silent as to whether the "pre-hearing conference" will be public. The name of the conference, however, indicates that it will not be a public hearing. To the extent the Chair's proposed procedures contemplate holding a closed hearing without following the established procedures for closing a hearing, this would be in violation of House and Committee Rules.

Objection 8

Committee Counsel objects to the deadline for submission of objections to the procedure for the adjudicatory hearing. The Chair's Letter requires that "[a]ny objections regarding the procedure for the adjudicatory hearing must be submitted to the adjudicatory subcommittee in writing by October 15, 2010."[35] The proposed procedures outlined in the Chair's Letter are incomplete, and some of the proposed procedures raise additional questions, including but not limited to: whether the parties are required to exchange pre-hearing filings such as objections; whether the parties will be expected to file written responses to the opposing party's pre-hearing filings; and whether a party's allotted hearing time will include time used for raising or responding to objections, or time used for cross-examining hostile and possibly time-consuming witnesses.[36] For this reason, Committee Counsel reserves the right to object to any of the Chair's proposed procedures to the extent that the Chair, any subcommittee Member, or any party have differing interpretations of the procedures.

[34] House Rule XI, clause 2(g)(1).
[35] Chair's Letter at 5.
[36] Committee Counsel will provide a more thorough recitation of its questions regarding the proposed procedure at a later date.

Objection 9

Committee Counsel objects to the Chair's Letter to the extent that the Chair's letter appropriates to the Chair duties reserved for the adjudicatory subcommittee. For example, Committee Rule 23(f)(1) states, "[t]he adjudicatory subcommittee shall, in writing, notify the respondent that the respondent and respondent's counsel have the right to inspect . . . documents . . . that the adjudicatory subcommittee counsel intends to use as evidence against the respondent in an adjudicatory hearing."[37] The Chair's Letter appears to attempt to fulfill this requirement, but the Chair's Letter was only sent by the Chair and not jointly by the Chair and the Ranking Member of the adjudicatory subcommittee, or the entire subcommittee.

CONCLUSION

Committee Counsel respectfully submits these objections. As noted above, Committee Counsel reserves its right to make further objections to the proposed procedures as are necessary.

Copies to:

Stanley M. Brand, Esq.
Andrew Herman, Esq.
Brand Law Group
923 Fifteenth Street, N.W.
Washington, D.C. 20005
Counsel to Respondent Maxine Waters

[37] Committee Rule 23(f)(1) (emphasis added).

EXHIBIT 12

ONE HUNDRED ELEVENTH CONGRESS

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT
Washington, DC 20515–6328

October 20, 2010

CONFIDENTIAL

Ms. C. Morgan Kim
Deputy Chief Counsel
Committee on Standards of Official Conduct
Suite HT-2, The Capitol
Washington, DC 20515

Re: In the Matter of Representative Maxine Waters

Dear Ms. Kim:

As Chair of the Adjudicatory Subcommittee (ASC) in the Matter of Representative Maxine Waters, I am responding to the October 15, 2010, filing in this matter, Committee Counsel's Objections to the Chair's Proposed Adjudicatory Hearing Procedures.[1]

Legal standard

Under Committee Rule 23(i)(2), the Chair "shall rule upon any question of admissibility or relevance of evidence, motion, procedure, or any other matter." Such rulings may be appealed by a "witness, witness counsel, or a member of the subcommittee."[2] In the event that a ruling of the Chair under this provision is appealed, a majority vote of the members present at the proceeding at which the ruling is appealed shall govern the question of admissibility, and no appeal shall lie to the Committee.[3] By this letter, I am responding to each of the nine objections raised by Committee counsel in their October 15 filing. The Ranking Member of the ASC, Representative Jo Bonner; respondent's counsel, Stanley M. Brand and Andrew D. Herman; and the Committee Chief Counsel, R. Blake Chisam, will all be served copies of this letter.

Objection 1 – length of hearing

Committee counsel object to "the Chair's proposed time limit for the adjudicatory hearing."[4] This objection is overruled.

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[1] Although the filing is unsigned, the Chair understands that this filing is submitted by C. Morgan Kim, Stacey Sovereign, Tom Rust, and Sheria Clarke, the Committee counsel assigned to this matter (hereinafter "Committee counsel").
[2] Committee Rule 23(i)(2).
[3] *Id.*
[4] Committee Counsel's Objections to the Chair's Proposed Adjudicatory Hearing Procedures (Committee Counsel's Objections) at 2.

Since designating the ASC in this matter, I have repeatedly requested that counsel provide a framework for a practical schedule that would resolve the entire ASC process as expeditiously as possible, while ensuring that a fair forum is provided for the parties to present their respective cases. As Committee counsel are aware, I have declined to authorize an adjudicatory schedule that would allow the parties 30 hours per side to present their cases, not including opening and closing arguments, because such a schedule would be impractical and inconsistent with prior Committee precedent for such hearings.

By Committee counsel's own estimate, allowing each party 30 hours per side would result in an adjudicatory hearing that would last between 8-10 legislative days and 12-14 legislative days, depending on the scope of stipulations agreed to by the parties and approved by the ASC. (That estimate is for the adjudicatory hearing alone, and does not account for the actions that must follow the hearing, including deliberations, transmittal of findings to the full Committee, etc.)

However, the Committee has not held a public disciplinary hearing longer than three days, and most have been one day or less. Committee counsel have made no attempt to distinguish this matter from the eight matters resolved in hearings of three days or less to explain why this matter merits or requires a substantially greater amount of time.

In addition, the Committee has held one adjudicatory hearing, regarding former Representative James A. Traficant, Jr., under the bifurcated system that separates the members who serve on the subcommittees tasked with investigative and adjudicatory roles. In that matter, the parties were allotted five hours per side to present their cases regarding a Statement of Alleged Violation that included ten counts and included alleged activities by the respondent spanning a period of 14 years. (Committee counsel in the matter of former Representative Traficant did not have three days to present their case, as Committee counsel in this matter suggest – they were allotted five hours to present their case, of which time they used approximately 90 minutes.[5]) By contrast, the Statement of Alleged Violation in this matter includes three counts based on factually related alleged activities occurring over a much shorter period of time.

Committee counsel cite only the matter of former Representative Traficant, and note that because the adjudicatory hearing in that matter followed a seven- to eight-week federal criminal trial and trial transcripts were admitted at the ASC hearing, Committee counsel required less time to develop the facts at the adjudicatory hearing. However, it does not follow that because the Traficant hearing came after a seven- to eight-week week federal criminal trial, the factual development in the Traficant adjudicatory hearing would have required seven to eight weeks if it had not followed a lengthy federal criminal trial.

[5] Committee Counsel's Objections at 3.

In this regard, it is also important to bear in mind that the ASC proceeding is a hearing, not a trial. Although the respondent obviously has due process rights under Committee and House rules, the same scope of protections and rules that guide the adversarial process in a criminal trial simply do not apply in the adjudicatory hearing context.

The parties are not limited to introducing exhibits via live witness testimony, for example. In fact, as the October 12 scheduling letter makes clear, it is expected that once objections to evidence have been resolved in the pre-hearing process, copies of the parties' evidence will be provided to members of the ASC by November 19, 2010 – ten days before the start of the hearing – to ensure that members have adequate time to review the material so they can be prepared to evaluate witness testimony at the hearing and to ask questions, should they choose to do so.

Allowing each party six hours per side, exclusive of time allotted for opening and closing arguments, is consistent with prior Committee precedent and provides ample time for each party to make a full presentation to the ASC on the core issues of the matter.

Objection 2 – Chair's authority to set time limits for adjudicatory hearings

In addition to objecting to the length of the adjudicatory hearing, Committee counsel objects to the Chair's "unilateral attempt to set time limits for the adjudicatory hearing."[6] This objection is overruled.

As Committee counsel note, under Committee Rule 5(e), a "subcommittee shall meet at the discretion of its Chair." Committee counsel's argument that because the rule does not also explicitly state that the Chair may determine the length of a hearing the Chair lacks such "unilateral authority" is misplaced. The ability to schedule the length of a hearing or meeting is inherent in the Chair's authority to schedule meetings and hearings. For example, as Committee counsel are well aware, when the Chair provides notice to Committee members of a full Committee meeting, such notices include not only the date, location, and start time of a meeting, but also the end time of the meeting.

The authority of the Chair to unilaterally set the schedule was recently recognized by minority members of the Committee in a public statement, which stated in part that, "Committee Rule 5(e) provides that a subcommittee – including the adjudicatory subcommittees of the Rangel and Waters trials [sic] – shall meet *at the discretion of its Chair*."[7]

Objection 3 – "unilateral" altering of deadlines

Committee counsel also object to "the Chair's unilateral attempt to alter deadlines provided for in the Committee rules."[8] This objection is overruled.

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[6] *Id.* at 4.
[7] "Statement of the Ranking Republican Member of the Committee on Standards of Official Conduct," Sep. 28, 2010 (emphasis original).
[8] Committee Counsel's Objections at 4.

Committee counsel argue that the Chair may not unilaterally schedule deadlines for the parties to provide copies of the evidence they intend to present to the opposing party other than 15 days before the adjudicatory hearing (for Committee counsel to provide copies to respondent's counsel) or 5 days before the adjudicatory hearing (for the respondent to provide copies to Committee counsel).[9] Committee counsel argue that to set the deadline at any other time would require a change to Committee rules, and thus require a majority vote of the full Committee.[10]

This argument is inconsistent with Committee rules, Committee precedent, and the Chair's inherent authority to schedule deadlines related to the adjudicatory hearing.

The October 12 scheduling letter does not conflict with or alter the timeframe for the parties to provide copies of evidence under the relevant Committee rule. The relevant time periods in the rule are "no less than 15 calendar days prior" and "no less than 5 days prior" to an adjudicatory hearing.[11] Those deadlines set a minimum number of days before the hearing by which the parties must provide certain material to the opposing party – not an exact limit or a maximum number of days for such action. The wording of the rule clearly anticipates discretion for the respective deadlines to be set farther in advance of the hearing. Moreover, nothing in the Committee rules states that a Committee vote would be necessary to exercise such scheduling discretion.

For example, in the matter of former Representative Traficant, the Chair and Ranking Member of the ASC scheduled these same deadlines related to the adjudicatory hearing in that matter by sending a letter to the respondent. Among other deadlines scheduled in that letter, the letter announced that the respondent would have access to evidence that Committee counsel intended to present beginning June 28, 2002 – more than 15 days before the start of the adjudicatory hearing on July 15, 2002.

Those deadlines were scheduled and announced to the respondent at the same time the Chair designated the members of the ASC in that matter, and the letter was signed by both the Chair and Ranking Member of the ASC. The ASC in that matter did not meet until nearly two weeks after the various deadlines had been scheduled and the full Committee did not meet during that period, so Committee precedent is clear that a deadline greater than the 15 days or 5 days may be scheduled without a vote of either the full Committee or the ASC.

Although the scheduling letter in the matter of former Representative Traficant was signed by both the Chair and Ranking Member of the ASC, nothing in Committee rules required that both members sign the letter scheduling those deadlines. Those deadlines were scheduled although no explicit authority to schedule the deadlines exists in Committee rules other than Committee Rule 5(e), which establishes that a "subcommittee shall meet at the discretion of its Chair."

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[9] *Id.*
[10] *Id.* at 5.
[11] Committee Rule 23(f)(1), (g).

In this matter, the Chair exercised her authority to set the schedule for the adjudicatory hearing and related pre-hearing deadlines after the minority members of the Committee publicly requested that she do so.

Objection 4 – copies of evidence

Committee counsel object to the "the proposed deadline for Committee Counsel to provide a copy of the evidence it intends to present at the adjudicatory hearing to the extent that the deadline would prohibit Committee Counsel from introducing evidence not in Committee Counsel's possession on October 18, 2010, but acquired by Committee Counsel more than 15 days before the adjudicatory hearing."[12] This objection is overruled.

As an initial matter, I have stayed the October 18 deadline set in the October 12 scheduling letter for Committee counsel to produce materials to the respondent. I provided notice of this decision to Committee counsel and the Ranking Republican Member of the ASC on October 18, and instructed Committee counsel to provide notice to the respondent's counsel. The parties will be notified of the rescheduled deadline.

However, the stay is not a reflection of the Chair's authority to schedule (or stay or reschedule) this deadline. As discussed above, the October 12 scheduling letter does not conflict with or alter the timeframe in the rule regarding Committee counsel's obligation to provide evidence, witness lists, and witness summaries to the respondent. The date set to provide the respondent copies of the evidence is not less than 15 days before the start of the adjudicatory hearing.[13]

To the extent that Committee counsel identify or discover additional evidence after the deadline set in the October 12 scheduling letter, neither the Committee rules nor the scheduling letter absolutely prohibit Committee counsel from either providing that evidence to the respondent or introducing that evidence at the adjudicatory hearing. Committee counsel retain the ability to seek approval to offer late-acquired or discovered evidence or testimony upon a showing that extraordinary circumstances justify its use.[14]

The rule balances flexibility and fairness for the parties. While setting a cutoff for parties to provide evidence to one another, it also allows that there may be circumstances in which it is appropriate to allow evidence that is acquired or discovered after the deadline, provided there is still prior notice to the opposing party. To the extent that the deadlines set in this matter by the October 12 scheduling letter are in advance of the minimum deadlines set by the rule, it is conceivable that there may be evidence which the parties have not yet acquired which may still be ruled admissible.

[12] Committee Counsel's Objections at 5.
[13] Committee Rule 23(f)(1).
[14] *Id.*

Objection 5 – other deadlines

Committee counsel object to the "deadlines provided in the Chair's letter that are not provided for in the Committee Rules."[15] This objection is overruled.

Committee counsel argue that because Committee rules "are silent as to deadlines for objections and submissions of stipulations" and "providing copies of exhibits to Members of the adjudicatory subcommittee," any such deadlines are "outside the Committee Rules and would thus qualify as a 'special procedure' as contemplated by Committee Rule 1(c)."[16] Thus, Committee counsel assert that setting any of these types of deadlines requires a majority vote of the Committee.

As discussed above, this argument is inconsistent with Committee precedent. In the matter of former Representative Traficant, the same types of deadlines were scheduled and announced to the respondent at the same time that the Chair designated the members of the ASC in that matter, and the letter was signed by both the Chair and Ranking Member of the ASC. The ASC in that matter did not meet until nearly two weeks after the various deadlines had been scheduled and the full Committee did not meet during that period, so Committee precedent is clear that scheduling such deadlines is not a "special procedure" that would require a majority vote of the full Committee or of the ASC.

Although the scheduling letter in the matter of former Representative Traficant was signed by both the Chair and Ranking Member of the ASC, nothing in Committee rules required that both members sign the letter scheduling those deadlines. Those deadlines were scheduled although no explicit authority to schedule the deadlines exists in Committee rules other than Committee Rule 5(c), which establishes that a "subcommittee shall meet at the discretion of its Chair."

In this matter, the Chair exercised her authority to set the schedule for the adjudicatory hearing and related pre-hearing deadlines after the minority members of the Committee publicly requested that she do so.

Objection 6 – witness transcripts

Committee counsel object to "allow[ing] the subcommittee to accept witness transcripts into the record even if the witness is available to testify."[17] This objection is overruled.

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[15] Committee Counsel's Objections at 6.
[16] *Id.*
[17] *Id.* at 7.

The argument advance by Committee counsel is inconsistent with Committee rules and precedent. First, the rule cited by Committee counsel specifies the order for receiving testimony and other relevant evidence during the adjudicatory hearing, "whenever possible".[18] The first category is for "witnesses (deposition transcripts and affidavits obtained during the inquiry may be used in lieu of live witnesses if the witness is unavailable) and other evidence offered by the Committee counsel."[19] The wording of the rule is not restrictive, but permissive. Rather than restrict the use of transcripts by Committee counsel only to situations where a live witness is unavailable, the rule simply permits the use of transcripts when a live witness is unavailable.[20]

Second, to interpret the language of the rule as restricting the use of transcripts by Committee counsel where the live witness is unavailable, rather than as clarifying that such use is permitted, is inconsistent with prior Committee precedent. In the matter of former Representative Traficant, the ASC specifically considered the question of whether to rely on the use of transcripts from a prior proceeding when the live witnesses could have been made available. There, the ASC determined that it would be appropriate to rely on the transcripts, even though the live witnesses could have been available to testify in person at the adjudicatory hearing.

Objection 7 – pre-hearing conference

Committee counsel object to the ASC holding a pre-hearing conference on the grounds that such a conference "is not a public hearing."[21] This objection is overruled.

Committee rules clearly distinguish between "meetings" and "hearings" of the Committee and its subcommittees.[22] A "meeting" of a subcommittee shall occur in executive session unless the subcommittee votes by an affirmative of a majority of its members to open the meeting to the public, while a "hearing" held by an ASC or any "sanction hearing" held by the Committee shall be open to the public unless the ASC or Committee votes by an affirmative of a majority of its members to close the meeting to the public.[23]

It has previously been discussed at meetings of the Waters ASC that the ASC will likely hold a meeting in executive session at a time prior to the adjudicatory hearing to resolve any remaining pre-hearing issues, and to allow the parties an opportunity to appeal rulings as permitted to the entire ASC panel. Staff have not previously objected to such a meeting.

Accordingly, and per the October 12 scheduling, the parties are advised that a pre-hearing conference, if necessary, will be held as a closed meeting of the Waters ASC at 1:00 p.m. on November 18, 2010. Appropriate notice will be provided to the parties and members of the ASC regarding the scheduling of the pre-hearing conference when it becomes clear from other pre-hearing activity whether such a pre-hearing conference is required.

[18] Committee Rule 23(j)(3).
[19] Committee Rule 23(j)(3)(i).
[20] *Id.*
[21] Committee Counsel's Objections at 7.
[22] *See* Committee Rule 5.
[23] Committee Rule 5(c), (d).

Objection 8 – other procedures

Committee counsel object to the "deadline of submission of objections to the procedure for the adjudicatory hearing" of October 15, 2010, set by the October 12 scheduling letter.[24] This objection is overruled.

As noted above, the Chair has authority to schedule deadlines related to the adjudicatory hearing, and opted to set a deadline for the parties to file objections to aspects of the October 12 scheduling letter.

However, the Chair recognizes that given the relative infrequency with which aspects of the Committee's rules relating to the ASC process have been employed, it is possible – if not likely – that the parties may have questions about the ASC process and procedure. The Chair took the consideration that such questions may not have been anticipated or resolved to date, in addition to other remaining pre-hearing procedural steps, into account in setting the adjudicatory hearing schedule.

The parties are strongly encouraged to raise any questions that may arise from perceived ambiguities or other issues relating to ASC procedures with one another. To the extent that the parties may reach agreement between themselves about how to resolve a procedural question, the parties could submit a joint filing to the Chair for consideration. If either party wishes to raise a question regarding ASC procedure other than in a joint filing, that party should submit an appropriate motion to the Chair and serve the other party.

Committee counsel have also raised several specific questions about hearing procedure, which are addressed in turn. First, Committee counsel ask "whether the parties are required to exchange pre-hearing filings such as objections."[25] Given the adversarial nature of the ASC process and its current posture, both parties should treat pre-hearing filings as adversarial filings that should be both filed with the Chair and served on the opposing party.

Second, Committee counsel ask "whether the parties will be expected to file written responses to the opposing party's pre-hearing filings."[26] The parties will not be expected to file written responses to the opposing party's pre-hearing filings. To the extent that a party may wish to file such a written response and it is possible to do within the deadlines established by the October 12 scheduling letter and any subsequent modifications or additions to the schedule, the parties may file such responses with the Chair. As noted above, such responses should be filed with the Chair, and also served on the opposing party.

[24] Committee Counsel's Objections at 8.
[25] *Id.*
[26] *Id.*

Third, Committee counsel ask "whether a party's allotted hearing time will include time used for raising or responding to objections, or time used for cross-examining hostile and possibly time-consuming witnesses."[27] As noted in the October 12 scheduling letter, Committee counsel and respondent's counsel will each be allowed six hours to present their respective cases, exclusive of the time allotted for opening and closing arguments. Time used by a party for raising or responding to objections or cross-examining witnesses will count against that party's overall allotted time of six hours. Notwithstanding the fact that Committee counsel's request for 30 hours to present its case is overruled, the six hour limitation on presentation of each side's case will remain subject to reconsideration based upon a reasonable request for additional time.

Objection 9 – notice to respondent

Committee counsel object to the October 12 scheduling letter "to the extent that [it] appropriates to the Chair duties reserved for the adjudicatory subcommittee."[28] This objection is overruled.

Committee counsel base this argument on Committee Rule 23(f)(1), which states, in part, that an "adjudicatory subcommittee shall, in writing, notify the respondent that the respondent and respondent's counsel have the right to inspect, review, copy, or photograph books, papers, documents, photographs, or other tangible objects that the adjudicatory subcommittee counsel intends to use as evidence against the respondent in an adjudicatory hearing."

The act of providing a respondent with notice of the right to review and obtain copies of the evidence an ASC intends to use as evidence is mandatory and is, therefore, ministerial in nature. This obligation may arguably be fulfilled by transmitting to the respondent a copy of the Committee's rules. There is no sound basis in reason or policy to read this rule so as to require an ASC to vote to provide this information to the respondent, to require that such notice be transmitted under the signature of all ASC members, or to require that such notice be transmitted under the joint signatures of both the Chair and Ranking Member. Thus, it is within the Chair's authority to "fulfill" such a mandatory, ministerial obligation. Accordingly, the October 12 scheduling letter did not exceed the Chair's authority under Committee rules.

For the aforementioned reasons, each of the nine objections raised by Committee counsel in their October 15, 2010, filing in this matter, Committee Counsel's Objections to the Chair's Proposed Adjudicatory Hearing Procedures, is hereby denied.

Sincerely,

Zoe Lofgren
Chair

[27] *Id.*
[28] *Id.* at 9.

cc: Representative Jo Bonner, Ranking Republican Member
R. Blake Chisam, Chief Counsel, Committee on Standards of Official Conduct
Stanley M. Brand, Esq., Counsel for Respondent
Andrew D. Herman, Esq., Counsel for Respondent

EXHIBIT 13

ONE HUNDRED ELEVENTH CONGRESS

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT

Washington, DC 20515–6328

October 22, 2010

CONFIDENTIAL

Representative Maxine Waters
U.S. House of Representatives
2344 Rayburn House Office Building
Washington, DC 20515

Ms. C. Morgan Kim
Deputy Chief Counsel
Committee on Standards of Official Conduct
Suite HT-2, The Capitol
Washington, DC 20515

Re: In the Matter of Representative Maxine Waters

Dear Representative Waters and Ms. Kim:

As Chair of the Adjudicatory Subcommittee (ASC) in the Matter of Representative Maxine Waters, I am writing with regard to the adjudicatory hearing schedule in this matter.

Under Committee Rule 5(e), a "subcommittee shall meet at the discretion of its Chair." Pursuant to Rule 5(e) and Rule 23(e) of the Committee and Clause 2(g)(3) of House Rule XI, the Chair of an ASC is required to make a public announcement in advance of an adjudicatory hearing.

On October 7, 2010, as Chair of the ASC in this matter, I issued a public statement announcing that the adjudicatory hearing in this matter will begin on November 29, 2010, at 9:00 a.m. At that time, I also noted that substantial actions must be taken before a public hearing can begin. Accordingly, I publicly stated that I would notify the parties of the schedule and other procedural issues. On October 12, 2010, consistent with Committee precedent, I sent a letter to the parties scheduling various pre-hearing procedural deadlines.

Pursuant to Committee Rule 23(f)(1), Committee counsel are required to provide the respondent with access to the evidence they intend to use as evidence against her at the adjudicatory hearing, the names of witnesses Committee counsel intend to call, and a summary of their expected testimony no less than 15 calendar days prior to the hearing. The October 12 scheduling letter established a deadline of October 18, 2010, for Committee counsel to provide those materials to the respondent.

On October 18, 2010, I stayed that October 18 deadline. By this letter, I am notifying both parties that the deadline for Committee counsel to provide the respondent with copies of the evidence, their intended witness list, and a summary of the witnesses' expected testimony is rescheduled for **October 25, 2010.**

This modification to the schedule may also impact the parties' ability to prepare for and meet other previously scheduled pre-hearing deadlines. Accordingly, although the adjudicatory hearing will proceed on November 29, I am hereby modifying another deadline established by the October 12 scheduling letter.

Under the terms of the October 12 scheduling letter, since subcommittee approval is required for any stipulations, the parties were required to jointly submit any proposed stipulations to the ASC in writing by October 27, 2010. Per this letter, that deadline will be rescheduled to **November 15, 2010.**

Unless otherwise specified in this letter, all deadlines announced in the October 12 scheduling letter are unchanged and remain in effect for both parties.

Sincerely,

Zoe Lofgren
Chair

cc: Representative Jo Bonner, Ranking Republican Member
R. Blake Chisam, Chief Counsel, Committee on Standards of Official Conduct
Stanley M. Brand, Esq., Counsel for Respondent
Andrew D. Herman, Esq., Counsel for Respondent

EXHIBIT 14

UNITED STATES HOUSE OR REPRESENTATIVES
Committee on Standards of Official Conduct
Adjudicatory Subcommittee

In the Matter of	:
	:
REPRESENTATIVE	:
MAXINE WATERS	:

RESPONDENT'S OBJECTIONS TO COMMITTEE COUNSEL'S RULE 23(f)(1) PRODUCTION

On October 25, 2010, Committee counsel for the adjudicatory subcommittee in the Matter of Representative Maxine Waters provided to Respondent's counsel copies of "a set of redacted documents for use at the hearing" and a "set of summaries for the expected testimony for the witnesses that Committee counsel intends to call at the adjudicatory hearing." *See* October 25, 2010, Letter from Tom Rust, Counsel, to Stanley M. Brand. This production includes well over 3,000 pages of documents and a list of 24 witnesses.

Committee counsel produced this material pursuant to Committee Rule 23(f)(1), which directs it to produce both documentary evidence it "intends to use" and the "names of witnesses" that counsel "intends to call" along with a "summary of [those witnesses'] expected testimony." Counsel's production fails to satisfy Rule 23(f)(1)'s clear direction in that, instead of producing only the materials that it intends to utilize, Committee counsel has produced nearly all of the materials in its possession; Committee counsel has similarly declined to cull its witness list or provide actual summaries of the witnesses' testimony to Respondent.

Moreover, the vast majority of the proffered documents and witnesses are irrelevant to the charges set forth in the Statement of Alleged Violation ("SAV") and much of the material is unduly prejudicial to Respondent. Accordingly, Respondent hereby respectfully submits the following objections to Committee counsel's submission and requests an order from the Chair mandating that counsel resubmit the materials in an appropriate form. Given the voluminous records that she has received, Respondent cannot reasonably review the material and form objections by the October 29, 2010, deadline imposed by the Chair for doing so.

LEGAL STANDARD

Pursuant to Committee Rule 23(c): "The adjudicatory subcommittee shall hold a hearing to determine whether any counts in the Statement of Alleged Violation have been proved by clear and convincing evidence and shall make findings of fact . . . ."

Pursuant to Committee Rule 23(f)(1): "The adjudicatory subcommittee shall in writing, notify the respondent that the respondent and respondent's counsel have the right to inspect, review, copy, or photograph books, papers, documents, photographs, or other tangible objects that the adjudicatory subcommittee counsel intends to use as evidence against the respondent in an adjudicatory hearing. The respondent shall be given access to such evidence, and shall be provided the names of witnesses the subcommittee counsel intends to call, and a summary of their expected testimony . . . ."

OBJECTIONS

Objection 1

Respondent objects to Committee counsel's submission of thousands of pages of documentary evidence, exceeding any reasonable amount of material that it could

"intend" to use in the six hours allotted to counsel to "make a full presentation to the [adjudicatory subcommittee] on the core issues of the matter." *See* October 20, 2010, Letter from Zoe Lofgren, Chair of the Adjudicatory Subcommittee, to C. Morgan Kim, Deputy Chief Counsel.

Committee counsel's voluminous submission cannot not satisfy any reasonable concept of "intend." Even accounting for the uncertainties attendant to any legal hearing, it is simply not reasonable for Committee counsel to assert that it "intends" to use at the hearing each and every of the thousands of documents submitted on October 25 to Respondent's counsel. For example, Committee counsel cannot actually intend to use every document submitted by Congressman Barney Frank, every page of Treasury Secretary Henry Paulson's daily calendar that it received, and every document provided by the Treasury Department. In short, Committee counsel has designated most, if not every, document that it received during its investigation as a document that it "intends to use as evidence in [the] adjudicatory hearing." Such a submission does not satisfy the clear direction of Committee Rule 23(f).

Committee counsel's refusal to provide any guidance as to the presentation of its actual case hamstrings Respondent's and her counsel's ability to prepare for the hearing. Indeed, without guidance from Committee counsel as to which documents it actually "intends" to utilize to establish the charges in the SAV, Respondent's counsel can only conclude that Committee counsel intends to rely upon irrelevant and potentially prejudicial information; evidence to which, of course, Respondent's counsel would rightfully object.

In that vein, this submission of documents apparently indicates Committee counsel's intent to ignore Committee Rule 23(c) directing Committee counsel to simply prove the "counts in the Statement of Alleged Violation . . . by clear and convincing evidence." Committee counsel's misdirection is evidenced by its language supporting Objection One to Committee Counsel's Objections to the Chair's Proposed Adjudicatory Hearing Procedures. There, Committee Counsel asserted that: "What is at issue is not just whether Respondent contacted then-Secretary Paulson to set up a meeting for OneUnited executives with Treasury officials, but also events key to the charges in the statement of alleged violation that occurred long before the Treasury meeting and in the months afterward." *Id.* at 3. This assertion is at odds with, and significantly expands the scope of, the allegations set forth in the SAV.

As a general matter, the three counts alleged in the SAV are limited and narrow. Indeed, all three counts relate *solely* to actions taken by Respondent's Chief of Staff subsequent to the meeting request made to Secretary Paulson and Respondent's alleged failure to supervise her Chief of Staff's actions properly.

More specifically, the SAV lists Respondent's purported failure to supervise as the *only* action potentially subject to sanction by the adjudicatory subcommittee. *See* SAV ¶ 49 (Count I: "Respondent's failure to instruct her Chief of Staff to refrain from assisting OneUnited after Respondent realized 'she should not be involved'" violated House Rule XXIII, clause 1); SAV ¶ 56 (Count II: Respondent's "failure to instruct" violated House Rule XXIII, clause 2); SAV ¶ 62 (Count III: Respondent's responsibility for Chief of Staff's "continued involvement in assisting OneUnited" violated Code of Ethics for Government Service, clause 5).

This purported failure to supervise is the gravamen of each of the SAV's three counts. Conversely, Respondent's contact with Secretary Paulson is neither relevant to establishing the counts in the SAV, as required by Committee Rule 23(c), nor a matter of factual dispute. Although the SAV asserts that Representative Waters called Secretary Paulson and requested a meeting on behalf of the National Bankers Association, SAV ¶ 14, none of the three counts alleged in the SAV relate or refer to that meeting in any way. While testimony related to Rep. Waters' phone call to Secretary Paulson might be admissible to provide context for those later actions, such testimony is simply irrelevant to establishing the ultimate validity of the counts contained in the SAV.[1]

To the extent that specific facts relating to the phone call and meeting are relevant to the SAV, Respondent does not dispute the details relating to those events. Rep. Waters has answered all questions posed to her by members of the investigative subcommittee and Committee Counsel relating to her interaction with Secretary Paulson. *See*, e.g., Interview of Rep. Waters, CSOC.WAT.TRANS.636-37.

Committee Counsel's assertion that it will need to present facts relating to "events key to the charges in the statement of alleged violation that occurred long before the Treasury meeting and in the months afterward," Objections at 3, is similarly flawed. Respondent does not dispute Committee Counsel's need to provide factual context for the three charges. But, as detailed above, the counts in the SAV are narrow. Committee Counsel has proffered no justification for the need to elucidate events that occurred "long

[1] Indeed, given this Committee's decision to reject the recommendation by the Office of Congressional Ethics for further review relating to the phone call, it is apparent that this Committee has already determined that Rep. Waters' interaction with Secretary Paulson complied fully with House rules.

before the Treasury meeting." Such events are not at issue in the SAV. As for events subsequent to that meeting, the SAV sets forth the purported actions taken by Rep. Waters Chief of Staff that give rise to the charges. *See* SAV ¶¶ 25-31 (detailing series of emails sent and received by Respondent's Chief of Staff over a 10-day period).[2] Any other "subsequent events" are simply irrelevant to the claims.

Committee Counsel provides no explanation, nor should it be permitted to assert, why this matter requires a more wide-ranging presentation than that offered in the controlling SAV. Indeed in denying Respondent's Motion for a Bill of Particulars pursuant to Committee Rule 22(b), the Investigative Subcommittee, represented by now-Committee counsel determined that:

> 1. Each count of the Statement of Alleged Violation contains a plain and concise statement of the alleged facts of the violation.
>
> ***
>
> 3. Each count of the Statement of Alleged Violation contains information sufficient to advise Respondent of the allegations against her, and sufficient to afford her a meaningful opportunity to respond to those allegations.

Order Denying Respondent's Motion for a Bill of Particulars. The Investigative Subcommittee, with the assistance of Committee counsel, elected to issue the SAV and ratified it in the face of Respondent's objections. That document controls this proceeding

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[2] To this point, Committee counsel's decision to omit Respondent's Chief of Staff, Mikael Moore, from its witness list also illustrates its misguided view of its obligations under Committee rules. While it is not the role of Respondent's counsel to advise Committee counsel on the presentation of its case, given that Mr. Moore's conduct is the central focus of the SAV (*see, e.g.*, SAV ¶¶ 25-31) and the sole source of Respondent's alleged misconduct, it is hard to imagine how counsel would be able to meet its burden of proof without presenting Mr. Moore's testimony.

and Committee counsel cannot now expand the breadth of the facts at issue because it now fears that those facts are inadequate to establish the charges contained therein.

As controlled by the contents of the SAV, the adjudicatory hearing on the three counts at issue concerns Respondent's purported failure to supervise seven discrete actions by her Chief of Staff. Any documentary evidence submitted that does not relate to those three counts is irrelevant and potentially prejudicial to Respondent. Accordingly, the Chair should direct Committee counsel to withdraw the submitted materials and redesignate only the material that it actually "intends" to use at the adjudicatory hearing.

Objection 2

Incorporating the arguments made above, Respondent similarly objects to Committee counsel's submission of 24 witnesses that it ostensibly "intends to call." Given the limited subject matter of the counts in the SAV and the six-hour time constraint, Committee counsel cannot actually "intend" to call all 24 of these witnesses. Again, even in light of any uncertainty regarding testimony and cross-examination, much of the individuals on the witness list are cumulative, irrelevant and potentially prejudicial.

Respondent's counsel can only assume that Committee counsel either does not truly intend to call all 24 witnesses or, for some unknown and improper purpose, plans to elicit irrelevant and potentially prejudicial testimony unrelated to the counts in the SAV. As such, the Chair should direct Committee counsel to withdraw its submission of this witness and redesignate only those witnesses which it actually "intends" to use at the adjudicatory hearing to establish the counts set forth in the SAV.

Objection 3

Committee counsel's witness submission also fails to provide "a summary" of the witnesses "expected testimony," as required by Committee Rule 23(f). Its purported summaries provide that the witness "may be called to testify before the adjudicatory committee regarding the following relevant topics." These lists of "topics" do not satisfy any fair definition of "summary," defined by *Merriam-Webster* Dictionary as: "an abstract, abridgment, or compendium especially of a preceding discourse." The topic lists provided by Committee counsel give no indication as to the actual content of the testimony, as contemplated by the "summary" requirement. Instead, the documents merely list the general topics to be elicited from each witness.

As discussed above, this inadequate disclosure prevents Respondent and her counsel from fully developing her case or assessing whether and how to object to any of the proposed witness. Moreover, these topic lists again indicate that Committee counsel intends to elicit irrelevant, cumulative and potentially prejudicial testimony from the witnesses in violation of Committee Rules. As such, the Chair should direct Committee counsel to withdraw its summaries of the witness testimony and resubmit actual summaries of the contents of the intended witnesses' testimony.

Respectfully submitted this 27th day of October, 2010

Stanley M. Brand
Andrew D. Herman
Brand Law Group, PC
923 15th Street, NW
Washington, DC 20005

Counsel for Representative Maxine Waters

CERTIFICATE OF SERVICE

The undersigned declares under penalties of perjury that on October 27, 2010, I hereby served a copy of the foregoing Motion to Dismiss the Statement of Alleged Violations via electronic mail and first class mail, on Daniel J. Taylor, Counsel to the Chair, and Blake Chisam, Counsel, House Committee on Standards of Official Conduct;

Andrew D. Herman

EXHIBIT 15

ONE HUNDRED ELEVENTH CONGRESS

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT

Washington, DC 20515–6328

October 28, 2010

CONFIDENTIAL

Mr. Stanley M. Brand, Esq.
Mr. Andrew D. Herman, Esq.
Brand Law Group, P.C.
923 15th Street, N.W.
Washington, DC 20005

Re: In the Matter of Representative Maxine Waters

Dear Mssrs. Brand and Herman:

As Chair of the Adjudicatory Subcommittee (ASC) in the Matter of Representative Maxine Waters, I am responding to the October 27, 2010, filing in this matter, Respondent's Objections to Committee Counsel's Rule 23(f)(1) Production.

Legal standard

Under Committee Rule 23(i)(2), the Chair "shall rule upon any question of admissibility or relevance of evidence, motion, procedure, or any other matter." Such rulings may be appealed by a "witness, witness counsel, or a member of the subcommittee."[1] In the event that a ruling of the Chair under this provision is appealed, a majority vote of the members present at the proceeding at which the ruling is appealed shall govern the question of admissibility, and no appeal shall lie to the Committee.[2] By this letter, I am responding to each of the three objections raised by Respondent's counsel in their October 27 filing. The Ranking Member of the ASC, Representative Jo Bonner; Committee counsel; and the Committee Chief Counsel, R. Blake Chisam, will all be served copies of this letter.[3]

Objection 1 – evidence

Respondent's counsel object to the material produced by Committee counsel on October 25, 2010, pursuant to Committee Rule 23(f)(1) as evidence intended to be used against the respondent in the adjudicatory hearing.[4] This objection is overruled.

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[1] Committee Rule 23(i)(2).
[2] *Id.*
[3] Under Committee rules, nonpartisan Committee staff are tasked with proving the counts alleged in a Statement of Alleged Violation. The Committee counsel assigned to this matter are C. Morgan Kim, Stacey Sovereign, Tom Rust, and Sheria Clarke (hereinafter "Committee counsel").
[4] Respondent's Objections to Committee Counsel's Rule 23(f)(1) Production (Respondent's Objections) at 2.

Respondent's counsel note that Committee counsel produced "well over 3,000 pages of documents" and argue that this "exceed[s] any reasonable amount of material that it could 'intend' to use in the six hours allotted to counsel" to present its case at the adjudicatory hearing.[5] Assuming that Committee counsel could not use all of that evidence within the six-hour time limit, respondent's counsel argue that it is not possible for Committee counsel to have a genuine intent to use the evidence in the adjudicatory hearing.[6] Respondent's counsel thus request that "the Chair should direct Committee counsel to withdraw the submitted materials and redesignate only the material that it actually 'intends' to use at the adjudicatory hearing."[7]

However, it is important to bear in mind – as has been previously stated – that the ASC proceeding is a hearing, not a trial. Although the respondent obviously has due process rights under Committee and House rules, the same scope of protections and rules that guide the adversarial process in a criminal trial simply do not apply in the adjudicatory hearing context.

Accordingly, the parties are not limited to introducing exhibits via live witness testimony. As previous letters to the parties make clear, it is expected that once objections to evidence have been resolved in the pre-hearing process, copies of the parties' evidence will be provided to members of the ASC by November 19, 2010 – ten days before the start of the hearing – to ensure that members have adequate time to review the material so they can be prepared to evaluate witness testimony at the hearing and to ask questions, should they choose to do so.

Thus, it has been made clear to the parties that it is anticipated that they will each provide documentary evidence to the ASC that the members can review prior to the start of the hearing. It is not necessary that the parties introduce each exhibit during the hearing as would be the case in a trial setting.

Respondent's counsel argue that the scope of documents provided to respondent suggests that Committee counsel "intend[] to rely upon irrelevant and potentially prejudicial information; evidence to which, of course, Respondent's counsel would rightfully object."[8] For example, they assert that any documentary evidence that "does not relate" to the three counts alleged in the Statement of Alleged Violation "is irrelevant and potentially prejudicial to Respondent."[9]

Respondent's counsel also acknowledge that certain related testimony "might be admissible to provide context" for other actions.[10] In that regard, "[t]o the extent that specific facts relating to the phone call and meeting are relevant to the SAV, Respondent does not dispute the details relating to those events."[11]

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[5] Per the October 12 scheduling letter, each party will be allowed six hours to present its case, exclusive of the time allotted for opening and closing arguments. Respondent's Objections at 1, 2-3.
[6] Respondent's Objections at 3.
[7] *Id.* at 7.
[8] *Id.* at 3.
[9] *Id.* at 7.
[10] *Id.* at 5.
[11] *Id.*

Since Respondent's counsel have not yet filed such specific objections it is neither possible nor necessary to rule on any objections to specific pieces of evidence Committee counsel propose to use at this time. However, the parties are reminded that under Committee rules, "[a]ny relevant evidence shall be admissible unless the evidence is privileged under the precedents of the House of Representatives."[12] Any objections based on relevancy or privilege will be addressed at the appropriate time.

Under the schedule as originally announced in the October 12 scheduling letter, Committee counsel were required to produce materials to respondent's counsel by October 18, and respondent's counsel would have had 11 days to submit objections. The October 18 deadline for Committee counsel was subsequently stayed and then rescheduled for October 25, although the deadline for respondent's counsel to submit any corresponding objections was not also modified.

By this letter, I am notifying both parties that the deadline for respondent's counsel to provide Committee counsel with objections to Committee counsel's proposed exhibits or witnesses is rescheduled for Monday, **November 1, 2010**. Since respondent's counsel was provided with Committee counsel's proposed exhibits, witness list, and witness summaries on October 25, 2010, respondent's counsel will thus have seven days to review that material, then prepare and file any specific objections with the ASC. All other previously announced deadlines are unchanged and remain in effect for both parties.

Finally, in discussing the relevancy of proposed evidence, respondent's counsel states "[t]o the extent that specific facts relating to the phone call and meeting are relevant to the SAV, Respondent does not dispute the details relating to those events."[13] As a reminder, the parties may, subject to subcommittee approval, enter into stipulations as to facts that are not in dispute.[14] Committee counsel need not present any evidence regarding any fact stipulated or count that the respondent admits.[15]

However, since subcommittee approval is required for any stipulations, the parties must jointly submit any proposed stipulations to the adjudicatory subcommittee in advance. Per the October 22 letter regarding modifications to the schedule, the parties must submit any proposed stipulations to the ASC in writing by **November 15, 2010.**

Objection 2 – witness list

Respondent's counsel also object to "Committee counsel's submission of 24 witnesses that it ostensibly 'intends to call.'"[16] This objection is overruled.

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[12] Committee Rule 23(f)(1).
[13] Respondent's Objections at 5.
[14] Committee Rule 23(f)(4).
[15] Committee Rule 23(n).
[16] Respondent's Objections at 7.

Respondent's counsel argue that in light of the "limited subject matter of the counts in the SAV and the six-hour time constraint, Committee counsel cannot actually 'intend' to call all 24 of these witnesses."[17]

As an initial matter, the list of witnesses provided by Committee counsel to respondent's counsel actually lists 21 witnesses; the document itself is 24 pages. More importantly, as respondent's counsel note elsewhere, "it is not the role of Respondent's counsel to advise Committee counsel on the presentation of its case."[18] Nor is it the role of the Chair or the ASC to dictate which witnesses Committee counsel (or respondent's counsel) should call, or how to allocate the overall time allowed each party to each witness it opts to call at the adjudicatory hearing.

It is appropriate for the Chair to rule upon questions of admissibility or relevance of witness testimony, and such rulings are subject to appeal to the full ASC.[19] However, no such question regarding admissibility or relevance of a particular witness proposed by Committee counsel is presented here.

Objection 3 – witness summaries

Respondent's counsel object to the witness summaries provided by Committee counsel on the grounds that they "give no indication as to the actual content of the testimony, as contemplated by the 'summary' requirement."[20] This objection is overruled in part, and Committee counsel have until **5 p.m. on October 29, 2010**, to cure the summaries with respect to two witnesses.

Under Committee rules, Committee counsel must provide to the respondent, among other materials, the names of the witnesses Committee counsel intend to call, as well as a "summary of their expected testimony" no less than 15 days before the start of the adjudicatory hearing.[21]

The summaries provided by Committee counsel for 19 of the 21 witnesses they intend to call provide a sufficient basis to comport with the requirement of Committee Rule 23(f)(1). However, the summaries for two witnesses are insufficient.

For Representative Maxine Waters, Committee counsel indicate that she may be called to "testify before the adjudicatory subcommittee regarding topics consistent with her testimony before the Office of Congressional Ethics on June 25, 2009, her testimony before the investigative subcommittee on December 16, 2009, and the press conference she held on August 13, 2010, including any materials presented or distributed at or in connection with the press conference."[22] Similarly, the summary for Michael Grant indicates only that he "may be called

[17] *Id.*
[18] *Id.* at 6, n.2.
[19] Committee Rule 23(f)(2).
[20] Respondent's Objections at 8.
[21] Committee Rule 23(f)(1).
[22] Committee Counsel Witness Summary, Representative Maxine Waters.

to testify before the adjudicatory subcommittee regarding relevant topics consistent with his testimony before the investigative subcommittee on November 10, 2009."[23]

Many of the other proposed witnesses identified by Committee counsel and for whom Committee counsel provided summaries of expected testimony also testified before the investigative subcommittee, but Committee counsel provided greater detail for those summaries than simply referring to "relevant topics" covered in their testimony. Committee counsel should also provide greater detail in the summaries for Representative Waters and Mr. Grant. Committee counsel are granted an opportunity to cure the summaries for these two witnesses, and have **until 5 p.m. on October 29, 2010**, to cure the summaries with respect to two witnesses and provide those summaries in writing.

For the aforementioned reasons, objections one and two raised by respondent's counsel in their October 27, 2010, filing in this matter, Respondent's Objections to Committee Counsel's Rule 23(f)(1) Production, are hereby overruled. Objection three, relating to witness summaries, is overruled in part, and Committee counsel are provided with additional time to cure witness summaries for Representative Maxine Waters and Michael Grant. Committee counsel is granted **until 5 p.m. on October 29, 2010**, to cure these two summaries and provide copies in writing.

Sincerely,

Zoe Lofgren
Chair

cc: Representative Jo Bonner, Ranking Republican Member
R. Blake Chisam, Chief Counsel, Committee on Standards of Official Conduct
C. Morgan Kim, Deputy Chief Counsel, Committee on Standards of Official Conduct

[23] Committee Counsel Witness Summary, Michael Grant.

EXHIBIT 16

11-15-2010

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT
ADJUDICATORY SUBCOMMITTEE

In the Matter of

REPRESENTATIVE MAXINE WATERS,

Respondent.

COMMITTEE COUNSEL'S MOTION TO RECOMMEND RECOMMITAL OF THE MATTER TO THE INVESTIGATIVE SUBCOMMITTEE

While Committee counsel was preparing a witness for the adjudicatory hearing in the matter of Representative Maxine Waters, that witness gave Committee counsel a new piece of evidence. A copy of this evidence is attached as Exhibit 1. The investigative subcommittee in this matter did not have access to this evidence. Committee counsel believes that this evidence may have had a material impact on the investigative subcommittee's investigation and the resulting statement of alleged violation that the investigative subcommittee transmitted to the full Committee. For this reason, Committee counsel moves that the adjudicatory subcommittee send this new evidence to the full Committee with a recommendation that the Committee recommit the matter to the investigative subcommittee.

Respectfully submitted,

C. Morgan Kim, Deputy Chief Counsel
Tom Rust, Counsel
Stacey Sovereign, Counsel
Sheria Clarke, Counsel
Counsel to the Committee on Standards of Official Conduct

Copies to:

Stanley M. Brand, Esq.
Andrew Herman, Esq.
Brand Law Group
923 Fifteenth Street, N.W.
Washington, D.C. 20005
Counsel to Respondent Maxine Waters

Exhibit 1

Hughes, John

From: Rosianowick, Jeanne
Sent: Sunday, September 28, 2008 2:09 PM
To: Moore, Mikael
Cc: Maurano, Rick; Hughes, John; Stewart, Lawranne
Subject: RE: Bailout

Mikael – Leg counsel still working on most recent draft – no final doc yet – RM and/or JH will report on progress

J

From: Moore, Mikael
Sent: Sunday, September 28, 2008 1:56 PM
To: Rosianowick, Jeanne; Stewart, Lawranne; Laster, Gail; Maurano, Rick
Subject: Bailout

All,

Thank you for all of your work on this bill. I know that you have been pulled in a thousand different directions, and want to acknowledge the extreme responsiveness of the FSC staff to the issues raised by Rep. Waters, especially by Gail, John, Rick and Lawranne. With that being said, I am a little concerned that I have not seen a draft for a couple of days and would like to know the status of the provisions that we have been working on. Rep. Waters is under the explicit impression that the contracting language, the small bank language and systemic loan modification approach language is included in the bill. If there is any material or technical changes to the language as last agreed upon, please alert me as soon as possible so that Rep. Waters has an opportunity to weigh in. It would not be acceptable to receive a copy after it is final. Furthermore, as a senior member of the Committee and Subcommittee Chair, Rep. Waters EXPECTS to see the entire bill well before it is available for public consumption. As you can imagine, Members, press and constituents are extremely interested in her disposition towards the bill.

As you consider this request, I would like to flag what appear to be two drafting errors, one in the small bank language and one from the contracting language....

In the draft small bank language, the word "financial" was left out before the word "assistance." Please include "financial" before assistance.

1

CSOC.WAT.HUGHES.001

CSOC.WAT.005997

COE.WAT.OC.018874

In the draft language provided, page 21 line to the word "practicable" was substituted for "possible." Please make sure that the final draft, in fact includes the word "possible"..... Thank you.

Miknel Moore
Chief Of Staff
Congresswoman Maxine Waters (CA-35)
o: 202-225-
c. 202-821-
f: 202-225-

CSOC.WAT.HUGHES.002

CSOC.WAT.005998

COE.WAT.OC.018875

EXHIBIT 17

11-16-2010

UNITED STATES HOUSE ON REPRESENTATIVES
Committee on Standards of Official Conduct
Adjudicatory Subcommittee

In the Matter of	:
	:
REPRESENTATIVE	:
MAXINE WATERS	:

RESPONDENT'S RESPONSE TO COMMITTEE COUNSEL'S MOTION TO RECOMMEND RECOMMITAL OF THE MATTER TO THE INVESTIGATIVE SUBCOMMITTEE

On November 15, 2010, Committee counsel for the adjudicatory subcommittee (ASC) in the Matter of Representative Maxine Waters filed a Motion to Recommend Recommital of the Matter to the Investigative Subcommittee. Counsel premises its request on a "new piece of evidence" which "the investigative subcommittee in this matter did not have access to" and which "counsel believes . . . may have had a material impact on the investigative subcommittee's investigation and the resulting statement of alleged violation . . . transmitted to the full Committee." Recommital Motion at 1. Accordingly, counsel "moves that the adjudicatory subcommittee send this new evidence to the full Committee with a recommendation that the Committee recommit the matter to the investigative subcommittee." *Id.*

Committee counsel's filing is an explicit acknowledgement of Respondent's oft-stated assertion that Committee counsel cannot use the adjudicatory hearing process to expand the facts relevant to the SAV. Respondent also maintains that Committee counsel's filing is, at least, a tacit recognition that the facts presented in the current SAV are insufficient to establish the legal charges in the document. Accordingly, regardless of the Committee's decision on the underlying motion, any ruling must reflect the implications of Committee counsel's request.

Respondent respectfully opposes Committee counsel's motion. The motion should be denied because Committee counsel cites no Committee rule – nor can Respondent's counsel find any authority – permitting recommital of the existing SAV to the investigative subcommittee for further activity and, potentially, amendment.

Committee rule 20(a) provides the only manner by which an SAV may be amended: "An investigative subcommittee may, upon an affirmative vote of a majority of its members, amend its Statement of Alleged Violation anytime before the Statement of Alleged Violation is transmitted to the Committee." (Emphasis added). Of course, because the investigative subcommittee has already transmitted the SAV to the Committee no amendment is permissible at this juncture.

Committee counsel's advocacy of this unauthorized remedy is extraordinary for several reasons. Respondent has maintained, essentially from the beginning of this process, that the investigative subcommittee's (ISC's) inquiry was flawed, at best. For example, the ISC summarily dismissed the assertions set forth in Respondent's Motion for a Bill of Particulars that the SAV did not contain sufficient factual proof to establish the alleged counts. Indeed, the ISC issued its blanket denial less than 24 hours after Respondent had filed her motion. The ISC, less than three days after the filing of Respondent's second pleading, and confidently reasserting that all three counts stated sufficient facts to establish a violation, also denied Respondent's Motion to Dismiss.

Remarkably, despite Respondent's repeated written and oral exhortations throughout this process, before yesterday Committee counsel had repeatedly denied that additional facts or documents were necessary to establish the counts charged. Instead, counsel argued either that the SAV was sufficient or that it did not establish limits on the relevance of material that could be presented to the ASC. *See, e.g.*, July 1, 2010, Order Denying Respondent's Motion

for a Bill of Particulars (asserting that "[e]ach count of the [SAV] contains a plain and concise statement of the alleged facts of the violation") and November 5, 2010, Committee Counsel's Response to Respondent's Objections to Committee Counsel's 23(f)(1) Production at 10-12 (setting forth expansive reading of issues presented by SAV).

With the filing of its recommital request, however, Committee counsel appears to acknowledge that documents, witness testimony and other evidence gathered after transmittal of the SAV cannot serve to satisfy counsel's burden of proof on the current SAV. In Respondent's view, Committee counsel's request and the clear implications of that filing present the Committee with two options:

If Committee denies counsel's motion, Respondent respectfully requests that it limit witnesses and evidence to the material offered during the investigative phase to establish the SAV. Indeed, counsel's motion represents an admission that the ISC not only should not have moved forward with the SAV, but that it was hasty in its decision to do so. As an example of its flawed approach, despite the SAV's focus on his actions as the prime mover in this matter and Committee counsel's repeated emphasis on the importance of his actions, the ISC Members never questioned Respondent's Chief of Staff on this matter nor did ISC counsel designate him as a witness before the ASC. Nor does Committee counsel explain why it could not have obtained "Exhibit 1" to its current motion prior to transmittal of the SAV or why it waited until two weeks prior to the start of the adjudicatory hearing to submit a motion relying on a document that it had in its possession for weeks, if not months. In sum, Committee counsel's eleventh-hour conversion casts doubt on its previous claims regarding this matter and confirms Respondent's consistent, repeated assertions regarding the flaws in the process.

Now that Committee counsel has acknowledged these significant deficiencies in the

SAV, this Committee cannot simply proceed on the expansive path formerly advocated by Committee counsel. The only permissible *adjudicatory* solution would be to move forward with a hearing that reflects the limited scope of the factual assertions and legal issues in the SAV, an approach for which Respondent has repeatedly advocated.

If, alternatively, the Committee elects to grant the relief requested by Committee counsel, the only manner authorized by rule to accomplish that request would be for the adjudicatory subcommittee to dismiss the current SAV as "not proved." *See* Committee Rule 23(o) ("A count that is not proved shall be considered as dismissed by the subcommittee.").

Although not strictly relevant to the motion before the Committee, Respondent notes the Chair's statement yesterday in the Rangel Matter that because the process has been ongoing for two years and because Representative Rangel's counsel withdrew more than a month ago, he had ample time to review and comment on the proposed matters. That rationale applies to this matter with similar force. Here, the ISC clearly rushed to judgment, ignoring Respondent's repeated requests that it acknowledge and conform to applicable House rules. Whether such actions were taken in an attempt to force Respondent into a hasty settlement before publication of an SAV or were simply the product of legal error, Committee counsel has finally acknowledged the defects in the SAV. Given the aforementioned, it is ironic that on the eve of the hearing in this matter Committee counsel now asks for more time to complete its work.

In sum, Respondent opposes Committee counsel's Motion to Recommend Recommital of the Matter to the Investigative Subcommittee. However, whether the Committee chooses to allow counsel to abandon the current SAV or orders counsel to proceed with its offer of proof, the Committee must mandate that counsel comply with all relevant Committee rules. While such action cannot cure the significant legal and procedure

defects that have occurred up to this point, *see, e.g.*, Respondent's November 8, 2010, filing, it would at least be an initial step toward to providing Respondent with a fair and impartial adjudicatory hearing.

Respectfully submitted this 16th day of November, 2010,

Stanley M. Brand
Andrew D. Herman
Brand Law Group, PC
923 15th Street, NW
Washington, DC 20005

Counsel for Representative Maxine Waters

CERTIFICATE OF SERVICE

The undersigned declares under penalties of perjury that on November 16, 2010, I hereby served a copy of the foregoing Response to Motion to Recommend Recommital of the Matter to the Investigative Subcommittee, on Daniel J. Taylor, Counsel to the Chair, and Blake Chisam, Counsel, House Committee on Standards of Official Conduct:

Andrew D. Herman

EXHIBIT 18

ONE HUNDRED ELEVENTH CONGRESS
U.S. House of Representatives
COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT
Washington, DC 20515–6328

November 17, 2010

CONFIDENTIAL

Mr. Stanley M. Brand, Esq.
Mr. Andrew D. Herman, Esq.
Brand Law Group, P.C.
923 15th Street, N.W.
Washington, DC 20005

Ms. C. Morgan Kim
Deputy Chief Counsel
Committee on Standards of Official Conduct
Suite HT-2, The Capitol
Washington, DC 20515

Re: In the Matter of Representative Maxine Waters

Dear Messrs. Brand and Herman and Ms. Kim:

As Chair of the Adjudicatory Subcommittee (ASC) in the Matter of Representative Maxine Waters, I am writing with regard to the schedule in this matter.

The October 12, 2010, scheduling letter in this matter notified the parties of the possibility that a pre-hearing conference, if necessary, would be held at 1:00 p.m. on November 18, 2010, to resolve outstanding pre-hearing issues. The parties were also advised by letter on October 20, 2010, that the parties would be notified as to whether a pre-hearing conference would be held on that date when it became clear, based on other pre-hearing activity, whether such a meeting would be necessary.

In light of various pending motions in this matter, I have determined that a pre-hearing conference with the ASC and the parties is not appropriate at this time. As stated previously, both parties will be provided notice of rulings on the pending motions, as well as any rescheduled dates or deadlines in this matter. Should any further changes to the schedule be required, both parties will be notified.

Sincerely,

Zoe Lofgren
Chair

cc: Representative Jo Bonner, Ranking Republican Member
R. Blake Chisam, Chief Counsel, Committee on Standards of Official Conduct

EXHIBIT 19

ONE HUNDRED ELEVENTH CONGRESS

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT
Washington, DC 20515–6328

November 19, 2010

MEMBER'S PERSONAL ATTENTION
The Honorable Maxine Waters
U.S. House of Representatives
2344 Rayburn House Office Building
Washington, DC 20515

Dear Colleague:

The Committee on Standards of Official Conduct (Committee) has voted to recommit the matter of allegations regarding your conduct to an investigative subcommittee to conduct further proceedings due to materials discovered that may have had an effect on the investigative subcommittee's transmittal to the Committee.

As a result, the adjudicatory subcommittee no longer has jurisdiction over this matter and the adjudicatory hearing previously scheduled for November 29, 2010, will not be held.

Pursuant to the Committee's actions, the investigative subcommittee shall have jurisdiction to determine whether you violated the Code of Official Conduct or any law, rule, regulation, or other standard of conduct applicable to your conduct in the performance of your duties or the discharge of your responsibilities, with respect to your alleged communications and activities with, or on behalf of, the National Bankers Association or OneUnited Bank, a bank in which your husband owned stock and previously served on the board of directors, and the benefit, if any, you or your husband received as a result.

Representative Kathy Castor will serve as Chair of the investigative subcommittee, and Representative K. Michael Conaway will serve as its Ranking Republican Member. The other two members of the subcommittee are Representative Keith Ellison and Representative Marsha Blackburn.

Enclosed are copies of the House Rules and Committee Rules for the 111th Congress. By this letter, we also remind you of your right, pursuant to Committee Rule 26(a), to be represented by counsel provided at your own expense.

If you or your counsel have any questions, please do not hesitate to contact the Committee's Chief Counsel and Staff Director, R. Blake Chisam.

Sincerely,

Zoe Lofgren
Chair

Jo Bonner
Ranking Republican Member

ZL/JB:tar

Enclosures: Rules of the House of Representatives
Rules of the Committee on Standards of Official Conduct

cc: Mr. Andrew Herman

CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (the "Confidentiality Agreement") is entered into by Representative Maxine Waters ("Respondent"), and Stan Brand, for himself and for and on behalf of any and all personnel from the law firm Brand Law Group (the "Firm"), including any and all attorneys, support personnel, and other employees (individually and collectively "Respondent's Counsel"), on this 25 day of May, 2010.

WHEREAS, an investigative subcommittee ("Investigative Subcommittee") of the Committee on Standards of Official Conduct (the "Committee") has been investigating certain allegations relating to Respondent pursuant to Rules 17A, 18, and 19 of the Rules of the Committee (as amended June 9, 2009) (the "Committee Rules");

WHEREAS, the Investigative Subcommittee has schedule a vote on a Statement of Alleged Violation ("SAV") because it has "determine[d] that there is substantial reason to believe that a violation of the Code of Official Conduct, or of a law, rule, regulation, or other standard of conduct applicable to the performance of official duties or the discharge of official responsibilities by a Member . . . has occurred" (*see* Committee Rule 19(f));

WHEREAS, pursuant to Committee Rules 25 and 26(c), the Investigative Subcommittee seeks to provide Respondent and Respondent's Counsel with a copy of the Statement of Alleged Violation it intends to adopt, together with (i) all evidence it intends to use to prove those charges which it intends to adopt, including, to the extent such evidence exists, documentary evidence, witness testimony, memoranda of witness interviews, and physical evidence, and (ii) any exculpatory information ((i) and (ii) collectively referred to herein as the "Evidence");

WHEREAS, pursuant to Committee Rule 26(f), the Investigative Subcommittee may not make any such Evidence available to Respondent or to Respondent's Counsel unless and until Respondent and Respondent's Counsel agree in writing to comply with Committee Rule 26(f) and maintain the confidentiality of such Evidence until such time as is specified in the Rule; and

WHEREAS, Respondent and Respondent's Counsel understand and agree that, to permit the Investigative Subcommittee to make the Evidence available to either or both of them, both Respondent and Respondent's Counsel must agree in writing to comply with Committee Rule 26(f) and to maintain the confidentiality of the Evidence until such time as is provided in the Rule;

NOW THEREFORE, Respondent and Respondent's Counsel hereby agree as follows:

1. *Definition of Confidential Information*: As used in this Confidentiality Agreement, "Confidential Information" shall mean all Evidence made available to Respondent and/or to Respondent's Counsel, together with any and all information, facts, conclusions, or

inferences in any way based on, drawn, derived, or stemming from, or related to the Evidence, whether oral, written, electronic, or in any other medium, including, but not limited to, memoranda, reports, summaries, other documents, or emails. "Confidential Information" shall also include any and all Evidence provided to Respondent and/ or Respondent's Counsel after the date hereof, whether pursuant to Committee Rules 25 or 26(e) or otherwise.

2. *Protection of Confidential Information*: Respondent and Respondent's Counsel shall maintain the confidentiality of the Confidential Information and not disclose it in any way, shape or form to anyone other than Respondent and/or Respondent's Counsel unless such person or persons is/are subject to this Confidentiality Agreement or to an agreement providing the same or substantially similar protection to the Confidential Information ("Other Confidentiality Agreements"), until the Disclosure Date set forth in Section 3 below.

3. *Disclosure Date*: Respondent and/or Respondent's Counsel may not disclose the Confidential Information to persons not subject to this Confidentiality Agreement or Other Confidentiality Agreements until (the "Disclosure Date"):
   a. Such time as a Statement of Alleged Violation is made public by the Committee if the Respondent has waived an adjudicatory hearing pursuant to Committee Rule 26(b); or
   b. The commencement of an adjudicatory hearing if the Respondent has not waived an adjudicatory hearing.

4. *Respondent's Failure to Receive the Evidence*: The failure of Respondent and Respondent's Counsel to agree in writing to protect the confidentiality of the Confidential Information, and therefore their failure to receive the Evidence as permitted pursuant to Committee Rule 26(f), shall not preclude a vote on a Statement of Alleged Violation at the end of the ten-day period referenced in Committee Rule 26(c).

5. *Limitations*: The obligations of Respondent and Respondent's Counsel hereunder shall not apply to such portions of the Confidential Information that were in the possession of the Respondent and/or Respondent's Counsel prior to the date hereof and which were not acquired or obtained from the Investigative Subcommittee or the Committee. Prior to disclosing any such information to any party not subject to this Confidentiality Agreement or Other Confidentiality Agreements, Respondent and/or Respondent's Counsel hereby agree to notify the Committee in writing at least five (5) days prior to any disclosure and, with that notice, to provide evidence of his or their possession of such information prior to the date hereof.

6. *Notices*: In the event of an inadvertent disclosure of the Evidence, Respondent or Respondent's Counsel shall notify the Committee of such disclosure within five (5) days of such disclosure.

7. *Remedies*: Respondent and Respondent's Counsel understand and agree that if the Investigative Subcommittee determines that Respondent and/or Respondent's Counsel may have violated this Confidentiality Agreement, the Investigative Subcommittee may avail itself of any remedy provided in the Committee Rules, including, but not limited to, Committee Rules 19(o)(3) and 26(m).

8. *Validity of Agreement; Counterparts*: This Confidentiality Agreement shall not come into force and effect unless and until signed both by Respondent and Respondent's Counsel. The effective date shall be the later of the date on which either Respondent or Respondent's Counsel executes the Confidentiality Agreement. All executed copies of this Confidentiality Agreement are duplicate originals, equally admissible as evidence. The Confidentiality Agreement may be executed in counterparts, and such counterparts taken together shall be deemed the Confidentiality Agreement. A facsimile copy of a signature of a party hereto shall have the same force and effect as an original signature.

IN WITNESS WHEREOF, and each intending to be legally bound, Respondent and Respondent's Counsel have executed this Confidentiality Agreement on the dates indicated below.

Maxine Waters

The Honorable Maxine Waters

Date: 5/28, 2010

Date: _____, 2010

Stan Brand, Esq.
Brand Law Group

CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (the "Confidentiality Agreement") is entered into by Representative Maxine Waters ("Respondent"), and Stan Brand, for himself and for and on behalf of any and all personnel from the law firm Brand Law Group (the "Firm"), including any and all attorneys, support personnel, and other employees (individually and collectively "Respondent's Counsel"), on this 28TH day of MAY, 2010.

WHEREAS, an investigative subcommittee ("Investigative Subcommittee") of the Committee on Standards of Official Conduct (the "Committee") has been investigating certain allegations relating to Respondent pursuant to Rules 17A, 18, and 19 of the Rules of the Committee (as amended June 9, 2009) (the "Committee Rules");

WHEREAS, the Investigative Subcommittee has schedule a vote on a Statement of Alleged Violation ("SAV") because it has "determine[d] that there is substantial reason to believe that a violation of the Code of Official Conduct, or of a law, rule, regulation, or other standard of conduct applicable to the performance of official duties or the discharge of official responsibilities by a Member . . . has occurred" (*see* Committee Rule 19(f));

WHEREAS, pursuant to Committee Rules 25 and 26(c), the Investigative Subcommittee seeks to provide Respondent and Respondent's Counsel with a copy of the Statement of Alleged Violation it intends to adopt, together with (i) all evidence it intends to use to prove those charges which it intends to adopt, including, to the extent such evidence exists, documentary evidence, witness testimony, memoranda of witness interviews, and physical evidence, and (ii) any exculpatory information ((i) and (ii) collectively referred to herein as the "Evidence");

WHEREAS, pursuant to Committee Rule 26(f), the Investigative Subcommittee may not make any such Evidence available to Respondent or to Respondent's Counsel unless and until Respondent and Respondent's Counsel agree in writing to comply with Committee Rule 26(f) and maintain the confidentiality of such Evidence until such time as is specified in the Rule; and

WHEREAS, Respondent and Respondent's Counsel understand and agree that, to permit the Investigative Subcommittee to make the Evidence available to either or both of them, both Respondent and Respondent's Counsel must agree in writing to comply with Committee Rule 26(f) and to maintain the confidentiality of the Evidence until such time as is provided in the Rule;

NOW THEREFORE, Respondent and Respondent's Counsel hereby agree as follows:

1. *Definition of Confidential Information*: As used in this Confidentiality Agreement, "Confidential Information" shall mean all Evidence made available to Respondent and/or to Respondent's Counsel, together with any and all information, facts, conclusions, or

inferences in any way based on, drawn, derived, or stemming from, or related to the Evidence, whether oral, written, electronic, or in any other medium, including, but not limited to, memoranda, reports, summaries, other documents, or emails. "Confidential Information" shall also include any and all Evidence provided to Respondent and/ or Respondent's Counsel after the date hereof, whether pursuant to Committee Rules 25 or 26(e) or otherwise.

2. *Protection of Confidential Information*: Respondent and Respondent's Counsel shall maintain the confidentiality of the Confidential Information and not disclose it in any way, shape or form to anyone other than Respondent and/or Respondent's Counsel unless such person or persons is/are subject to this Confidentiality Agreement or to an agreement providing the same or substantially similar protection to the Confidential Information ("Other Confidentiality Agreements"), until the Disclosure Date set forth in Section 3 below.

3. *Disclosure Date*: Respondent and/or Respondent's Counsel may not disclose the Confidential Information to persons not subject to this Confidentiality Agreement or Other Confidentiality Agreements until (the "Disclosure Date"):
    a. Such time as a Statement of Alleged Violation is made public by the Committee if the Respondent has waived an adjudicatory hearing pursuant to Committee Rule 26(b); or
    b. The commencement of an adjudicatory hearing if the Respondent has not waived an adjudicatory hearing.

4. *Respondent's Failure to Receive the Evidence*: The failure of Respondent and Respondent's Counsel to agree in writing to protect the confidentiality of the Confidential Information, and therefore their failure to receive the Evidence as permitted pursuant to Committee Rule 26(f), shall not preclude a vote on a Statement of Alleged Violation at the end of the ten-day period referenced in Committee Rule 26(c).

5. *Limitations*: The obligations of Respondent and Respondent's Counsel hereunder shall not apply to such portions of the Confidential Information that were in the possession of the Respondent and/or Respondent's Counsel prior to the date hereof and which were not acquired or obtained from the Investigative Subcommittee or the Committee. Prior to disclosing any such information to any party not subject to this Confidentiality Agreement or Other Confidentiality Agreements, Respondent and/or Respondent's Counsel hereby agree to notify the Committee in writing at least five (5) days prior to any disclosure and, with that notice, to provide evidence of his or their possession of such information prior to the date hereof.

6. *Notices*: In the event of an inadvertent disclosure of the Evidence, Respondent or Respondent's Counsel shall notify the Committee of such disclosure within five (5) days of such disclosure.

7. *Remedies*: Respondent and Respondent's Counsel understand and agree that if the Investigative Subcommittee determines that Respondent and/or Respondent's Counsel may have violated this Confidentiality Agreement, the Investigative Subcommittee may avail itself of any remedy provided in the Committee Rules, including, but not limited to, Committee Rules 19(c)(3) and 26(m).

8. *Validity of Agreement; Counterparts*: This Confidentiality Agreement shall not come into force and effect unless and until signed both by Respondent and Respondent's Counsel. The effective date shall be the later of the date on which either Respondent or Respondent's Counsel executes the Confidentiality Agreement. All executed copies of this Confidentiality Agreement are duplicate originals, equally admissible as evidence. The Confidentiality Agreement may be executed in counterparts, and such counterparts taken together shall be deemed the Confidentiality Agreement. A facsimile copy of a signature of a party hereto shall have the same force and effect as an original signature.

IN WITNESS WHEREOF, and each intending to be legally bound, Respondent and Respondent's Counsel have executed this Confidentiality Agreement on the dates indicated below.

_____ Date: _____, 2010
The Honorable Maxine Waters

Stan Brand Date: MAY 28, 2010
Stan Brand, Esq.
Brand Law Group

EXHIBIT 20

MAXINE WATERS
MEMBER OF CONGRESS
35TH DISTRICT, CALIFORNIA

CHIEF DEPUTY WHIP

COMMITTEES:
FINANCIAL SERVICES
SUBCOMMITTEE ON CAPITAL MARKETS AND GOVERNMENT SPONSORED ENTERPRISES
RANKING MEMBER

JUDICIARY
SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION, AND THE INTERNET
SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

Congress of the United States
House of Representatives
Washington, DC 20515–0535

May 9, 2011

PLEASE REPLY TO:
WASHINGTON DC OFFICE
2344 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–0535
PHONE: (202) 225-2201
FAX: (202) 226-7854

DISTRICT OFFICE:
LOS ANGELES OFFICE
10124 SOUTH BROADWAY
SUITE I
LOS ANGELES, CA 90003
PHONE: (323) 757-8900
FAX: (323) 757-8903

Congressman Jo Bonner, Chairman
Committee on Ethics
1015 Longworth House Office Building
Washington, DC 20515

Congresswoman Linda Sanchez, Ranking Member
Committee on Ethics
1015 Longworth House Office Building
Washington, DC 20515

Re: Request for Meeting with Ethics Committee Leadership and Staff

Dear Reps. Bonner and Sanchez,

Now that the Ethics Committee has adopted rules and hired a staff director, I am writing to request a meeting between myself, my team and you and your appropriate staff, as soon as is practicable. The purpose of this meeting is to reach an understanding about a process which can be established to address several issues relating to the Committee's abruptly canceled inquiry into my advocacy for small and minority banks at the end of the 111th Congress. It is important that this process be established and the resulting questions answered before the Committee decides whether it will resume consideration of this matter in the 112th Congress and, if it chooses to proceed, how it will do so.

In large part, I am making this request because news reports have suggested that there may have been improper actions taken by Committee staff and/or Members during the last session of Congress. Prosecutorial misconduct is a serious and potentially prejudicial offense, and if such misconduct occurred I believe that I have the right as the respondent to know the nature of the conduct and its impact on the inquiry into my actions.

Further, dozens of confidential documents and other information in the sole possession of the Committee have been leaked to persons outside of the Committee, including multiple news outlets, all in possible violation of Committee and House rules and, in one instance, federal law. As you know, the Committee is required under its rules to investigate such breaches of confidentiality.

Given that almost six months have passed since the Committee last acted, I believe that the delay and the lack of communication, particularly in light of the intense political and media scrutiny I have experienced, violates my basic rights to, among other things, due process. Despite this, and at great personal, political and financial sacrifice, I have been abundantly patient as the Committee struggled to organize itself. Patience notwithstanding and given the new makeup of the Committee that includes a new staff director and five new Members, these issues must be addressed before the Committee can decide whether and how it will proceed in this matter.

Failure to grant this simple and reasonable request coupled with the repeated denials of due process in this and other matters before the Committee would reveal an extremely troublesome level of bias and lack of commitment to fairness.

I look forward to working with you, my team and your staff to come to an equitable procedure aimed at providing transparency to this process.

Sincerely,

Maxine Waters

Maxine Waters
Member of Congress

Cc:
Rep. John Boehner
Rep. Nancy Pelosi
Rep. Eric Cantor
Rep. Steny Hoyer
Rep. Michael McCaul
Rep. Michael Conaway
Rep. Charles Dent
Rep. Gregg Harper
Rep. John Yarmuth
Rep. Mazie Hirono
Rep. Pedro Pierluisi
Rep. Donna Edwards

EXHIBIT 21

11-8-2010

UNITED STATES HOUSE OR REPRESENTATIVES
Committee on Standards of Official Conduct
Adjudicatory Subcommittee

In the Matter of :
:
REPRESENTATIVE :
MAXINE WATERS :

RESPONDENT'S REPLY TO COMMITTEE COUNSEL'S RESPONSE TO RESPONDENTS SECOND SET OF OBJECTIONS TO COMMITTEE COUNSEL'S PRODUCTION UNDER COMMITTEE RULE 23(f)(1) & RESPONSE TO MOTION FOR ADEQUATE TIME FOR HEARING

The debate between the parties culminating in Committee counsel's November 5, 2010 filings exhibits the parties' widely divergent views of the function and purpose of a Statement of Alleged Violation [SAV] under Committee Rules. More broadly, the parties disagree concerning the application of Committee rules to the general conduct of the adjudicatory hearing and what factual and legal elements are necessary to establish the three counts set forth by the SAV.

Respondent's view, reflected in every one of her filings to both the investigative and adjudicatory subcommittees, is that Committee rules, precedent and due process concerns mandate that the SAV clearly and fully articulate the charges and the attendant factual basis for such charges against the accused at the time that an investigative subcommittee transmitted the SAV to the full Committee. Committee counsel adopts a more expansive view of the process, advocating that transmittal of an SAV limits neither counsel's subsequent investigative authority nor the universe of facts available for presentation to an adjudicatory subcommittee.

Indeed, Committee counsel asserts that the investigative subcommittee's rulings have "no bearing on this adjudicatory subcommittee's view of what facts are relevant at the hearing." *See* November 5 Response at 7 n.34; *see also id.* n.35 (subcommittee's ruling "has no bearing on what evidence is relevant in this matter"). If the investigative subcommittee's views on the SAV are indeed irrelevant and Committee counsel is permitted to expand the scope of facts at issue, then Respondent presently has no guidance for measuring the factual and legal scope of charges against her.

The determination of her witnesses list, currently due tomorrow, is one example of the current issues facing Respondent in presenting her defense. Obviously, the scope of the facts at issue and the time limit applicable to her presentation will affect Respondent's decision as to which witnesses to call. Of course, other considerations, including stipulations and exhibits, will also be affected by these determinations.

Thus, Respondent files this Reply to Committee Counsel's Response to Respondent's Objections and Response to its Motion for Adequate Time for Hearing. In order to resolve these issues, Respondent hereby respectfully requests that the Committee Chair and Ranking Member convene as soon as possible an executive session with Committee counsel and Respondent and her counsel to resolve these issues in a forum analogous to a criminal pre-trial conference.[1] Respondent believes that such a session is in the best interest of all interested parties; establishing these "ground rules" will enable Respondent to adequately prepare and present her defense, while concomitantly allowing

[1] Although Respondent believes that these issues can be best addressed by convening all parties in person, should this request be denied she would ask that the Chair and Ranking Member address her concerns in a detailed, written order. Respondent would also accept the opportunity to address these issues more fully in written form.

Committee counsel to best prepare it case; doing so would also ensure that the adjudicatory hearing will comply with all Committee Rules and be conducted and concluded in an orderly and efficient matter.

Respondent previously requested guidance on these and other related issues in its Motion for a Bill of Particulars, which was hastily denied by the investigative subcommittee. Accordingly, Respondent requests that the Chair and Ranking member provide the parties with an opportunity to address the following issues:

1. Do Committee rules limit Committee counsel to presenting the facts set forth in the SAV? In short, is counsel limited to utilizing facts and material acquired prior to transmittal of the SAV or, as it has done, may counsel continue to develop its factual presentation post-transmittal? Respondent believes that Committee Rules 19(f), 20(a), 23(c) and 23(n) govern this question.

2. Are the parties bound by the investigative subcommittee's factual and legal rulings? How will the adjudicatory subcommittee address potential conflicts between the SAV and the Orders issued by the investigative subcommittee? For example:

   a. In its Memorandum in Support of Order Denying Respondent's Motion to Dismiss, the investigative subcommittee devoted a section to the proposition that the "Statement of Alleged Violation Asserts that the Actions of Respondent and Her Chief of Staff Appeared to be for Her Benefit, Not that the Actions Actually Benefitted Her." Memorandum at 13-14. However, the SAV asserts the relevance of the fact that "preservation of value of Respondent's husband's investment in OneUnited would constitute a benefit to Respondent." ¶61.

   b. In its Memorandum in Support of Order Denying Respondent's Motion to Dismiss, the investigative subcommittee ruled that "the [SAV] does not assert that OneUnited was ultimately assisted by Respondent's Chief of Staff's actions." Memorandum at 13-14. However, the SAV asserts that "Respondent's Chief of Staff provided continued assistance to OneUnited in their efforts to obtain legislation that ultimately resulted in OneUnited receiving funding from Treasury." ¶42.

3. Does the adjudicatory subcommittee agree with Committee counsel's assertion that the adjudicatory hearing is *de novo*? Does this standard of review apply to both the facts and the law at issue?

4. Similarly, what is the effect on this process of respondent's constitutional due process right to be notified of the factual and legal allegations against her?

5. What are the elements that Committee counsel must demonstrate by clear and convincing proof to establish the three counts in the SAV? Does the House Ethics Manual establish these elements and their burden of proof? Respondent sets forth a list of representative examples below:

   a. For Count I of the SAV, the House Ethics Manual at page 13 states that House Rule XXIII, clause 1 "was included within the Code to deal with 'flagrant' violations of the law that reflect on 'Congress as a whole,' and that might otherwise go unpunished." To illustrate, it lists criminal or similar conduct, such as bribery, diversion of campaign funds and sexual misconduct. It is evident in its writings that Committee counsel disagrees with Respondent's reading with what counsel describes as "the broadest" provision. What is the correct reading of the extent of this provision?

      i. Further, what House rule or standard of conduct governs the application of the appearance standard to this count?

   b. For Count II of the SAV, Respondent is still unclear as to the scope of this charge; *i.e.*, whether she is charged with actually receiving a benefit or simply the spirit or appearance of such a benefit. The SAV is contradictory on this point. Furthermore, Respondent and Committee counsel evidently disagree on the how to define "compensation" under this charge. What is the correct reading of the extent of this provision?

      i. In addition, the Committee's Report *In the Matter of Graves*, H. Rep. 111-320, 111th Cong., 1st Sess. (2009), 18 states that "to establish a violation under House Rule 23, clause 3 . . . it must be shown that a Member improperly used his or her official position . . . and that the Member received a direct pecuniary benefit." Further, the House Ethics Manual at page 17 states that House Rule XXIII, clause 2 has "been interpreted to mean that Members, officers, and employees may not do indirectly what they would be barred from doing directly." Accordingly, does this require that Committee counsel establish that Respondent's Chief of Staff's purported actions violated House Rule XXIII, clause 3 (causing an "indirect violation" on the part of the Respondent)? If not, then what

elements must they establish to prove a violation on this charge?

ii. Further, what House rule or standard of conduct governs the application of the appearance standard to this count?

c. For Count III of the SAV, whether the "reasonable person" standard applies to all counts of the SAV, just this count, or just the second clause, subsequent to the semicolon, of the Code of Ethics for Government Service, section 5. Must Committee counsel establish both clauses, or one or the other?

i. As Respondent requested in her Motion for a Bill of Particulars, what is the definition of "special favors or privileges" for purposes of this charge?

ii. As Respondent requested in her Motion for a Bill of Particulars, what is the definition of "accept . . . favors or benefits" for purposes of this charge? Does this require a transaction with another person or entity?

6. What is the relevance and effect of Committee precedent? For example:

a. *In the Matter of Graves*, H. Rep. 111-320, 111th Cong., 1st Sess. (2009) and *In the Matter of Sikes*, H. Rep. 94-1364, 94th Cong., 2d Sess. (1976) establish that being a member of a class does not disqualify a representative who is a member of a class from acting on behalf of that class. For example, *Graves* at page 18 held that "even if [the witnesses'] testimony benefitted only the two companies in which Mrs. Graves was invested, [the member's] personal financial interests would have been affected as members of a class of investors and not as individuals."

b. *In the Matter of St. Germain*, H. Rep. 100-46, 100th Cong., 1st Sess. (1987) and the investigative subcommittee's recent ruling denying Representative Rangel's motion to dismiss establish that the Committee cannot presume improper motive of a respondent without direct evidence of such motive. Is Committee counsel required to establish Respondent's alleged improper motive by clear and convincing evidence?

c. In the SAV, Committee counsel draws a distinction between Respondent's actions relating to the National Bankers Association and those allegedly relating solely to OneUnited. Yet, in its Memorandum of the Chair and Ranking Member to the members of the Committee in the Representative Tom DeLay matter, this Committee held that even if Rep. DeLay's staffers "were involved in monitoring or even seeking commitments to the Westar provision" because the 'major actions' on the provision were taken by

> [another member]." Accordingly, there was no "special favor." The Committee also noted "that the complaint carries the suggestion that any action on any legislative provision that would benefit only one company or entity is by definition an impermissible special favor. That is not the case." Accordingly, even if the adjudicatory subcommittee were to find that the actions at issue related to OneUnited alone, does Committee counsel have to establish that those actions were "major actions."

In preparing her defense at present, Respondent and her counsel are significantly hampered by the uncertainty regarding the adjudicatory hearing procedures and the legal applicable to the proceeding. Without the benefit of resolution on the general issues raised above, Respondent is unable to develop and prepare a substantive, adequate defense. She believes that achieving resolution on these issues will serve the best interests of both interested parties, the Committee and the House of Representatives as an institution.

Accordingly, Respondent requests an opportunity to address these issues at the earliest possible time and a stay of the November 9, 2010 deadline applicable to witness lists and exhibits currently in place. Finally, Respondents simple response to the Motion for Adequate Time for Hearing is that the adjudicative subcommittee lacks any mechanism for reviewing pre-hearing appeals of previously decided motions.

Respectfully submitted this 8th day of November, 2010,

EXHIBIT 22

August 22, 2008

The Honorable Maxine Waters
U.S. House of Representatives
2344 Rayburn House Office Building
Washington, DC 20515

Re: Minority Depository Institutions and Fannie Mae/Freddie Mac Equity Investments

Dear Congresswoman Waters,

Please find the attached memorandum outlining the issues in connection with effect of the recent decline in the stock prices of Fannie Mae and Freddie Mac securities, and the adverse effect on minority depository institutions.

I have also attached an article that sheds some broader light on the situation across the banking industry. As Chairman-Elect of the National Bankers Association, could you kindly provide contacts for me to follow up with at Fannie Mae and Freddie Mac, as well as the U.S Department of the Treasury? As always, we appreciate your assistance in these and other matters of critical importance to minority depository institutions and the communities we serve.

Very truly yours,

Robert Patrick Cooper
Senior Counsel

RPC:prp
Encs.

OneUnited Bank 3683 Crenshaw Blvd. Los Angeles, CA 90016 tel: [redacted] | fax: 323.293.7746 www.oneunited.com . 1

The Impact of the Decline in Fannie Mae and Freddie Mac Preferred Stock Price on Community Development Financial Institutions' and Minority Banks' Capital

Issue:
The recent decline in the value of the preferred stock of Government-Sponsored Entities ("GSEs") creates significant and possibly fatal losses for minority banks, Community Development Financial Institutions ("CDFIs") and not-for-profit organizations.

Background:
Certain community financial institutions, such as CDFIs and minority banks, as well as a host of not-for-profit organizations, invest in GSE securities, including bonds and preferred stock, as a function of their community development charters and other community development and support mandates. The U.S. government has committed to providing support, ensuring the viability and growth of these types of entities (see Financial Institutions Reform and Recovery Act of 1989, Section 308 and the Riegle Community Development and Regulatory Improvement Act of 1994). These community financial institutions invest their funds in GSEs as a way to support affordable housing initiatives until they can place these funds into other community development activities. These community financial institutions are neither speculators nor large institutions capable of replacing large amounts of lost capital. In a reciprocal fashion, GSEs have supported CDFIs and minority banks through equity investments and deposits and have served as a clearing house for community lending.

Critical Inflection Point:
The U.S. Treasury's attempt to reassure investor confidence by its readiness and willingness to invest capital into GSEs has unexpectedly resulted in declining values of GSE securities. Specifically, investors have been unwilling to purchase GSE equity securities because of the uncertainty as to the potential effects a government investment might have on the value of existing securities. Consequently, the preferred stock of the GSEs has dropped to the point where financial institutions that are required to mark the securities to market to calculate regulatory capital on their third quarter call reports may need to report significant "paper" losses if the value of these securities does not recover by September 30, 2008. This deterioration of regulatory capital could cause severe damage and possible failures across the banking industry, and principally within the minority and CDFI banking sector.

Recommended Solutions:

1. **Treasury completes plan to reassure investors in GSE securities by affirmatively stating that it is going to purchase preferred stock on essentially the same terms and conditions of existing preferred stock, prior to the end of the third quarter.** This move would help shore up the value of all GSE securities, helping the government, GSEs and investors.

2. **Avoid damage to minority banks, CDFIs and not-for-profits by converting their investments** into the same securities the government purchases from GSEs, or simply redeeming their investments as part of a government investment plan in GSEs, and otherwise offer protection to these institutions consistent with the government's obligations under FIRREA.

BN Sovereign, Midwest Battered By Fannie, Freddie Preferred Stock
Aug 22 2008 8:01:01

By Mark Pittman and Shannon D. Harrington

Aug. 22 (Bloomberg) -- Midwest Bank Holdings Inc. Chief Investment Officer Don Wiest is wagering U.S. Treasury Secretary Henry Paulson will rescue him from a failing $57 million stake in Fannie Mae and Freddie Mac.

Melrose Park, Illinois-based Midwest and banks from Philadelphia-based Sovereign Bancorp to Frontier Financial Corp. in Everett, Washington, own preferred shares in the beleaguered mortgage-finance companies that have lost more than half their $35 billion value since June 30. Concern that Paulson may step in with a rescue plan that would wipe them out along with common stock investors has sent the securities tumbling.

``I guess we are betting on Paulson,'' Wiest said. ``We have to believe that his plan carries the day somehow.''

Midwest, an owner of banks in Illinois, has $57.5 million, or as much as 23 percent of its risk-weighted assets tied up in Washington-based Fannie and Freddie of McLean, Virginia.

Small, regional banks may have the most to lose from the stumbles in Fannie and Freddie, and Paulson may risk bank failures unless he protects preferred stockholders, said Ira Jersey, an interest-rate strategist at Credit Suisse Group AG in New York. The impact on the preferred holders ``may be an important driver'' in Paulson's decisions, Jersey said.

``Any wipeout of the preferreds could have implications for the capital of the greater financial system and these regional banks that might have reasonably precarious capital situations,'' Jersey said. ``You don't want to make that worse if you're the government.''

'Zero Clarity'

Paulson, who won approval from Congress last month to pump unlimited amounts of capital into Fannie and Freddie, hasn't said how any rescue may work. While the common and preferred shares initially rose after he announced his plan, that optimism has vanished on speculation that the deteriorating housing market is depleting the companies' capital, forcing Paulson to step in.

Paulson, 62, has provided ``zero clarity on the issue and until the market knows where Hank is going to be in the capitalization structure, then it gets worse and not better,'' said Paul McCulley, a money manager at Newport Beach, California-based Pacific Investment Management Co., which oversees the world's largest bond fund.

Treasury probably will get preferred shares as part of any bailout, eliminating the value of the common shares and causing ``a lot of pain'' for preferred shareholders, who will rank behind the government in payments and may have their dividend cut, according to Friedman Billings Ramsey & Co. analyst Paul Miller in Arlington, Virginia. CreditSights Inc. analyst Richard Hofmann in New York said holders should ``brace'' for a deferral

BN Sovereign, Midwest Battered By Fannie, Freddie Preferred Stock
Aug 22 2008 0:01:01

of dividends.

Receivership

The Treasury may wait until Fannie and Freddie's capital is so eroded that regulators can put them into a receivership, said Andrew Laperriere, managing director at International Strategy & Investment Group, a money management and research firm in Washington.

Treasury spokeswoman Jennifer Zuccarelli referred to Paulson's July 22 speech, in which he said Fannie and Freddie's ``stability is critical to financial market stability,'' because their debt is held by banks around the world. She declined further comment.

Fannie Mae's $7 billion of 8.25 percent perpetual preferred shares have declined 52 percent to $11.06 since June 30. They fell 27 percent this week, with the yield rising to 19.4 percent from 13.9 percent.

Freddie Mac's $1.1 billion of 5.57 percent preferred stock has plunged 60 percent to $7.25 since June 30 and 37 percent this week, pushing the yield to 19.9 percent from 12.3 percent.

'Viewed as Safe'

``We bought them when they were viewed as safe,'' said Heng Chen, chief financial officer of Cathay General Bancorp in Los Angeles, which has $30 million of Fannie and Freddie securities. ``It's hard to tell now.''

Cathay, whose Web Site says it has been offering financial services to the Chinese-American community since 1962, has fallen 31 percent in Nasdaq Stock Market trading this year. The company wrote down the value of its Fannie and Freddie securities by $3.4 million last quarter.

Preferred shares rank one level above common stock in the capital structure, which is used to determine the priority of payment in the event of a bankruptcy. Senior debt holders rank first, then the companies' subordinated bondholders followed by preferreds then equity.

Fannie was created by Congress as part of Franklin D. Roosevelt's New Deal in the 1930s and became a publicly owned company in 1968. Freddie was started in 1970, when the economy was strained by the Vietnam War.

'Every Bank Has Them'

The companies, which own or guarantee about $5 trillion of the $12 trillion of outstanding U.S. home loans, were developed to expand financing to homebuyers by purchasing mortgages from lenders and packaging other loans into securities that they then guarantee. Their charters imply that the government will stand behind the debt. The equity doesn't get the same backing.

Banks bought Freddie and Fannie preferred stock because they can be used as capital that regulators require to cushion against losses on loans. Banks also get a tax break on 70

BN Sovereign, Midwest Battered By Fannie, Freddie Preferred Stock
Aug 22 2008 0:01:01

percent of the securities, making them attractive to own, said Midwest's Wiest.

``These are the only two companies that the regulators have allowed banks to hold in their portfolios,' Wiest said. ``Everybody knows we have them. It seems like every bank has them.''

Sovereign tumbled for a fourth day yesterday on concern its $632 million stake may be worthless in a bailout. The savings and loan said in July it may take ``significant'' charges on its holdings. Chief Financial Officer Kirk Walters said yesterday the company would have enough capital ``in a worst-case scenario.''

Ramifications

Frontier owns $5 million of Fannie and Freddie securities. The bank cut its dividend by two-thirds in June, saying the deterioration in the housing market was affecting borrowers. Its shares are down 51 percent this year.

``It's just a hard one to figure right now and second guess what they're going to do,'' Frontier Chief Financial Officer Carol Wheeler said in a telephone interview. ``The ramifications are so big. I think every bank across the country has got some preferreds across their portfolio.''

Paulson must also weigh whether hurting preferred shareholders would cripple the $350 billion market that banks across the country also rely on for financing, said CreditSights' Hoffman. Banks sold $76 billion of preferreds this year to bolster capital after more than $500 billion of credit losses and writedowns.

``My fear is that if the Treasury allows the preferreds to fall to zero, all they're going to do is shift the problem from two entities, Fannie and Freddie, to the 8,000 banks that hold this in their portfolios,'' Wiest at Midwest said. Shares of Midwest, with 539 employees at the end of 2007, are down 63 percent this year.

Wiest said he'd be willing to sell the preferred securities at 70 cents on the dollar. ``I'd take it,'' Wiest said. ``Take it and move on and not look back.''

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--With reporting by Caroline Salas, Linda Shen, Bryan Keogh and Jody Shenn in New York and Dawn Kopecki, Rebecca Christie and John Brinsley in Washington. Editors: Emma Moody, Romaine Bostick

To contact the reporters on this story:
Mark Pittman in New York
at +1-212-[redacted] or [redacted]@bloomberg.net;
Shannon D. Harrington in New York at +1-212-[redacted] or [redacted]

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BN Sovereign, Midwest Battered By Fannie, Freddie Preferred Stock
Aug 22 2008 0:01:01
[redacted]@bloomberg.net

To contact the editor responsible for this story:
Emma Moody at +1-212-617-[redacted] or [redacted]@bloomberg.net

EXHIBIT 23

NATIONAL BANKERS ASSOCIATION

September 6, 2008

The Honorable Henry M. Paulson, Jr.
Secretary
United States Department of the Treasury
Office of the Treasurer
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: **National Bankers Association – Comments Regarding Impact on Minority Banks in Connection with Conservatorship of Fannie Mae and Freddie Mac**

Dear Mr. Secretary:

I am writing this letter on behalf of the National Bankers Association ("NBA"), the largest and oldest trade organization in the United States representing minority and women-owned banks and thrifts, founded in 1927, to among other roles, serve as an advocate on legislative and regulatory matters.

We are writing this letter urgently regarding your pending resolution of the situation regarding Fannie Mae and Freddie Mac (collectively, the "GSEs"). We want to ensure that the interests of minority banks are properly protected in any such resolution. To be clear, **we are not asking for minority banks to receive any windfall from this resolution. Rather, we simply are seeking a return of the money we invested in the GSEs. In other words, each minority bank would demonstrate the amount of funds it invested into the preferred stock of the GSEs, and be assured of receiving that amount in return as part of any resolution you develop. At a bare minimum, we urge the GSE resolution to include a provision that any minority bank that will fail due to its investment in GSE preferred stock would simply have its investment returned.**

We understand why you are acting to preserve the GSEs. The GSEs serve an important role in the fabric of US home ownership, making home ownership more available to the citizenry of the United States. These social benefits, as well as the economic calamity that would follow were the GSEs to collapse, more than warrant government action on their behalf.

We are writing this letter to re-emphasize, as FIRREA has made clear statutorily since 1989, the important role of minority banks in the urban inner city communities of America. Unlike majority banks, which principally focus on profit, the express mission of minority banks is to promote these underbanked, underprivileged communities, and serve as a rare beacon of hope to their residents. Accordingly, just as the GSEs serve

1513 P Street NW, Washington, D.C. 20005
(202)[redacted] Fax (202)[redacted]

critical economic and social roles in America, minority banks have no less importance to the communities they serve – communities that are wholly neglected by the vast majority of financial institutions. Indeed, in part due to the consistency of their missions, minority banks have acquired substantial interests in the preferred stock of the GSEs.

Accordingly, we submit that there is no less reason to protect minority banks that invest in GSEs than the reasons for the resolution you are developing for the GSEs themselves. Both serve critical social and economic roles in their communities. We would therefore strongly urge that any resolution, in addition to providing needed capital to the GSEs, also provide for minority banks to be protected with respect to those preferred stock interests. As stated above, each minority bank would demonstrate the amount of funds it invested into the preferred stock of the GSEs, and be assured of receiving that amount in return as part of any resolution you develop. To ensure that no inappropriate consequences result with the bank regulatory agencies in the interim, we also would ask that the resolution make clear that the regulators treat this right of repayment as equivalent to tier one capital during any interim period prior to the receipt of funds by the minority banks.

We appreciate this action on our behalf. If you do not adopt this request, many minority banks will fail along with the GSEs. In such a circumstance, we submit that your resolution would not have fulfilled its purpose. As while it will have protected the housing and social environment of the United States at a macro level, it will not have protected the urban inner city communities uniquely served by minority banks. Then, once again, the urban poor and underbanked would have received a lesser benefit than other constituents that rely on the GSEs. Such a result would be wholly contrary to the purposes set forth in FIRREA in 1989, and innumerable bank regulatory and government pronouncements since then. More fundamentally, such a result would be contrary to any declared efforts of this country to recognize and improve the lives of urban inner city residents.

Thank you again. Obviously this is critically important to us. If you have any questions whatsoever, or any doubts whatsoever about following this recommendation, please call the undersigned immediately at [redacted]

Sincerely,

Robert Patrick Cooper

Robert Patrick Cooper
Chairman-Elect

cc: The Honorable Barney Frank
The Honorable Maxine Waters

EXHIBIT 24

FOR IMMEDIATE RELEASE
Contact: Michael Grant
(202) [redacted]
[redacted]@nationalbankers.org

PRESS RELEASE

The Board of Directors of the National Bankers Association (NBA) at its 2009 Legislative/Regulatory Conference being held in Washington, DC from March 17-19 reviewed the events previously reported by the Boston Globe on March 14, 2009 regarding actions taken by the Association's then Chair-Elect and Chairperson of its Legislative Committee, Robert P. Cooper.

The Board determined that actions taken by Mr. Cooper were consistent with practices and authority granted him by the Association.

For over 80 years, the National Bankers Association has served as the voice of minority banks. As that voice, the NBA's overarching goal is to protect, preserve and promote minority banks. As minority banks face many unique challenges in this difficult economic environment, the Association will continue to solicit the support and the strong advocacy from the White House Administration, members of Congress and regulatory bodies to aid in its mission.

-30-

1513 P Street, NW., Washington, D. C. 20005
([redacted]) Fax (202) 588-5443

EXHIBIT 25

Moore, Mikael

From: Jeffers, Erika
Sent: Monday, September 08, 2008 6:16 PM
To: Harwitz, Jonathan; Moore, Mikael

This message has been archived. View the original item

Barney would like me to go to the 10 am meeting at Treasury and NBA with you tomorrow. Don't leave without me, please.

E

EXHIBIT 26

MEMORANDUM

To: Barney
From: Erika
Date: September 9, 2008
Re: Update on Treasury Meeting with National Bankers Association

****

Staff from Rep. Waters' and Senator Kerry's offices and I attended the meeting at Treasury with representatives from the National Bankers Association (NBA) (Bob Cooper, Chair-elect of NBA and General Counsel of One United Bank along with Kevin Cohee and Terry Williams from One United Bank; and Greg Lyons, outside counsel for NBA). Staff from FDIC, OCC, OTS and the Federal Reserve also attended the meeting.

One United Bank

One United Bank had about $25 million in Fannie and $25 million in Freddie in preferred stock and they maintain that the bank is now functioning with effectively no capital. Bob Cooper asked Treasury to buy back the preferred GSE stock of MOIs that may otherwise fail due to overexposure from preferred GSE stock. They estimate that this buy-back could amount to about $75-$100 million to address MOIs' vulnerability from overexposure of GSE preferred stock. FDIC, the primary regulator for One United Bank, indicates that they have already been in contact with the bank to try to devise a plan to address the capital problem and that prompt corrective action, if triggered, would still give the bank about 90 days to address any capital issues. Given the difficulties of raising capital for MOIs, however, One United Bank argued that it was in serious danger of failing if Treasury decides not to offer some sort of protection of buy-back to it. No commitment was made from Treasury staff at the meeting, other than to consider the request.

Other Minority-Owned Financial Institutions

Although Bob Cooper has framed the problem of having significant exposure of preferred GSE stock as one that is, or could be, affecting the solvency of other MOIs, it is unclear to me whether they are any other MOIs that are facing the same capital situation as One United right now. During the Treasury meeting, FDIC staff asked Bob Cooper directly what information he had on the scope of the problem facing other MOIs and his answer was vague. He responded that he has heard some anecdotal information from other MOIs but that those banks are unlikely to step forward to confirm this information due to the potential public relations problems that it could cause. FDIC staff seemed skeptical that the scope of this problem with MOIs was widespread. Although initially, Bob and Kevin indicated that the problem facing MOIs could likely be solved with $100 million buy-back from the affected institutions, at the close of the meeting, they mentioned a lower amount of $75 million.

EXHIBIT 27

Jeffers, Erika

From: Moore, Mikael
Sent: Thursday, September 11, 2008 12:45 PM
To: Jeffers, Erika
Subject: FW: NBA Letter to the Treasury
Attachments: NBA Treasury Letter (091008).pdf

Mikael Moore
Chief Of Staff
Congresswoman Maxine Waters (CA-35)
o: 202-[redacted]
c. 202[redacted]
f: 202-225-7854

From: Phillip Perry [mailto[redacted]@OneUnited.com]
Sent: Wednesday, September 10, 2008 8:46 PM
To: Moore, Mikael
Cc: Bob Cooper
Subject: NBA Letter to the Treasury

Dear Mikael,

Attached please find the National Bankers Association's letter to the U.S. Dept. of the Treasury. Please don't hesitate to contact me if you have any questions or if I can be of further assistance. Thank you.

Phillip R. Perry
Department Administrator
Legal and Business Development
OneUnited Bank
100 Franklin Street, Suite 600
Boston, MA 02110
p: 617.[redacted]
f: 617.542.1797
bb: 617.[redacted]
[redacted]*@oneunited.com*
www.oneunited.com

--

Moore, Mikael

From: Moore, Mikael
Sent: Thursday, September 11, 2008 12:45 PM
To: Jeffers, Erika
Subject: FW: NBA Letter to the Treasury
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Chief Of Staff
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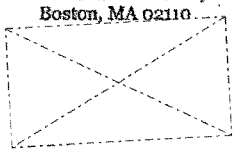
Phillip R. Perry
Department Administrator
Legal and Business Development
OneUnited Bank
100 Franklin Street, Suite 600
Boston, MA 02110



NATIONAL BANKERS ASSOCIATION

CONFIDENTIAL

September 10, 2008

The Honorable Anthony W. Ryan
Acting Under Secretary for Financial Institutions Policy
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: National Bankers Association – Minority Bank Capital Restoration Program

Dear Mr. Ryan:

As a follow-up to our meeting yesterday, we sincerely appreciated the opportunity to discuss with you, Senior Treasury representatives and bank regulatory agency officials the impact of the recent conservatorship of Fannie Mae and Freddie Mac (collectively, the "GSEs") on minority depository institutions ("MDIs"). We emphasized that Treasury should provide appropriate protection on an urgent basis to avert possible failure of one if not several of our institutions, a situation that would undoubtedly reverberate through the entire minority banking sector, causing irreparable harm to the inner-city communities we serve. Unlike with a typical "majority" bank, no bank will step in to save our inner-city communities should one of our banks fail.

As a result of the discussions at the meeting and subsequently, we have refined our proposal consistent with our immediate need to protect minority banks from failure or significant adverse impact due to the decline in the GSE preferred stock. Accordingly, we would propose the following Minority Bank Capital Restoration Program:

As a part of the resolution to the takeover of the GSEs, Treasury would redeem the GSE preferred stock held by an MDI in an amount equal to the lesser of: (1) the amount the MDI paid for the preferred stock; or (2) the amount necessary to return the MDI back to "well-capitalized" status (as defined in the relevant Prompt Corrective Action rules).

Again, we are not seeking a windfall from this resolution. We note that this proposal very well may result in an MDI losing money on its GSE preferred, which is consistent with Treasury's stated goal to protect taxpayers. We also reiterate our position that there is no less reason to protect minority banks that invested in GSEs than the reasons for the resolution you are developing for the GSEs themselves. Both serve critical social and economic roles in the economic and social framework of their communities.

To be clear, however, while the return of this capital is very important to the continued health of minority banks, given their size it is not significant to the government in

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(202) [redacted] Fax (202) [redacted]

absolute dollar terms, let alone relative to the anticipated expenditure with respect to the GSEs. Such a result will preserve the critical service provided by minority banks, and be consistent with the broader and more significant relief provided to the GSEs and the more general Congressional and other commitments to preserve minority banks in FIRREA and elsewhere.

It is also worth mentioning that time is of the essence and we continue to be concerned that the relief we are seeking, or any appropriate derivative thereof, may not be granted in time to avert an impending crisis. Therefore, we respectfully request and thank you in advance for acting on our request on an urgent basis. To put it bluntly, we are seeking Treasury action on this proposal this week.

If you have any questions, please feel free to contact me at (617) [redacted] In any event, I hereby request ongoing standing calls with you or a member of your Senior staff to discuss progress. Please call me to discuss the appropriate member of your staff to engage in those discussions.

We hereby request confidential treatment of this letter to the fullest extent permitted by your regulator.

Sincerely,

Robert Patrick Cooper

Robert Patrick Cooper
Chairman-Elect

cc: The Honorable Henry M. Paulson, Jr.

The Honorable Michael E. Capuano
The Honorable Christopher Dodd
The Honorable Barney Frank
The Honorable Edward Kennedy
The Honorable John Kerry
The Honorable Maxine Waters
The Honorable Stephen F. Lynch

NATIONAL BANKERS ASSOCIATION

EXHIBIT 28

NATIONAL BANKERS ASSOCIATION

CONFIDENTIAL

September 11, 2008

The Honorable Anthony W. Ryan
Acting Under Secretary for Financial Institutions Policy
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: National Bankers Association – Minority Bank Capital Restoration Program

Dear Mr. Ryan:

As a follow-up to my letter of September 10, 2008, and further to the issues discussed in that letter, the National Bankers Association ("NBA") has just concluded an internal survey of its membership, the purpose of which is to ascertain the extent of our member banks' holdings in Fannie Mae and Freddie Mac (collectively, the "GSEs") preferred securities.

With respect to the survey, it should be noted that not all member banks responded. As part of our additional diligence, we found that most of the non-reporting banks are smaller, privately held institutions for which detailed information on their investments is not readily available. Notwithstanding, we believe that the number of affected institutions is limited. Based on this review, we are somewhat relieved to inform you that although a number of our member banks owned the GSE preferred securities prior to the conservatorship, only two (2) of those institutions continue to hold GSE preferred securities subsequent to the date of the conservatorship.

Although the number of our member banks involved is relatively small, without intervention on the part of Treasury, the impact on these institutions and the greater communities they serve would be significant.

I would be happy to personally discuss with you on a strictly confidential basis the impact on these institutions at your earliest available time. I may be reached at (617) [redacted] to schedule such a meeting.

We hereby request confidential treatment of this letter to the fullest extent permitted by your regulator.

Sincerely,

Robert Patrick Cooper

Robert Patrick Cooper
Chairman-Elect

1513 P Street, NW Washington, D.C. 20005
(202) [redacted] Fax (202) 588-5443

COS.MW.FRANK.53

CSOC.WAT.000472

EXHIBIT 29

Jeffers, Erika

From:	Moore, Mikael
Sent:	Thursday, September 11, 2008 12:45 PM
To:	Jeffers, Erika
Subject:	FW: American Banker Article
Attachments:	20080911100733772.pdf

20080911100733772.pdf (220 KB)...

Mikael Moore
Chief Of Staff
Congresswoman Maxine Waters (CA-35)
o: 202[redacted]
c. 202[redacted]
f: 202-225-7854

-----Original Message-----
From: Bob Cooper [mailto[redacted]@OneUnited.com]
Sent: Thursday, September 11, 2008 10:16 AM
To: Moore, Mikael; [redacted]@state.ma.us
Cc: Kevin Cohee; Phillip Perry; [redacted]@state.ma.us
Subject: American Banker Article

Please see attached American Banker article re: Barney Frank and GSE Takeover by Treasury. See asterix at top of third column: "House Financial Services Committee Chairman Barney Frank said he does not think any bank will be allowed to fail as a result of the takeover."

Robert Patrick Cooper
Senior Vice President / Senior Counsel
OneUnited Bank
100 Franklin Street, Suite 600
Boston, MA 02110

p - 617[redacted]
c - 617[redacted]
f - 617.507.8925
e [redacted]@oneunited.com

WASHINGTON AMERICAN BANKER

What Congress Might Want To Know About GSE Takeover

Continued from page 1

necessary. He used that authority very aggressively. "Fool me once, your fault. Fool me twice, my fault."

Sen. Jim Bunning, R-Ky., went even further in a press release.

"Secretary Paulson knew more than he was telling us during his appearance before the Banking Committee," he said. "He knew that Fannie and Freddie were in an irreversible state of damage. He knew all along he was going to have to use this authority despite what he was telling Congress and the American people at the time."

But that feeling was by no means uniform, with some Democrats defending Mr. Paulson.

"It comes as a surprise to all of us but I don't feel like I've been duped or the secretary has played the Congress," Rep. Mel Watt, D-N.C., said in an interview Tuesday. "He has done things he thought would work and they haven't worked as well as he anticipated."

Is the Federal Housing Finance Agency a credible operator of Fannie and Freddie?

James Lockhart, the agency's director, is suffering from a black eye in some circles. Before putting them into conservatorship Sunday, he spent months arguing that Fannie and Freddie were fundamentally sound and well capitalized.

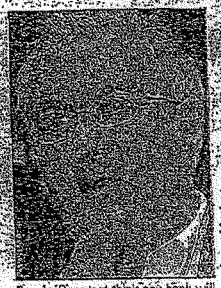
"The enterprises' $95 billion in total capital, their substantial cash and liquidity portfolios, and their experienced management serve as strong supports for the enterprises' continued operation," he said July 13.

Some observers say such statements undercut Mr. Lockhart's credibility.

"In my mind, there is some significant uncertainty about the ability to actually run these organizations in the conservatorship," said L. Richard Fischer, a partner with Morrison & Foerster LLP. "If is the same individual and the same organization that's been overseeing the GSEs for some time now. I don't think his organization, alone is going to be able to do this."

What exactly has changed?

On the operational side, not much. New chief executives have been installed — Herb Allison at Fannie and David Moffett at Freddie — but how much power they have is unclear. Mr. Lockhart appears to be running the show as conservator.



Frank: 'Does not think' any bank will be allowed to fail as a result.

Of course, Fannie and Freddie also have new sources of capital and liquidity. The government will take a senior preferred equity stake in them, purchase $5 billion of mortgage-backed securities, and provide them with up to $100 billion of liquidity each.

So why now? What changed in the last month that required the Sept. 7 takeover?

That is perhaps one of the most perplexing questions, and one lawmakers say they want to examine.

"It is important for them to tell us why they felt they had to move," said Rep. Maxine Waters, D-Calif.

FREQUENTLY ASKED QUESTIONS

Mr. Lockhart has not answered directly, but in an interview Monday with PBS' "Nightly Business Report," he said examinations found "significant deteriorations over the last three months."

Speculation has grown that Mr. Paulson pulled the trigger after learning of growing fear among foreign investors and central banks. During an interview Monday on CNBC, he hinted that was a concern. "Overseas buyers had reduced the level of buying, and some had stopped buying," Mr. Paulson said. "There was just grave concern throughout this country and outside of this country."

Will the takeover cause bank failures?

This is the overriding concern of many lawmakers this week. At issue are companies that had significant concentrations of GSE preferred stock whose value has plummeted. Regulators have said they plan to help institutions with capital restoration plans, but it remains unclear how many banks and thrifts are affected.

House Financial Services Committee Chairman Barney Frank said he does not think any bank will be allowed to fail as a result of the takeover.

"I do think there are conversations with the regulator to deal with that, and you will see some regulatory forbearance if necessary," he said. "I would be very badly surprised if, anything failed because of this. The secretary is going to take every effort to make sure that doesn't happen."

What does the conservatorship mean for the affordable housing fund?

The housing law enacted in July requires Fannie and Freddie to contribute to a fund that finances a government program for distressed homeowners. But now that they are in conservatorship, some worry Mr. Lockhart, never a fan of the fund, could suspend payments to it. That would anger Democratic lawmakers.

However, Rep. Frank said he has been assured that the fund will remain viable. Mr. Paulson "told me on Friday that he intends to stand by his commitment and Mr. Lockhart was with him when he told me that," the Massachusetts Democrat said Tuesday.

What's next?

Every time the government has acted in the current housing crisis, a bigger and broader plan has always been needed shortly thereafter. That has left some lawmakers wondering what the Treasury may already be planning.

"Is this action going to produce the desired results, or are there other actions that are being thought about that we aren't being told about?" Sen. Dodd asked.

One possibility — raised by several observers — is that Fannie and Freddie will be put into a receivership and effectively unwound. The Treasury said the Finance Agency did not do so this weekend, but everything remains in flux.

Former Rep. Jim Leach said such a move could be made after the presidential election. "My guess is [receivership] is the philosophical step, and my guess is the executive branch wants to put on having to make that decision," he said. "I don't rule out a hurricane Christmas decision making or post-election decision making."

Others agreed that receivership is a possibility. "One could argue there were more assets to sell that way, it would really be in the best interest of everyone to use it," Mr. Fischer said.

Jaymie Heilman contributed to this article.

EXHIBIT 30

OneUnited Bank's investment is unique and needs to be protected because:

1. The funds are public purpose dollars. OneUnited Bank is a U.S. Treasury certified Community Development Financial Institution ("CDFI") whose primary mission is community development. As such, its dollars are used for community development purposes.

2. The funds were a result of OneUnited Bank's efforts to promote savings to urban communities and communities who support its community development mission. The funds were a result of the success of this program.

3. The funds were placed in Fannie Mae and Freddie Mac because their mission of promoting affordable housing and increasing the home ownership rate of minority communities was consistent with the community development mission of OneUnited Bank and its customers.

4. OneUnited Bank is the largest and only CDFI bank serving three distinct cities - Boston, Massachusetts; Los Angeles, California; and Miami, Florida – with physical locations in low-to-moderate communities each of these cities. The Bank is inextricably tied throughout the social and economic fabric of these communities

5. OneUnited Bank is the largest African-American owned bank in the United States. The Bank is an amalgam of four African-American owned banks – Boston Bank of Commerce in Boston, Massachusetts; Peoples National Bank of Commerce in Miami, Florida; Family Savings Bank in Los Angeles, California; and Founders National Bank in Los Angeles, California.

6. The amount of the funds represents over 100% of the capital of the Bank.

EXHIBIT 31

MEMORANDUM

To: Barney
From: Erika
Date: September 15, 2008
Re: Draft Letter to Treasury about OneUnited Bank

****

Attached is a draft letter to Treasury expressing support for the National Bankers Association's proposal to redeem the preferred GSE stock of minority-owned financial institutions. OneUnited Bank discussed the bank's problems in detail with Rep. Capuano last week and Noelle, with Rep. Capuano, told me that her boss is closely monitoring the situation and wants to be helpful. OneUnited also met with Rep. Lynch's office but told me that they did not discuss the bank's problems in depth with that office. Please advise on whether you want me to ask either of those offices to sign onto the letter with you.

I have attached for your information a chart developed by OneUnited Bank, that contains nonpublic information, and specifies that amount of money involved in the buy-back to ensure the bank remains well-capitalized. As it is currently drafted, the letter does not reference a specific amount of money needed. Given the sensitive nature of this information, it may be a good idea to provide it orally to Secretary Paulson as a follow-up to the letter.

OneUnited Bank representatives:
-Bob Cooper, Chairman-elect of NBA and General Counsel of OneUnited Bank, (617) [redacted] (cell)
-Kevin Cohee, Chairman and CEO of OneUnited Bank, (617) [redacted]

yes - DONT

EXHIBIT 32

A Request for Protection from U.S. Treasury
to Avert the Failure of OneUnited Bank due to Its Investment in GSE Preferred Stock

OneUnited Bank Investment in GSE Preferred Stock

Series	Book value	Par value	Par	Shares
Fannie Mae				
N	$ 4,780,439.30	$ 5,000,000.00	$ 50.00	100,000
Q	$ 4,833,968.46	$ 5,000,000.00	$ 25.00	200,000
S	$ 5,179,245.32	$ 5,000,000.00	$ 25.00	200,000
S	$ 10,271,225.07	$ 10,000,000.00	$ 25.00	400,000
Freddie Mac				
T	$ 5,824,130.61	$ 6,250,000.00	$ 50.00	125,000
Z	$ 5,228,121.50	$ 5,000,000.00	$ 25.00	200,000
Z	$ 5,196,676.56	$ 5,000,000.00	$ 25.00	200,000
Z	$ 5,196,789.24	$ 5,000,000.00	$ 25.00	200,000
Z	$ 5,245,807.53	$ 5,000,000.00	$ 25.00	200,000
	$ 51,756,403.58	51,250,000.00		

Call Report Data

	June 30, 2008		September 30, 2008
	Reported on call report		Minimum capital needed to be well-capitalized
Tier 1 capital	$ 39,928,000.00	RC-R 11	$ 35,000,000.00
Average assets*	$ 735,370,000.00	RC-R 27	$ 700,000,000.00
Tier 1 leverage ratio	5.43%	RC-R 31	5.00%
Capital category	WELL		WELL

* OneUnited Bank has been reducing assets to reduce capital needed to remain well capitalized

A Request for Protection from U.S. Treasury to Avert Failure

Tier 1 Capital as of June 30, 2008	$ 39,928,000.00
Tier 1 Capital at Preferred GSE Values Since Conservatorship (This amount does not include the $4.7million of current value of GSE stock to be return to Treasury)	$ (6,993,403.58)
Request from Treasury in exchange for $51,250,000 in GSE Preferred Stock (par value) (This amount is based on the $35,000,000 required to be well capitalized and the negative $6,993,403.58 Tier 1 Capital.)	$ 41,993,403.58
OneUnited Bank Remaining Loss from GSE Preferred Stock	$ (9,763,000.00)

EXHIBIT 33

Jeffers, Erika

From: Moore, Mikael
Sent: Friday, September 19, 2008 12:22 PM
To: Jeffers, Erika
Subject: Re: OU is in trouble

I think it will be come a timetable issue

Sent using BlackBerry

----- Original Message -----
From: Jeffers, Erika
To: Moore, Mikael
Sent: Fri Sep 19 12:21:35 2008
Subject: Re: OU is in trouble

Depends on scope

----- Original Message -----
From: Moore, Mikael
To: Jeffers, Erika
Sent: Fri Sep 19 12:20:07 2008
Subject: OU is in trouble

Sent using BlackBerry

COS.MW.FRANK.44

EXHIBIT 34

Moore, Mikael

From: Bob Cooper [redacted]
Sent: Friday, September 19, 2008 12:38 PM
To: Moore, Mikael
Cc: Melton, Noelle; Kevin Cohee
Subject: FW: MDI Preferred Stock Redemption Language

Hi Mikael:
Here are our thoughts on an alternative back-up strategy in case Treasury does not grant the specific relief that we are requesting within the next couple of days. We would appreciate your thoughts, comments, etc. on both the strategy and the particular language. We have had an initial conversation with Mike Capuano's office and they are supportive of this approach, though they stressed that the particular language around the affected group would be key. It is a legislative solution and with that we realize that it may be fraught with the challenges and uncertainty that comes with trying to pass legislation. **Could you kindly share with Erika.** We will follow up with her.

It would be a provision in the Continuing Resolution, a temporary appropriations bill, that will be passed by Congress this coming week and signed by the president next weekend or early the following week. Alternatively, we could think about attaching it to the legislation creating a new RTC-like entity, but as we do know for sure that the CR will definitely be passed, it may be safer to put it in the CR as we are under extreme time pressure (filing of September 30th Call Report).

The brand new Federal Housing Finance Agency (the new GSE regulator) has never been addressed in an appropriations bill before. Its predecessor agency would have been addressed in the HUD appropriations bill but the new FHFA is an independent financial institution regulator which, like other such independent regulators, coordinates with the Treasury Department. So I have drafted this language as a provision in the appropriations bill (actually in this case, as a title of a continuing resolution that would fund Treasury and other fiscal agencies.) It is possible, however, that the House and Senate appropriations committees have not yet decided in which subcommittee (and, therefore, in which title of this continuing resolution) FHFA belongs. We don't really care for our purposes in this continuing resolution since, wherever they might put it in such an omnibus bill, it will be the law governing FHFA.

I've drafted this to provide only redemption at the purchase price since it's possible this provision would go in at the last minute without the committee having any time to (or wanting to?) vet it with Treasury.

Appreciate your assistance.

IN THE FINANCIAL SERVICES AND GENERAL GOVERNMENT TITLE OF A BILL MAKING CONTINUING APPROPRIATIONS FOR FISCAL YEAR 2009, INSERT AT THE APPROPRIATE PLACE THE FOLLOWING PROVISION:

Provided further, That, notwithstanding any other provision of law, the Director of the Federal Housing Finance Agency, acting as conservator, shall, or shall cause the regulated entities in conservatorship to, immediately redeem at the purchase price paid the preferred stock of such regulated entities in conservatorship which is held by a [U.S. Department of Treasury certified Community Development Financial Institution.]

Robert Patrick Cooper
Senior Vice President / Senior Counsel
OneUnited Bank
100 Franklin Street, Suite 600
Boston, MA 02110

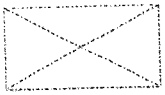


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EXHIBIT 35

Moore, Mikael

From: Moore, Mikael
Sent: Saturday, September 20, 2008 3:44 PM
To: 'kcohee[redacted]
Subject: Draft
Attachments: TreasuryDraft).pdf

Mikael Moore
Chief Of Staff
Congresswoman Maxine Waters (CA-35)
o: 202[redacted]
c. 202-
f:[redacted]

From: Moore, Mikael
Sent: Saturday, September 20, 2008 3:11 PM
To: Harwitz, Jonathan; Ouertatani, Charla
Subject: FW: Bailout Memo - Waters

LEGISLATIVE PROPOSAL FOR TREASURY AUTHORITY
TO PURCHASE MORTGAGE-RELATED ASSETS

Section 1. Short Title.

This Act may be cited as _____.

Sec. 2. Purchases of Mortgage-Related Assets.

(a) Authority to Purchase.--The Secretary is authorized to purchase, and to make and fund commitments to purchase, on such terms and conditions as determined by the Secretary, mortgage-related assets from any financial institution having its headquarters in the United States.

(b) Necessary Actions.--The Secretary is authorized to take such actions as the Secretary deems necessary to carry out the authorities in this Act, including, without limitation:

(1) appointing such employees as may be required to carry out the authorities in this Act and defining their duties;

(2) entering into contracts, including contracts for services authorized by section 3109 of title 5, United States Code, without regard to any other provision of law regarding public contracts;

(3) designating financial institutions as financial agents of the Government, and they shall perform all such reasonable duties related to this Act as financial agents of the Government as may be required of them;

(4) establishing vehicles that are authorized, subject to supervision by the Secretary, to purchase mortgage-related assets and issue obligations; and

(5) issuing such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities of this Act.

Sec. 3. Considerations.

In exercising the authorities granted in this Act, the Secretary shall take into consideration means for--

(1) providing stability or preventing disruption to the financial markets or banking system; and

(2) protecting the taxpayer.

Sec. 4. Reports to Congress.

Within three months of the first exercise of the authority granted in section 2(a), and semiannually thereafter, the Secretary shall report to the Committees on the Budget, Financial Services, and Ways and Means of the House of Representatives and the Committees on the Budget, Finance, and Banking, Housing, and Urban Affairs of the Senate with respect to the authorities exercised under this Act and the considerations required by section 3.

Sec. 5. Rights; Management; Sale of Mortgage-Related Assets.

(a) Exercise of Rights.--The Secretary may, at any time, exercise any rights received in connection with mortgage-related assets purchased under this Act.

(b) Management of Mortgage-Related Assets.--The Secretary shall have authority to manage mortgage-related assets purchased under this Act, including revenues and portfolio risks therefrom.

(c) Sale of Mortgage-Related Assets.--The Secretary may, at any time, upon terms and conditions and at prices determined by the Secretary, sell, or enter into securities loans, repurchase transactions or other financial transactions in regard to, any mortgage-related asset purchased under this Act.

(d) Application of Sunset to Mortgage-Related Assets.--The authority of the Secretary to hold any mortgage-related asset purchased under this Act before the termination date in section 9, or to purchase or fund the purchase of a mortgage-related asset under a commitment entered into before the termination date in section 9, is not subject to the provisions of section 9.

Sec. 6. Maximum Amount of Authorized Purchases.

The Secretary's authority to purchase mortgage-related assets under this Act shall be limited to $700,000,000,000 outstanding at any one time

Sec. 7. Funding.

For the purpose of the authorities granted in this Act, and for the costs of administering those authorities, the Secretary may use the proceeds of the sale of any securities issued under chapter 31 of title 31, United States Code, and the purposes for which securities may be issued under chapter 31 of title 31, United States Code, are extended to include actions authorized by this Act, including the payment of administrative expenses. Any funds expended for actions authorized by this Act, including the payment of administrative expenses, shall be deemed appropriated at the time of such expenditure.

Sec. 8. Review.

Decisions by the Secretary pursuant to the authority of this Act are non-reviewable and committed to agency discretion, and may not be reviewed by any court of law or any administrative agency.

Sec. 9. Termination of Authority.

The authorities under this Act, with the exception of authorities granted in sections 2(b)(5), 5 and 7, shall terminate two years from the date of enactment of this Act.

Sec. 10. Increase in Statutory Limit on the Public Debt.

Subsection (b) of section 3101 of title 31, United States Code, is amended by striking out the dollar limitation contained in such subsection and inserting in lieu thereof $11,315,000,000,000.

Sec. 11. Credit Reform.

The costs of purchases of mortgage-related assets made under section 2(a) of this Act shall be determined as provided under the Federal Credit Reform Act of 1990, as applicable.

Sec. 12. Definitions.

For purposes of this section, the following definitions shall apply:

(1) Mortgage-Related Assets.--The term "mortgage-related assets" means residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before September 17, 2008.

(2) Secretary.--The term "Secretary" means the Secretary of the Treasury.

(3) United States.--The term "United States" means the States, territories, and possessions of the United States and the District of Columbia.

EXHIBIT 36

Moore, Mikael

From: Kevin Cohee [redacted]
Sent: Monday, September 22, 2008 9:01 AM
To: Moore, Mikael
Subject: Fw: Bailout Legislation
Attachments: five percent language.doc

Could you please print this for our meeting.

----Original Message----
From: Axfy17a[redacted]
To: COOPERBLACK [redacted]
CC: Kevin Cohee; Teri Williams
Sent: Mon Sep 22 06:04:45 2008
Subject: Re: Bailout Legislation

P <<five percent language.doc>> S to previous email.

Attached and pasted below is a draft re Robert Primus's request. I've reformatted it slightly so that it could be banking committee bill languge as opposed to approps language, but Counsel will vet it in any event

I will gavel my school board committee meeting to a close this morning in time to get to the doctor in Annapolis by 9:30 AM. It soul be about 90 minutes there, unless she finds something unusual, and then 40 minutes to the office (Mindy will be at the office by 7:45) I can cancel anything after that except the reception and dinner I am hosting for San Fran Mayor Newsom that starts at 6 PM

LJF

Leander J. Foley, III
Foley Maldonado & O'Toole
513 Capitol Court NE, Suite 100
Washington, D.C. 20002
[redacted]

Provided that, notwithstanding any other provision of law, the Director of the Federal Housing Finance Agency, acting as conservator, shall, or shall cause the regulated entities in conservatorship to, immediately redeem at the purchase price paid the preferred stock of such regulated entities in conservatorship which is held by any Department of Treasury certified community development financial institutions which, as September 5, 2007, had more than five percent of its total assets invested in the preferred stock of the regulated entities in conservatorship .

EXHIBIT 37

Moore, Mikael

From: [redacted]@aol.com
Sent: Wednesday, July 16, 2008 4:41 PM
To: Moore, Mikael
Cc: Harwitz, Jonathan; Quertatani, Charla; [redacted]@fmoassociates.com
Subject: Request for meeting from Lee Foley

This message has been archived. View the original item

Hi Mikael: I wonder if I could arrange to visit with the Congresswoman on three items that are quite time sensitive and that she may wish to consider acting upon:

1) Some months back, at the Congresswoman's request, I sent over to you a copy of the FIRREA amendments with which I had assisted her and then-Congressman Mfume during her first Congress. Those multifaceted provisions were designed for the then-new Resolution Trust Corporation but I believe remain today applicable to the FDIC. In that regard, the FDIC would be responsible, if it decides to close or dispose of any IndyMac branches (all of which are in the LA area), to determine first whether any such IndyMac branches serve primarily minority areas. If so, they must seek to preserve branch service to such areas by seeking out minority banks (such as OneUnted Bank in the Congresswoman's District, on whose Board I serve) to determine if they are interested in purchasing such branches. Such a minority bank could choose to take only the physical locations and their deposits or they could also ask for loans to match up with the deposits and could probably cherry pick in a bid for IndyMac loans. It is highly likely that the federal regulators now operating the IndyMac franchise do not even remember that this law continues to apply to them.

2) I have been wondering whether there might be one last chance to try to add to the House GSE bill the minority bank participation amendment the Congresswoman considered promoting in the original House bill. As you might recall, the provisions would not have a federal cost but would incentivize major lenders and servicers to partner with minority banks in the FHA refinance program and could have the beneficial effect of resulting in minority borrowers having their refinanced loans serviced by their local minority bank. The provisions could also help enhance the capital position of such minority banks. Surprisingly, some of the minority banks we talked to in developing the concept for these provisions subsequently talked to their own representatives in Congress and got some favorable responses -- including recent favorable responses from Republican members on the Committee including Senators Martinez, Corker and Shelby.

3) OneUnited CEO Kevin Cohee called me yesterday (he may also have called for Rep. Waters) and we discussed the market uncertainty surrounding the capital positions of Fannie and Freddie and how this could seriously hamper liquidity in the affordable housing credit markets going forward. Kevin reminded me that financial institutions regulated by three of the federal bank regulators (we believe its the Fed, OTS and FDIC) are not inclined to buy Fannie and Freddie stock since those regulators set the stocks' risk weighting at 100%, which means the banks themselves have to have more risk weighted capital in order to own such stock -- and thus such GSE stock ownership is inefficient with respect to banks deployment of their capital. But we believe the OCC separately risk weights such stock at 20% -- meaning, for national banks only, ownership of Fannie/Freddie stock is a very efficient deployment of capital, particularly since, for instance, Fannie's preferred stock has a very attractive coupon rate. As the implicit federal "full faith" backing of Fannie and Freddie is becoming more explicit, it seems like all federal regulators going to the 20% risk weighting would stimulate an instant boost to Fannie and Freddie's common and preferred stock capital and might create a virtuous circle of improved capital, increased liquidity, more affordable housing lending and etc -- at no cost to the federal government, the banker's bank (the Fed) or to the bank and thrift insurance funds. We thought the Congresswoman should be armed with this information.

I'm in town through Thursday evening and would cancel my Friday business trip if that's the only day she would have time to meet. I'll be back in DC on Monday as well.

Thanks Mikael.

Lee

Leander J. Foley, III
Foley Maldonado & O'Toole
513 Capi

EXHIBIT 38

MEMORANDUM

To: Barney
From: Erika, [redacted]
Date: September 22, 2008
Re: Update on National Bankers Association's Proposal re: Preferred GSE Stock Buy-back
****

I have called over to Treasury congressional staff a number of times and Jeanne has reached out directly to Frommer, Secretary Paulson's COS, but we have not been able to get a firm commitment from them about whether they will pursue National Bankers Association's (NBA) proposal to redeem the GSE preferred stock held by minority depository institutions (MDI) in an amount equal to the lesser of: (1) the amount the MDI paid for the stock; or (2) the amount necessary to return the MDI back to "well-capitalized" status. Frommer told Jeanne that while Paulson wants to be supportive, Frommer is not completely sure if Treasury has the administrative authority to implement the exact NBA proposal. Jeanne and I have not been able to get an answer from Treasury about what regulatory barriers they may think exists to prevent them from implementing the proposal. Jeanne is going to raise the issue again with Frommer when she meets with him this afternoon.

Banks' call report data is due on September 30. FDIC congressional staff indicates a willingness to work with affected institutions on their capital restoration plans but, without a firm commitment from Treasury to redeem the GSE preferred stock, OneUnited believes the bank will be shut down at the end of the month. OneUnited estimates that it would take about $41 million to keep OneUnited at well-capitalized status through the NBA's buy-back preferred stock proposal. ICBA has now raised similar concerns to NBA that some community banks may be considered undercapitalized because of their significant write-downs of GSE preferred stock.

Do you want to try to include a specific reference in the CR to address the NBA's proposal or continue to have staff try to get Treasury to issue a firm commitment to implement the proposal?

EXHIBIT 39

Bob Cooper

From:	Bob Cooper
Sent:	Tuesday, September 23, 2008 10:56 AM
To:	'MIKAEL.MOORE
Subject:	FW: Treasury Request Appendix Final.xls
Attachments:	Treasury Request Appendix Final.xls

-----Original Message-----
From: Teri Williams
To: 'makael.moore
CC: Bob Cooper
Sent: Tue Sep 23 10:45:59 2008
Subject: Treasury Request Appendix Final.xls

OneUnited Bank Investment in GSE Preferred Stock

Series	Book value	Par value	Par	Shares
Fannie Mae				
N	$ 4,780,439.30	$ 5,000,000.00	$ 50.00	100,000
Q	$ 4,833,968.46	$ 5,000,000.00	$ 25.00	200,000
S	$ 5,179,246.32	$ 5,000,000.00	$ 25.00	200,000
S	$ 10,271,225.07	$ 10,000,000.00	$ 25.00	400,000
Freddie Mac				
T	$ 5,824,130.61	$ 6,250,000.00	$ 50.00	125,000
Z	$ 5,228,121.50	$ 5,000,000.00	$ 25.00	200,000
Z	$ 5,196,676.55	$ 5,000,000.00	$ 25.00	200,000
Z	$ 5,196,789.24	$ 5,000,000.00	$ 25.00	200,000
Z	$ 5,245,807.53	$ 5,000,000.00	$ 25.00	200,000
	$ 51,756,403.58	51,250,000.00		

Call Report Data

	June 30, 2008 Reported on call report		September 30, 2008 Minimum capital needed to be well-capitalized
Tier 1 capital	$ 39,928,000.00	RC-R 11	$ 35,000,000.00
Average assets*	$ 735,370,000.00	RC-R 27	$ 700,000,000.00
Tier 1 leverage ratio	5.43%	RC-R 31	5.00%
Capital category	WELL		WELL

* OneUnited Bank has been reducing assets to reduce capital needed to remain well capitalized

Tier 1 Capital as of June 30, 2008	$	39,928,000.00
Tier 1 Capital at Preferred GSE Values Since Conservatorship (This amount does not include the $4.7million of current value of GSE stock to be return to Treasury)	$	(6,993,403.58)
Request from Treasury in exchange for $51,250,000 in GSE Preferred Stock (par value) (This amount is based on the $35,000,000 required to be well capitalized and the negative $6,993,403.58 Tier 1 Capital.)	$	41,993,403.58
OneUnited Bank Remaining Loss from GSE Preferred Stock	$	(9,763,000.00)

EXHIBIT 40

Moore, Mikael

From:	Jeffers, Erika
Sent:	Tuesday, September 23, 2008 11:54 AM
To:	Moore, Mikael
Subject:	RE: Treasury Request Appendix Final.xls

This message has been archived. View the original item

Jim et. al will continue to pursue T acting without legislation but John and I are also working on drafting CDFI-related language to help them that we could try to possibly add to the bailout bill. John H. and I are going to meet downstairs around 12:15 pm to try to draft something up.

Have you heard back from JR or GL on minority language yet? I haven't heard anything but I've been in meetings.

E

From: Moore, Mikael
Sent: Tuesday, September 23, 2008 11:51 AM
To: Jeffers, Erika
Subject: RE: Treasury Request Appendix Final.xls

How did the meeting go?

Mikael Moore
Chief Of Staff
Congresswoman Maxine Waters (CA-35)
o: 202-[redacted]
c. 202-[redacted]
f: 202-225-7854

From: Jeffers, Erika
Sent: Tuesday, September 23, 2008 11:50 AM
To: Moore, Mikael
Subject: RE: Treasury Request Appendix Final.xls

Thanks.

E

From: Moore, Mikael
Sent: Tuesday, September 23, 2008 10:56 AM
To: Jeffers, Erika
Subject: FW: Treasury Request Appendix Final.xls

Mikael Moore
Chief Of Staff
Congresswoman Maxine Waters (CA-35)
o: 202[redacted]
c. 202[redacted]
f: 202-225-7854

--

EXHIBIT 41

Bob Cooper

From:	Bob Cooper
Sent:	Tuesday, September 23, 2008 4:01 PM
To:	'MIKAEL.MOORE
Subject:	FW: warrants language options

-----Original Message-----
From: Bob Cooper
To: Phillip Perry
Sent: Tue Sep 23 15:42:06 2008
Subject: Re: warrants language options

Thanx.

-----Original Message-----
From: Phillip Perry
To: Bob Cooper
Sent: Tue Sep 23 14:23:41 2008
Subject: warrants language options

Option One

Notwithstanding any other provision of law, immediately upon enactment of this Act the Director of the Federal Housing Finance Agency, acting as conservator, and in a manner consistent with the purposes of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 regarding preserving minority depository institutions and consistent with the purposes of Title I of the Riegle Community Development and Regulatory Improvement Act of 1994 to promote community development through community development financial institutions, shall, or shall cause the regulated entities in conservatorship to, redeem at the purchase price paid the preferred stock of such regulated entities in conservatorship which is held by any Department of Treasury certified community development financial institutions which, as September 5, 2007, had more than five percent of its total assets invested in the preferred stock of the regulated entities in conservatorship. In return for such redemption, the conservator, or the regulated entities in conservatorship, shall receive warrants of equal value for preferred stock in such community development financial institutions.

Option Two

Nothwithstanding any other provision of law, immediately upon enactment of this Act the Secretary, acting in a manner consistent with the purposes of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 regarding preserving minority depository institutions and consistent with the purposes of Title I of the Riegle Community Development and Regulatory Improvement Act of 1994 to promote community development through community development financial institutions, shall inject into any Department of Treasury certified community development financial institution which, as September 5, 2007, had more than five percent of its total assets invested in the preferred stock of the regulated entities in conservatorship an amount of tier one regulatory capital equal to the original purchase price of such preferred stock. In return for such capital injections, the Secretary shall receive warrants of equal value for preferred stock in such community development financial institutions.

EXHIBIT 42

Jeffers, Erika

From: Hughes, John
Sent: Tuesday, September 23, 2008 8:00 PM
To: Yi, Charles
Cc: Jeffers, Erika
Subject: FW: Preferred Stock/MA Bank Issue
Attachments: CDFI Redemption_Draft Text.doc

If you have a chance, please take a look at the draft language and give us any suggestions you have for improving it. Thanks.

JCH

From: Hughes, John
Sent: Tuesday, September 23, 2008 4:17 PM
To: Segal, James; Stewart, Lawranne
Cc: Jeffers, Erika
Subject: Preferred Stock/MA Bank Issue

LS: BF confirmed this afternoon that he wants to address this in the rescue bill. Here's our draft language for your review and comment.

Draft Legislative Language
For Section 11.

The Secretary may establish a procedure to purchase the preferred stock of the entities under conservatorship under the manner set forth in the Housing and Economic Recovery Act of 2008 from individual institutions that are certified as community development financial institutions as defined under section 103(5) of the Riegle Community Development and Regulatory Improvement Act of 1994 with total assets of less than $750 million as of the date of the enactment of the Act in which the institutions capitalization rating has been materially impacted by the conservatorship at a sum that shall be determined by the Secretary. In establishing such a procedure, the Secretary shall include a requirement that the financial institution provide nonvoting stock as equity in exchange for the redemption.

EXHIBIT 43

Bob Cooper

From: Moore, Mikael [redacted]
Sent: Thursday, September 25, 2008 9:27 AM
To: Bob Cooper
Subject: Re: Any update?

Call in the office,

Sent using BlackBerry

----- Original Message -----
From: Bob Cooper [redacted]
To: Moore, Mikael
Sent: Thu Sep 25 09:23:41 2008
Subject: Any update?

--

EXHIBIT 44

Hughes, John

From: Roslanowick, Jeanne
Sent: Sunday, September 28, 2008 2:09 PM
To: Moore, Mikael
Cc: Maurano, Rick; Hughes, John; Stewart, Lawranne
Subject: RE: Bailout

Mikael – Leg counsel still working on most recent draft – no final doc yet – RM and/or JH will report on progress

J

From: Moore, Mikael
Sent: Sunday, September 28, 2008 1:56 PM
To: Roslanowick, Jeanne; Stewart, Lawranne; Laster, Gail; Maurano, Rick
Subject: Bailout

All,

Thank you for all of your work on this bill. I know that you have been pulled in a thousand different directions, and want to acknowledge the extreme responsiveness of the FSC staff to the issues raised by Rep. Waters, especially by Gail, John, Rick and Lawranne. With that being said, I am a little concerned that I have not seen a draft for a couple of days and would like to know the status of the provisions that we have been working on. Rep. Waters is under the explicit impression that the contracting language, the small bank language and systemic loan modification approach language is included in the bill0. If there is any material or technical changes to the language as last agreed upon, please alert me as soon as possible so that Rep. Waters has an opportunity to weigh in. It would not be acceptable to receive a copy after it is final. Furthermore, as a senior member of the Committee and Subcommittee Chair, Rep. Waters EXPECTS to see the entire bill well before it is available for public consumption. As you can imagine, Members, press and constituents are extremely interested in her disposition towards the bill.

As you consider this request, I would like to flag what appear to be two drafting errors, one in the small bank language and one from the contracting language....

In the draft small bank language, the word "financial" was left out before the word "assistance." Please include "financial" before assistance.

In the draft language provided, page 21 line to the word "practicable" was substituted for "possible." Please make sure that the final draft, in fact includes the word "possible"..... Thank you.

Mikael Moore
Chief Of Staff
Congresswoman Maxine Waters (CA-35)
o: 202[redacted]
c. 202-[redacted]
f: 202-225-7854

EXHIBIT 45

UST 000364

From: Fromer, Kevin
Sent: Sunday, October 05, 2008 3:23 PM
To: McCarthy, Peter; Wilkinson, Jim
Subject: Fw: Heads up

More on the contracting subject.

From: Roslanowick, Jeanne
To: Fromer, Kevin
Sent: Sun Oct 05 15:08:03 2008
Subject: Re: Heads up

Be aware that may not resolve the concern, however, Cong Waters' concerns do not focus on 8(a) contractors. There are apparently relatively large minority- and/or women-owned asset management firms on Wall Street that either alone or through joint ventures believe they would be in a position to do the business. She wants to ensure that such firms receive equally serious consideration and are reached out to.

----- Original Message -----
From: [redacted]@do.treas.gov [redacted]@do.treas.gov>
To: Roslanowick, Jeanne
Sent: Sun Oct 05 14:59:47 2008
Subject: Re: Heads up

Thanks. I am pursuing here. I am told our office of small and disadvantaged business utilization has been involved in procurement meetings.

From: Roslanowick, Jeanne
To: Fromer, Kevin
Sent: Sun Oct 05 13:57:03 2008
Subject: Heads up

Cong Waters is raising concerns with BF and the Speaker that the requests for proposals that Treasury is likely to put out tomorrow will not provide an opportunity for qualified minority and women-owned businesses to participate in the execution of the TARP program. Cong Waters is apparently hearing from a number of qualified minority- and women-owned firms to that effect.

EXHIBIT 46

Moore, Mikael

From: Bob Cooper [redacted]
Sent: Sunday, September 28, 2008 8:15 PM
To: Moore, Mikael
Subject: Thank you for all your hard work!

EXHIBIT 47

Moore, Mikael

From: Bob Cooper
Sent: Monday, September 29, 2008 9:28 AM
To: Moore, Mikael
Subject: Checking in

Good morning Mikael,

In thinking about next steps, we are prepared to rally our supporters by phone or through direct personal contacts. What is your sense, given that the inevitable "mental fatigue" will begin to set in around a process that even as we speak has not been settled. Obviously, we're trying to get some sort of written commitment from Treasury on an expedited basis prior to the recess for the Jewish holidays and before tomorrow's deadline. Let me know.

Best,

Robert Patrick Cooper
Senior Vice President / Senior Counsel
OneUnited Bank
100 Franklin Street, Suite 600
Boston, MA 02110

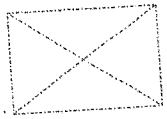

EXHIBIT 48

UST 000058

From: Fromer, Kevin
Sent: Monday, September 22, 2008 11:55 AM
To: Ryan, Tony
Cc: Mueller, King
Subject: FW: In 2129. Where r u?

Who is working on this issue? I will ask if he recalls what he told Frank about our ability to help.

From: Roslanowick, Jeanne [mailto:[redacted]@mail.house.gov]
Sent: Monday, September 22, 2008 11:49 AM
To: Mueller, King
Cc: Fromer, Kevin
Subject: RE: In 2129. Where r u?

I know you folks are going under for third time but I really need some guidance on what can be done about the National Bankers Association proposal. It is a huge priority for our minority caucuses who have had other major concerns not to date accommodated in pending bill. We are talking here about the potential failure of minority institutions that Treasury has a statutory responsibility to promote. BF and HP spoke personally and the Secretary indicated he was committed to being helpful. I just need to know what that means. If the issue can be dealt with administratively - - and will be -- that would be very helpful to know. Otherwise there will be recommendations for provisions for this bill.

From: King.Mueller@do.treas.gov [mailto:[redacted]@do.treas.gov]
Sent: Sunday, September 21, 2008 8:19 PM
To: Roslanowick, Jeanne
Subject: In 2129. Where r u?

UST 000021

Samarias, Joseph

From: Mueller, KingDisabled
Sent: Tuesday, October 21, 2008 5:04 PM
To: Nason, DavidDisabled; Norton, JeremiahDisabled
Cc: Fromer, KevinDisabled
Subject: One United Bank

I got another call from BF's office about this. They continue to express concerns about the Oct. 30th data when their most recent call report is made public. Not really sure what we can do- but can we discuss in the morning?

EXHIBIT 49

UST 000034

Samarias, Joseph

From: Bettinger, Lori
Sent: Tuesday, January 13, 2009 1:10 PM
To: Lerner, Brad; Mclellan, DonDisabled; Schaffner, Ted
Subject: FW: One United

Would we say that the CDFIs are approved under 103-67

-----Original Message-----
From: McLaughlin, Brookly
Sent: Tuesday, January 13, 2009 1:03 PM
To: Bettinger, Lori; Mueller, King; Lambright, James; Mclellan, Don; Kashkari, Neel; Schaffner, Ted
Cc: Davis, Michele; Fromer, Kevin
Subject: RE: One United

Are there other banks we've approved under section 103-67.

-----Original Message-----
From: Bettinger, Lori
Sent: Tuesday, January 13, 2009 12:13 PM
To: McLaughlin, Brookly; Mueller, King; Lambright, James; Mclellan, Don; Kashkari, Neel; Schaffner, Ted
Cc: Davis, Michele; Fromer, Kevin
Subject: RE: One United

Brookly,

One United is a CDFI, which permits them to participate in CPP without issuing warrants to Treasury. They are by no means an exception in this regard - there are two other CDFIs that have already been funded under this arrangement.

Thanks
Lori

-----Original Message-----
From: McLaughlin, Brookly
Sent: Tuesday, January 13, 2009 12:10 PM
To: Mueller, King; Lambright, James; Mclellan, Don; Kashkari, Neel; Schaffner, Ted; Bettinger, Lori
Cc: Davis, Michele; Fromer, Kevin
Subject: RE: One United

I think it's maybe best if I just tell the WSJ that this investment was recommended by the regulators and went through the normal application process. (It closed back in mid December - so this isn't new.)

Holler if you disagree - otherwise I'll proceed on that path.

-----Original Message-----
From: Mueller, King
Sent: Tuesday, January 13, 2009 11:57 AM
To: McLaughlin, Brookly; Lambright, James; Mclellan, Don; Kashkari, Neel; Schaffner, Ted; Bettinger, Lori
Cc: Davis, Michele; Fromer, Kevin
Subject: Re: One United

I seem to remember Waters' husband stepping down from the Brd shortly after a meeting she had w/ treas officials asking for us to intervene b/c of its exposure to f/f preferred.

UST 000035

----- Original Message -----
From: McLaughlin, Brookly
To: Lambright, James; Mclellan, Don; Kashkari, Neel; Schaffner, Ted; Bettinger, Lori
Cc: Davis, Michele; Fromer, Kevin; Mueller, King
Sent: Tue Jan 13 11:47:23 2009
Subject: RE: One United

Further to email below, WSJ tells me:

Apparently this bank is the only one that has gotten money through section 103-6 of the EESA law. And Maxine Waters' husband is on the board of the bank.

??????

-----Original Message-----
From: Lambright, James
Sent: Tuesday, January 13, 2009 10:09 AM
To: McLaughlin, Brookly; Mclellan, Don; Kashkari, Neel; Schaffner, Ted; Bettinger, Lori
Cc: Davis, Michele
Subject: RE: One United

Looping in Ted and Lori in CPP

----- Original Message -----
From: McLaughlin, Brookly
To: Mclellan, Don; Kashkari, Neel; Lambright, James
Cc: Davis, Michele
Sent: Tue Jan 13 10:05:32 2009
Subject: One United

Wsj is asking me about the One United CPP decision - says we met over a weekend about it...? What's up?

EXHIBIT 50

Moore, Mikael

From: Kevin Cohee [redacted]
Sent: Friday, October 31, 2008 6:28 PM
To: Moore, Mikael; maxine.waters[redacted]; Segel, James; Jeffers, Erika; Phillips, John
Subject: Thank you

We are pleased to report that we received in $17 Million in private investment today. Thank you for your kindness and consideration in helping us to consummate this transaction. This is in addition to the investment we received yesterday; the Bank is now adequately capitalized and we will be applying to the TARP program next week.

Best regards,

Kevin

--

APPENDIX C

U.S. House of Representatives

COMMITTEE ON ETHICS

Washington, DC 20515

September 25, 2012

BY HAND DELIVERY
Mr. Mikael Moore
Office of the Honorable Maxine Waters
U. S. House of Representatives
2344 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Moore:

By a unanimous vote on September 21, 2012, and pursuant to House Rule XI, clause 3(a)(1)-(2) and Committee Rules 10(a)(5) and 18, the Committee on Ethics for the Matter of Representative Maxine Waters (Committee) voted to issue you this letter of reproval. We have issued this letter as a result of your taking official action on behalf of OneUnited Bank, an entity in which your employing Member, Representative Maxine Waters, had a financial interest. The Committee has also voted unanimously to adopt the attached Report to the House of Representatives.

The conduct for which you are hereby reproved is summarized below:

1. You sent an email on September 19, 2008 to a staffer for the House Financial Services Committee stating that "[OneUnited Bank] is in trouble." You followed up with that staffer, writing "I think it will become a timetable issue."

2. You sent an email on September 23, 2008 to a staffer for the House Financial Services Committee forwarding a chart that summarized OneUnited Bank's investment in the preferred stock of certain government sponsored entities (GSEs) that were eventually placed into conservatorship. You followed up with that staffer, asking "how did the meeting go?," to which she responded, "[we] will continue to pursue [the Treasury Department] acting without legislation but [another staffer] and I are also working on drafting CDFI-related language to help them that we could try to possibly add to the bailout bill."

3. You failed to inform OneUnited Bank representatives that your office had recused itself from assisting in efforts to obtain federal government intervention related to its investment in GSEs, such that they continued to believe that your office was involved in the matter.

4. You engaged in the above-mentioned conduct when you knew, or should have known, that Representative Waters and her husband had a financial interest in OneUnited Bank.

With respect to the conduct described above, you violated House Rule XXIII, clause 3, which provides that "[a] Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive compensation and may not permit compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress." With respect to the conduct described above, you also violated paragraph 5 of the Code of Ethics for Government Service, which provides in relevant part that government employees may "[n]ever discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties." Finally, your conduct violated House Rule XXIII, clause 1, which provides that "[a] Member, Delegate, Resident Commissioner, officer, or employee of the House shall behave at all times in a manner that shall reflect creditably on the House."

The Committee has reviewed the statements you provided in this matter to the Office of Congressional Ethics (OCE), this Committee during a previous Congress, and to Outside Counsel during this Congress. The Committee understands that you contend that you were unaware of Representative Waters' conflict of interest when you took the actions described above. The Committee does not find that contention credible and finds that you either knew, or should have known, of her interest in OneUnited Bank. Representative Waters made her interest in OneUnited Bank public no later than 2007, when she disclosed her and her husband's personal financial stake in OneUnited Bank during a meeting of a Financial Services subcommittee, and you testified that you were aware of her statement regarding her husband's position on OneUnited Bank's Board of Directors. Representative Waters herself testified that you "would have known that [her] husband was invested in OneUnited [Bank]." Representative Waters also stated, during an August 2010 press conference, that she had instructed you not to get involved with OneUnited Bank, and she stated that she "clearly" communicated that direction to you. You testified that this conversation occurred in late September, and you interpreted it to mean simply that you should cease efforts on that day and that day only.

Your professed interpretation is not consistent with any reasonable interpretation of the events. First, if one is to credit Representative Waters' explanation of her instruction to you and her awareness of the conflict, it is not credible to suggest that you would have read an arbitrary time limit into her instructions if you were trying to abide by her direction. In fact, you informed the Chief of Staff to the Financial Services Committee of the conflict of interest and your office's recusal from matters involving OneUnited Bank. It is therefore clear that you understood the direction that Representative Waters provided to you, and yet chose to act on matters involving OneUnited Bank anyway. Moreover, the weight of the evidence suggests that, contrary to your assertion, you were given this direction by Representative Waters in early to mid-September.

Your actions on behalf of OneUnited Bank's private efforts to obtain assistance and avoid collapse created dramatic appearances of conflict with your employing Member's personal

financial interests. Your actions blurred an already difficult and close line of permissible conduct due to OneUnited's prominent role in responding to a significant crisis affecting an unknown number of banks. And your actions were the reason this Committee had such serious and appropriate concerns about the activities of you and your employing Member in September of 2008.

As the Chief of Staff for Representative Waters, it was incumbent upon you to uphold the House rules, laws, regulations and other standards of conduct and, where you knew or had reason to know of your employing Member's conflict of interest, to avoid engaging in impermissible conflicts on her behalf. Therefore, it is the determination of the Committee that your conduct in certain specific instances did constitute an impermissible conflict, and violated your obligation to behave in a manner that reflects creditably on the House.

Finally, the Committee finds that you have given inconsistent and incredible testimony. In addition, your lack of acknowledgment of any responsibility, as well as your disrespect for the Committee's investigative process and jurisdiction demonstrates that any mere comments by the Committee would be disregarded. Therefore, based on your conduct in this matter, the Committee has unanimously determined that you should be publicly reproved. Now that this letter has issued and the Committee has publicly noted its reproval of your conduct, the Committee has determined that this matter is closed.

Sincerely,

Robert Goodlatte
Acting Chairman

John A. Yarmuth
Acting Ranking Member