

**ADOPTED BY THE COMMITTEE ON ETHICS ON JULY 25, 2018**

**115TH CONGRESS, 2ND SESSION  
U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON ETHICS**

**IN THE MATTER OF ALLEGATIONS RELATING TO  
REPRESENTATIVE MARKWAYNE MULLIN**

**AUGUST 10, 2018**

Ms. BROOKS from the Committee on Ethics submitted the following

**REPORT**

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## REPORT STAFF

Thomas A. Rust, *Chief Counsel/Staff Director*

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Megan H. Savage, *Counsel to the Chairwoman*

Daniel J. Taylor, *Counsel to the Ranking Member*

Molly N. McCarty, *Investigator*

Mark Hamilton, *Investigative Clerk*

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*Ranking Member*



ONE HUNDRED FIFTEENTH CONGRESS

# U.S. House of Representatives

COMMITTEE ON ETHICS

Thomas A. Rust  
*Staff Director and Chief Counsel*

Donna Herbert  
*Director of Administration*

Megan Savage  
*Chief of Staff and Counsel to  
the Chairwoman*

Daniel J. Taylor  
*Counsel to the Ranking Member*

1015 Longworth House Office Building  
Washington, D.C. 20515-6328  
Telephone: (202) 225-7103  
Facsimile: (202) 225-7392

Kenny Marchant, Texas  
Leonard Lance, New Jersey  
Mimi Walters, California  
John Ratcliffe, Texas

Yvette D. Clarke, New York  
Jared Polis, Colorado  
Anthony Brown, Maryland  
Steve Cohen, Tennessee

August 10, 2018

The Honorable Karen L. Haas  
Clerk, U.S. House of Representatives  
Washington, DC 20515

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 Allegations Relating to Representative Markwayne Mullin."

Sincerely,

Susan W. Brooks  
Chairwoman

Theodore E. Deutch  
Ranking Member



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**115TH CONGRESS, 2ND SESSION  
U.S. HOUSE OF REPRESENTATIVES  
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**IN THE MATTER OF ALLEGATIONS RELATING TO  
REPRESENTATIVE MARKWAYNE MULLIN**

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**August 10, 2018**

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Ms. BROOKS from the Committee on Ethics submitted the following

**R E P O R T**

In accordance with House Rule XI, clauses 3(a)(2) and 3(b), the Committee on Ethics (Committee) hereby submits the following Report to the House of Representatives.

**I. INTRODUCTION**

On December 23, 2013, the Office of Congressional Ethics (OCE) sent a referral (OCE's Referral) to the Committee in which it recommended further review of allegations that Representative Markwayne Mullin, in 2013: (1) personally endorsed goods or services provided by companies he or his family owned; (2) received outside earned income, in excess of the applicable limits, from those companies; and, (3) served as a director and/or officer of the companies for compensation.

The Committee did further review the allegations OCE referred. After an extensive review, the Committee found the allegations raised several novel questions regarding the application of House rules and other standards of conduct to a Member's efforts to maintain and promote a family business. These questions were further complicated by the procedural posture of the matter, which began when Representative Mullin consulted Committee staff after his election to the House, on November 6, 2012, in order to ensure he and his family businesses would operate consistent with the applicable rules. As Representative Mullin was working with Committee staff to bring his family businesses into compliance, OCE began its separate review, and eventually referred allegations to the Committee that related to issues which were part of the Committee's advisory process. While these issues would typically be treated as advisory matters, and the Member would be given time to bring his businesses into compliance, OCE's Referral compelled the Committee to treat the issues as an investigative matter.

Ultimately, the Committee determined that Representative Mullin made a good faith effort to seek the Committee's informal guidance on numerous issues with respect to his family business. Although the Committee acknowledges that its informal, staff-level advice is not a categorical shield from future adverse actions, such advice is nevertheless

necessary to enable the House community to successfully navigate standards of conduct. Members and their staff are encouraged to diligently request the Committee's advice and, upon doing so, may rely on the advice to engage in the vetted actions. In this case, Representative Mullin sought advice from the Committee staff about his family business, and appears to have substantially complied with most of that advice. To the extent that Representative Mullin substantially complied with the Committee's advice, it would be inequitable to subject his conduct to additional review.

The Committee did determine that an accounting error led Representative Mullin to inadvertently fail to fully follow part of the Committee's advice. Committee staff advised Representative Mullin to transfer ownership of a company to his spouse. Representative Mullin transferred the ownership, but the company failed to terminate an automatic disbursement process. That mistake led Representative Mullin to personally receive \$40,000 from the company in 2013, despite his lack of ownership. The money was paid into a joint account held by both Representative Mullin and his spouse, the rightful payee. However, the Committee found that, to bring Representative Mullin into full compliance with the Committee's guidance, he must return \$40,000 to that company.

One of the issues on which Representative Mullin sought staff-level guidance was his participation in advertisements for his family business. Representative Mullin complied with the advice he received on this issue. However, the Committee believes that, going forward, the House would be better served by different guidance with regard to Member participation in advertisements. Therefore, the Committee takes this opportunity to clarify its guidance with respect to Member participation in advertisements or other commercial endorsements of goods or services. Under no circumstances should a Member be actively involved in personally selling or endorsing goods or services in which the Member has a financial interest.<sup>1</sup>

Accordingly, the Committee unanimously voted to adopt this Report, and take no further action. Upon publication of this Report and repayment of \$40,000 to Mullin Plumbing West Division, the Committee considers the matter closed.

## **II. PROCEDURAL HISTORY**

The Committee received OCE's Referral on December 23, 2013. Representative Mullin then submitted a response to the Committee, through counsel.<sup>2</sup> On March 24, 2014, the Committee published OCE's Referral and Representative Mullin's response, and publicly announced that it would investigate the matter pursuant to Committee Rule 18(a).

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<sup>1</sup> The House has long recognized that Members may receive income from the royalties of book sales. This restriction does not change the Committee's longstanding guidance permitting Members' participation in the promotion of their own books, so long as the Member does so in their personal capacity and without using any official resources.

<sup>2</sup> Letter from J. Baran to Representative Conaway and Representative Sánchez, Jan. 22, 2014 (*hereinafter* January 22, 2014 Submission).



In the course of its investigation, the Committee issued multiple requests for information to Representative Mullin and to the accountants for the plumbing and home maintenance companies owned by Representative Mullin at the time of his election to Congress (collectively, the “Mullin Companies”). In response to those requests, the Committee received and reviewed thousands of pages of materials. The Committee also interviewed the Chief Financial Officer (CFO) of the Mullin Companies, the companies’ accountants, and Representative Mullin, who appeared voluntarily before the Committee.

### III. HOUSE RULES, LAWS, REGULATIONS, AND OTHER STANDARDS OF CONDUCT

#### A. *Personal Endorsement of Commercial Goods and Services*

House Rule XXIII, clause 3, provides that a House Member “may not receive compensation and may not permit compensation to accrue to his beneficial interest from any source, the receipt of which would occur by virtue of influence improperly exerted from his position in Congress.” In addition, the Code of Ethics for Government Service (Code of Ethics), which applies to House Members, states that a federal official should never accept “benefits under circumstances which might be construed by reasonable persons as influencing the performance of official duties.”<sup>3</sup> Other House rules and standards regarding outside employment and outside earned income may also implicate these standards of conduct.<sup>4</sup> In discussing these standards of conduct, the *Ethics Manual* broadly states: “[A] Member should not undertake any outside employment that would involve the Member personally in the selling or endorsement of any goods or services.”<sup>5</sup>

#### B. *Outside Earned Income*

House Rule XXV, clause 4(d)(1), defines “outside earned income” to include “wages, salaries, fees, and other amounts received . . . as compensation for personal services.” Any such earned income is subject to limits established by the Ethics in Government Act (EIGA) and House Rule XXV, clause 1(a)(1), which provide that a Member may not have outside earned income attributable to a calendar year that exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of that calendar year. For calendar year 2013, the outside earned income limit for a Member was \$26,955.<sup>6</sup>

The House Rules include a provision for the treatment of payments a Member receives from a family-owned business. House Rule XXV, clause 4(d)(1)(D) states:

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<sup>3</sup> Code of Ethics for Government Service ¶ 5.

<sup>4</sup> See, e.g., Code of Ethics for Government Service ¶ 8; House Rule XXV, cl. 2; 5 U.S.C. app. § 501(a).

<sup>5</sup> *House Ethics Manual (2008)* (hereinafter *Ethics Manual*) at 188.

<sup>6</sup> The outside earned income limit for other relevant years has been: \$26,955 (2014); \$27,225 (2015); \$27,495 (2016); \$27,765 (2017); \$28,050 (2018).

[I]n the case of a Member . . . engaged in a trade or business in which such individual or the family of such individual holds a controlling interest and in which both personal services and capital are income-producing factors, any amount received by the Member [is not included in the definition of outside earned income] . . . so long as the personal services actually rendered by such individual in the trade or business do not generate a significant amount of income.”<sup>7</sup>

The Committee has stated that if a Member receives payments from a corporation that are “essentially a return on equity [invested in the company], then it would generally not be considered to be earned income.”<sup>8</sup> The *Ethics Manual* further states that “[i]n business corporations, only payment for services the Member performs is considered earned income. An increase in the value of the firm’s stock or distribution of profits is **not** considered earned income.”<sup>9</sup> However, in determining whether a payment from a corporation to a Member is a “distribution” (return on equity) or compensation for personal services, “the ‘real facts’ of a particular case would control as to whether moneys received would be deemed earned income.”<sup>10</sup> Thus, the “label or characterization placed on a . . . payment by the parties may be disregarded for purposes of the Rule,” and the payment will be considered earned income if it is “in fact attributable to any significant extent to services rendered by the Member.”<sup>11</sup>

In addition to this general guidance, the Committee has provided specific guidance with respect to S-Corporations, such as the Mullin Companies. If a Member owns an S-Corporation, the “determining factor” for whether payments from the corporation to the Member are deemed earned income “is whether the Member’s . . . personal services generate significant income for the business.”<sup>12</sup> If the Member performs services for the business that “actually generate any significant income for the business,” then some part of the payments the Member receives from the business may be deemed earned income. “However, if the Member . . . is engaged primarily in the general oversight and management or protection of his or her investment [in a business], such services would not be deemed to generate significant income.”<sup>13</sup>

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<sup>7</sup> In 2013, Representative Mullin or his spouse owned each of the Mullin Companies, which thus qualify as family-owned businesses. Based on information from Representative Mullin, it also appears that two of those companies, Mullin Plumbing, Inc. and Mullin Plumbing West Division, generated significant revenue from the sales of plumbing parts, and thus they satisfied the requirement of House Rule XXV, clause 4(d)(1)(D) that “both personal services and capital are income-producing factors [of the business].”

<sup>8</sup> See House Select Comm. On Ethics, Advisory Opinion No. 13 (October 1978) (herein after *Advisory Opinion No. 13*), reprinted in *Ethics Manual* at 364; *Ethics Manual* at 231.

<sup>9</sup> *Ethics Manual* at 231 (emphasis in original).

<sup>10</sup> *Id.*

<sup>11</sup> See *Advisory Op. No. 13*.

<sup>12</sup> *Id.* (see *Ethics Manual* at 368).

<sup>13</sup> *Id.*

C. *Compensation for Service as a Corporate Director or Officer*

House Rule XXV, clause 2(d) states that a Member “may not . . . serve for compensation as an officer or member of the board of an association, corporation, or other entity.” The Ethics Manual notes that “[a]s a general matter, Members and senior staff may serve in such capacities, but they may not be paid any directors’ fees or other compensation for that service.”<sup>14</sup>

#### IV. BACKGROUND

A. *Representative Mullin’s Business Interests and Election to the House*

Representative Mullin was elected to the House of Representatives on November 6, 2012. At that time, he owned the Mullin Companies, five S-Corporations (“S-Corps”) that were engaged in the plumbing and home maintenance industries. Representative Mullin long served as the primary spokesperson for the Mullin Companies and, as such, appeared in numerous advertisements promoting the business. These advertisements include video clips that appear on the companies’ website and in other places on the Internet. Additionally, Representative Mullin’s companies pay to air a weekly radio show in which someone from the companies, usually Representative Mullin, discusses topics related to home repair and suggests to listeners his companies can be a resource to them.

Representative Mullin was sworn into office on January 3, 2013. During the period between his election and his assumption of office, then-Representative-elect Mullin sought guidance from Committee counsel regarding various issues related to his ownership of, and work for, the Mullin Companies. Among other things, Representative Mullin discussed with Committee counsel whether the Mullin Companies could continue to use advertisements featuring Representative Mullin that had been recorded before his election, and whether he could retain his ownership of one of the S-Corps, Mullin Plumbing West Division (“Mullin West”), that had a contract with the federal government.

Committee counsel advised then-Representative-elect Mullin that the Mullin Companies could continue to use advertisements, featuring him, that were recorded before his election.<sup>15</sup> Committee counsel was not asked, and did not discuss, whether Representative Mullin could record new advertisements, featuring him, after his election. However, Representative Mullin asserts that, when Committee staff met with him after his election to the House, Committee staff understood that he regularly participated in the weekly radio program, and that he would continue to participate in that program as a Member, provided that he was not compensated for such participation. Representative

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<sup>14</sup> *Ethics Manual* at 222.

<sup>15</sup> Committee counsel made clear to Representative Mullin that any previously recorded advertisements that featured him could not make any reference to his status as a House Member. As far as the Committee is aware, Representative Mullin has complied with this requirement in all of his advertisements for the Mullin Companies.

Mullin cites that understanding as proof Committee staff did not intend to restrict his ability to appear in other forms of advertising for the companies.<sup>16</sup>

Committee counsel also advised Representative Mullin to transfer ownership of Mullin West to his wife, to avoid any issue with a federal statute that prohibits a Member from entering into contracts with the federal government.<sup>17</sup> Representative Mullin effected this transfer on December 31, 2012. Committee counsel also recommended several minor modifications to the business operations of the Mullin Companies to ensure compliance with House rules and federal law. Representative Mullin accepted these recommendations and the Mullin Companies made the appropriate changes.

After joining Congress, Representative Mullin continued to host the weekly radio show. Representative Mullin also continued to appear in radio, television, and web advertisements for the Mullin Companies. Those advertisements generally recommend contacting the Mullin Companies for the audience's plumbing and heating needs.

*B. Payments from the Mullin Companies to Representative Mullin in 2013*

In 2013, Representative Mullin's first year in the House of Representatives, the Mullin Companies made payments to him totaling \$640,110.44. Of that amount, the Committee determined \$545,110.44 was "passed through" Representative Mullin to other recipients, including his father (as payment for purchase of the businesses from him)<sup>18</sup> and state and federal governments (for payment of the Mullin Companies' tax obligations). Representative Mullin, through counsel, described the "pass through" payments as: "\$387,425: tax payments to the IRS and to the Oklahoma Tax Commission; \$69,983.44: payment to Rep. Mullin's father for purchase of the business; \$87,702: for purchase of rental properties."<sup>19</sup> The Committee found these descriptions to be accurate. Such pass-through payments are standard for S-Corps, and do not necessarily represent payments "to" an S-Corp's owner. In addition to these pass-through payments, in 2013, Representative Mullin did receive, and retain, \$95,000 in payments from two of the Mullin Companies: \$40,000 from Mullin West, and \$55,000 from Mullin Plumbing, Inc. ("Mullin Plumbing").

Representative Mullin has characterized these payments as "distributions," which he asserts were returns on capital he invested in the companies. Representative Mullin had capital invested in Mullin Plumbing in 2013. However, because he transferred ownership of Mullin West to his wife in 2012, Representative Mullin did not have capital invested in

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<sup>16</sup> Neither the Committee nor Representative Mullin have any contemporaneous records reflecting a discussion of the radio show. However, the Committee has no reason to believe that Representative Mullin's recollection of the discussion of the radio show is incorrect.

<sup>17</sup> Mullin West held a contract with a federal agency, which could have implicated the statutory prohibition on a Member contracting with the federal government. *See* 18 U.S.C. § 431. Consistent with precedent, Committee staff advised Representative Mullin to transfer ownership of Mullin West to his spouse.

<sup>18</sup> Representative Mullin's father started the Mullin Companies, and eventually sold them to Representative Mullin pursuant to an agreement whereby the Mullin Companies make monthly payments to Representative Mullin's father. The Committee understands that the amount of each payment is deducted from Representative Mullin's ownership interest in the Mullin Companies.

<sup>19</sup> *See* January 22, 2014 Submission at 4.

Mullin West in 2013. Some, but not all, of the checks from Mullin West to Representative Mullin in 2013 include “DIST” on the Memo line.

Although the payments to Representative Mullin from Mullin West and Mullin Plumbing raise similar legal issues, the Committee’s investigation revealed one significant difference between them. Mullin Plumbing intended to and did pay \$55,000 to Representative Mullin in 2013, while Mullin West paid him \$40,000 due to an apparent error in the company’s payment processes. Those payments were the result of an automatic disbursement process of \$5,000 monthly payments to Representative Mullin. Those payments were not terminated when Representative Mullin transferred ownership of Mullin West to his spouse. This seems to have occurred, in part, because Representative Mullin did not inform the CFO of the Mullin Companies of the change in ownership when it took effect. The payments were ultimately stopped in September 2013, shortly after OCE initiated its preliminary review of Representative Mullin’s involvement with the Mullin Companies. Representative Mullin did not notice the continued payments because they were automatically deposited into a joint account held by Representative Mullin and his spouse, and Representative Mullin did not view the accounts because his spouse managed the family’s finances. Nonetheless, Representative Mullin did receive the payments, and has never returned them.

*C. Representative Mullin’s Alleged Service as the President and Director of the Mullin Companies*

OCE found substantial reason to believe Representative Mullin, after he became a House Member, served as a member of the Boards of Directors of each of the Mullin Companies and also as the President of at least some of the companies. OCE suggested that some portion of the payments Representative Mullin received from the companies in 2013 “may have” been compensation for serving as a director and/or officer of the companies.<sup>20</sup> However, OCE did not provide any basis for connecting the payments Representative Mullin received to any role he had as a Director or officer. Indeed, it is not clear that Representative Mullin even served in these roles after 2012.

According to OCE’s summary of its interview with Representative Mullin, which was not recorded or transcribed, Representative Mullin stated that in 2013 he served on the Board of Directors of each of the five S-Corps that made up the Mullin Companies.<sup>21</sup> However, in testimony to the Committee, Representative Mullin stated that none of the Mullin Companies had a Board of Directors in 2013, and that he was thus not a Director of any company.<sup>22</sup> The CFO of the Mullin Companies confirmed that none of the companies has a Board of Directors.<sup>23</sup>

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<sup>20</sup> See OCE Referral at 15.

<sup>21</sup> See OCE’s Memorandum of Interview with Representative Mullin at ¶¶ 4, 17, 24, 29, 33 (Ex. 2 to OCE’s Referral).

<sup>22</sup> See 18(a) Interview of Representative Mullin. Representative Mullin told the Committee the Mullin Companies had a “Leadership Team,” rather than a formal Board of Directors. See *id.* It is possible Representative Mullin confused these concepts when speaking with OCE.

<sup>23</sup> See 18(a) Interview of Mullin Companies CFO.

The record is less clear with respect to whether Representative Mullin served as an officer of the Mullin Companies after he became a House Member. Representative Mullin told OCE that he gave up his position as President of the Mullin Companies when he was elected to the House.<sup>24</sup> However, a 2014 written submission to the Committee stated that he continued to serve as President.<sup>25</sup> When asked in his Committee interview whether he was still the President, Representative Mullin initially said “I don’t think so. I don’t know exactly how that’s laid out.”<sup>26</sup> When shown his 2014 written submission, Representative Mullin changed his answer and stated he was still the President of the various Mullin Companies.<sup>27</sup> The Mullin Companies’ CFO also told OCE in 2013 that Representative Mullin was still serving as President.<sup>28</sup>

## V. FINDINGS

### A. *Representative Mullin’s Consultations with the Committee*

Representative Mullin initially approached the Committee voluntarily, after his election to the House, to discuss a range of issues related to his ownership of, and involvement with, the Mullin Companies. During those discussions, Committee staff advised Representative Mullin to transfer ownership of Mullin West to his wife, and recommended several minor modifications to the business operations of the Mullin Companies. Representative Mullin followed that guidance. Committee staff also informally advised Representative Mullin that the Mullin Companies could re-use advertisements, which featured him and were recorded before his House election, under certain conditions.<sup>29</sup> Staff did not discuss whether Representative Mullin could film new advertisements for the Mullin Companies. However, the record indicates that Representative Mullin asked whether he could continue to participate in a weekly radio program the Mullin Companies paid for, in which he discussed common home maintenance issues, and that Committee staff said Representative Mullin could continue to participate in that program as a Member, provided that he was not compensated for such participation.

The Committee has long encouraged House Members and staff to avail themselves of the guidance of the Committee’s nonpartisan, professional staff. The rules governing outside employment often require a fact-specific analysis, and Members are encouraged to conduct that analysis with the guidance of the Committee’s nonpartisan, professional staff.

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<sup>24</sup> See OCE’s Memorandum of Interview with Representative Mullin at ¶ 4 (Ex. 2 to OCE’s Referral).

<sup>25</sup> See Letter from J. Baran to Representative Conaway and Representative Sanchez, Mar. 24, 2014, at 5-6.

<sup>26</sup> See 18(a) Interview of Representative Mullin.

<sup>27</sup> See *id.*

<sup>28</sup> See OCE’s Memorandum of Interview with Mullin Plumbing CFO at ¶¶ 7, 10 (Ex. 4 to OCE’s Referral).

<sup>29</sup> In an email to Representative Mullin’s Chief of Staff, Tom Rust stated that the Committee’s guidance during staff’s meeting with Representative Mullin was not memorialized in writing, but that staff told Representative Mullin the Mullin Companies could re-use advertisements filmed before his House election if the companies were not fiduciary businesses and the advertisements made no reference to Representative Mullin’s position in Congress. See OCE’s Referral, Ex. 11.

Although staff-level advice is not a categorical shield from future adverse actions by this Committee, such advice is nevertheless necessary to enable the House community to successfully navigate standards of conduct. Members and their staff are encouraged to diligently request the Committee's advice and, upon doing so, Members and their staff may rely on the advice to engage in the vetted actions.<sup>30</sup>

OCE, when confronted with Representative Mullin's evidence of consultation with the Committee staff, examined that consultation to determine whether it completely and accurately disclosed the facts of his proposed actions. As the Committee has stated in the past, this is a proper avenue of inquiry.<sup>31</sup> Neither formal advice from the Committee nor informal staff-level guidance will suffice to protect a Member when that advice is based on inaccurate facts, or when that advice endorses a course of action fundamentally different from the course actually taken. However, where Representative Mullin substantially complied with those consultations, the Committee believes that it would be inequitable to determine whether Representative Mullin's actions would constitute a violation.

*B. Personal Endorsement of Goods and Services*

The Committee has long advised that "a Member should not undertake any outside employment that would involve the Member personally in the selling or endorsement of any goods or services."<sup>32</sup> While there is no specific law, rule, or other standard of conduct that expressly forbids such employment, the Committee has stated that this prohibition arises from the House Rules and the Code of Ethics for Government Service, which prohibit a Member from any use of their office or official position to obtain compensation or other benefits.<sup>33</sup>

There is no question that Representative Mullin personally endorsed the Mullin Companies' goods and services, both before and after he became a Member of Congress, through a weekly radio program and advertisements for radio, television, and the web. However, Representative Mullin specifically asked the Committee's staff whether the Mullin Companies could continue to use advertisements featuring Representative Mullin, which he had recorded before his election. Committee counsel advised Representative Mullin that this would be permissible, as long as they made no reference to his status as a Member. Representative Mullin also believes that he asked Committee staff whether he could continue to participate in a weekly radio program the Mullin Companies paid for, in which he discussed common home maintenance issues. Representative Mullin recalls that Committee staff told him that he could continue to participate in the radio show, as long as he was not compensated for that participation.

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<sup>30</sup> See House Comm. on Ethics, *In the Matter of Allegations Relating to Representative Tom Petri*, H. Rep. 113-666, 113<sup>th</sup> Cong., 2d Sess. at 6-7 (2014).

<sup>31</sup> See *id.* at 7.

<sup>32</sup> *Ethics Manual* at 188.

<sup>33</sup> *Id.*

Representative Mullin's conduct conformed with this advice. However, going forward, the Committee believes that the House would be better served by different guidance with regard to Member participation in advertisements. Because this was informal, staff-level guidance, it is not subject to the same rule-based safe harbor for formal written guidance but Members and their staff are encouraged to diligently request the Committee's advice and, upon doing so, may rely on the advice to engage in the vetted actions. Thus, the Committee believes it would be inequitable to punish him when he relied on that advice.<sup>34</sup>

Further, Representative Mullin was not an employee of the Mullin Companies. He was the owner of Mullin Plumbing and his wife was the owner of Mullin West. The Committee has not previously addressed whether the prohibition on the selling or endorsing of goods or services extends beyond employment to other situations in which the Member has a financial interest. Some of the laws, rules, and other standards of conduct pertaining to outside employment make distinctions between employment and other financial interests. However, the relevant rules and other standards of conduct pertaining to commercial endorsements are not so limited. Instead, House Rule XXIII, clause 3 applies to the receipt or accrual of compensation to the Member's "beneficial interest from any source." And the Code of Ethics for Government Service applies to the acceptance by the Member or the Member's family of "favors or benefits."<sup>35</sup> Thus, there is no reason to believe that the prohibition on the selling or endorsing of goods or services is limited only to employment situations.

Members of the House of Representatives are widely recognizable public servants. Even when they make no explicit mention of their official position, when Members actively engage in commercial sales or endorsements, they may create the perception that they are making use of their official position for commercial gain. Members must at all times avoid even the appearance that they are monetizing their public role for personal gain.

Therefore, the Committee takes this opportunity to clarify for the whole House community that a Member should not be actively involved in personally selling or endorsing goods or services in which the Member has a financial interest.<sup>36</sup> As such, Representative Mullin should now understand that, going forward, he cannot participate in the weekly radio program or the advertisements for radio, television, and the web. This restriction only applies to the active participation in selling or endorsing goods or services. Thus, it does not require Representative Mullin to remove his name from the Mullin Companies,<sup>37</sup> nor does it require the Mullin Companies to scour the Internet to take down

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<sup>34</sup> The Committee notes that the more comprehensive and consistent one's consultation with the Committee or its staff, the more protection the Committee can offer in response to actions related to that consultation.

<sup>35</sup> Code of Ethics for Government Service ¶ 5.

<sup>36</sup> The House has long recognized that Members may receive income from the royalties of book sales. This restriction does not change the Committee's longstanding guidance permitting Members' participate in the promotion of their own books, so long as the Member does so in their personal capacity and without using any official resources.

<sup>37</sup> There are some restrictions on the use of a Member's name for certain businesses (*e.g.*, businesses that engage in fiduciary professions). And a Member of Congress choosing to add his or her name to a



old videos of advertisements featuring Representative Mullin. Instead, the Mullin Companies can no longer take active steps to promote Representative Mullin's endorsement of the companies. Thus, the Mullin Companies cannot film any new advertisements featuring Representative Mullin, and old advertisements featuring Representative Mullin should be removed from the Mullin Companies' website.

### C. *Outside Earned Income Limit*

The Ethics in Government Act (EIGA) states, "a Member . . . may not in any calendar year have outside earned income attributable to such calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of such calendar year."<sup>38</sup> House Rule XXVI, clause 2, provides that Title I of EIGA "shall be considered Rules of the House as they pertain to Members . . . of the House." Accordingly, House Rule XXV, clause 1(a)(1), incorporates EIGA's prohibition against Members earning outside earned income in excess of the annual outside earned income limit. For the 2013 calendar year, the limit was \$26,955.<sup>39</sup>

Prior to 2013, Representative Mullin received payments from the various Mullin Companies which were explicitly designated as "salary."<sup>40</sup> Once Representative Mullin joined the House, he stopped receiving "salary" payments, a change he, and the Mullin Companies' CFO, attributed to spending significantly less time managing the companies, due to his full-time work as a congressman.<sup>41</sup> However, Representative Mullin did receive payments totaling \$95,000 from two of the Mullin Companies in 2013: \$55,000 from Mullin Plumbing and \$40,000 from Mullin West. Representative Mullin has consistently characterized these payments as "distributions" – meaning a return on equity for capital he invested in the companies – not salary or other compensation for services rendered to the

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commercial enterprise after election to the House might be the kind of active endorsement of a commercial enterprise that would be improper. However, where no other restriction applies, the simple retention of a Member's name on a business does not violate these rules.

<sup>38</sup> 5 U.S.C. app. § 501(a)(1).

<sup>39</sup> See Memorandum from the Committee on Ethics to All Members, Officers and Employees re: Change to Financial Disclosure Reporting Obligations and Reminder Regarding Periodic Transaction Reporting Requirement (Jan. 24, 2013).

<sup>40</sup> See OCE's Memorandum of Interview with Mullin Plumbing CFO at ¶ 13; see also 18(a) Interview of Mullin Companies CFO.

<sup>41</sup> See 18(a) Interview of Representative Mullin; see also 18(a) Interview of Mullin Companies CFO. The CFO of the Mullin Companies confirmed Representative Mullin did significantly less work for the companies once he became a Member of Congress. See *id.* ("He used to come to work every day at 7 o'clock, and that obviously changed. He would hire and fire before, and now he doesn't. He would be involved in insurance renewals, banking decisions, policy decisions, and now he does not, he's not involved in those things. He used to run service calls; doesn't do that anymore. He used to oversee our shop; he doesn't do that anymore . . . . Now we will involve him on more of a general basis, just as an informative. I mean, obviously they are still his companies, so we as a consideration just let him know what's going on with them. If we change our uniforms, we might let him know that. If we – I mean, most of the time it's just reactionary. It's just an informative, this is what we've done. He might give his opinion, we might make changes based on that and then we might not.").

companies.<sup>42</sup> The CFO of the Mullin Companies has also characterized the payments as distributions, not salary or other compensation.<sup>43</sup>

OCE's Referral suggested that, despite the "distribution" label applied to the payments, they were in fact compensation for Representative Mullin's services to the Mullin Companies, namely the advertisements he continued to record for the companies after joining the House. OCE supported this finding in two ways. First, OCE cited an interview with an accountant for the Mullin Companies. OCE's summary of the interview, which was not recorded or transcribed, states that the accountant explained the 2013 "distributions" to Representative Mullin were made "in lieu of salary," which OCE interpreted as suggesting that the "distributions" were paid to make up for salary that Representative Mullin did not receive. Second, OCE found that the advertisements generated revenue for the Mullin Companies, and therefore should be characterized as outside earned income.

With respect to OCE's first point, Committee staff asked the Mullin Companies' accountant about the statement OCE relied on. The accountant stated: "The comment here, 'in lieu of salary,' I can't imagine me saying that because it's really not true."<sup>44</sup> The accountant also told Committee staff: "I know in 2013 he drew no salary from the Mullin companies because he was at that time a Representative of the House, and he wasn't working near as much in Tulsa for the company. He elected not to take a salary."<sup>45</sup> When asked how he came to this understanding, the accountant said Representative Mullin told him he was not taking a salary in 2013.<sup>46</sup> Based on all the available evidence, the Committee found that neither Representative Mullin nor the Mullin Companies or their accountant characterized the 2013 payments as salary or other compensation, or considered them as such.

But this does not settle the matter. The Committee has previously stated that "the label or characterization placed on a transaction, arrangement or payment by the parties may be disregarded for the purpose of [House Rule XXV]" and "the characterization of such amounts as partnership distributive share, dividends, rent, interest, payment for a capital asset, or the like, will not serve to prevent the application of [House] Rule 25 to

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<sup>42</sup> See OCE Memorandum of Interview with Representative Mullin at ¶¶ 11-13, 18-21, 26, 34 (Ex. 2 to OCE's Referral); see also January 22, 2014 Submission at 1, 4-7.

<sup>43</sup> See Letter from Mullin Plumbing CFO to OCE, Sept. 23, 2013 (Ex. 8 to OCE's Referral); see also 18(a) Interview of Mullin Companies CFO (Q. [T]he first sentence [of your letter to OCE] says, for the period of January 1, 2013, to current date, Markwayne Mullin has not received any income in the form of salary from any of the sources listed or any entities affiliated with these sources, and then there's a listing of each of the Mullin companies. Is that accurate? A. Yes, it is. Q. The next paragraph is, sources of income not considered salary for Markwayne Mullin from January 1, 2013, to September 13, 2013, and it includes distributions. When you say, 'sources of income not considered salary,' what does that mean? A. It was not run through our payroll system. It was not considered a salary, it was considered a distribution.").

<sup>44</sup> See 18(a) Interview of CPA.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

such amounts.”<sup>47</sup> The Committee is, therefore, not bound to accept the characterization of money received by Representative Mullin from his business, but must look at the facts surrounding the receipts of that money to determine whether it qualifies as earned or unearned income.

Further, the Mullin Companies are all S-Corps. The Committee’s longstanding guidance with respect to S-Corps is that the “determining factor” for whether payments from the business to the Member are deemed earned income “is whether the Member’s . . . personal services generate significant income for the business.”<sup>48</sup> If the Member performs services for the business that “actually generate any significant income for the business,” then some part of the payments the Member receives from the business may be deemed earned income. “However, if the Member . . . is engaged primarily in the general oversight and management or protection of his or her investment [in a business], such services would not be deemed to generate significant income.”<sup>49</sup>

Because Representative Mullin was the owner of Mullin Plumbing but not of Mullin West, the Committee considered the payments from the two companies separately.

With respect to the payments from Mullin Plumbing, the Committee determined that participation in the radio show and filming new advertisements did generate significant income for Mullin Plumbing.<sup>50</sup> In his interview, Representative Mullin stated numerous times, in various ways, that the advertisements he appeared in were an important driver of revenues for the Mullin Companies. For example, when asked the purpose of the advertisements, Representative Mullin stated, “It keeps customers coming in. It keeps us busy. Any company that has to advertise, they do it for a particular purpose. They don’t do it just for the sake of spending money.”<sup>51</sup>

Because the radio show and advertisements were a driver of revenue, and not simply general oversight and management of the firm, some portion of the payments that Mullin Plumbing characterized as distributions should be deemed compensation, and would be subject to the outside earned income limit. For several reasons, the Committee did not assess what portion of the payments were compensation subject to the outside earned income limit.

First, for calendar year 2013, the outside earned income limit for a Member was \$26,955. If Representative Mullin’s actual return on equity was \$28,045, or more, his

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<sup>47</sup> See *Advisory Op. No. 13*.

<sup>48</sup> *Id.* (see *Ethics Manual* at 368).

<sup>49</sup> *Id.*

<sup>50</sup> Notably, Representative Mullin has never denied that his advertising role benefited the businesses. Instead, Representative Mullin maintains that the “family business” provision of the outside earned income rule applies to that role. More specifically, Representative Mullin contends that, in the context of a family business, a Member must be allowed to sustain the business’s brand by appearing in advertisements for the business, without being subjected to the earned income limit. This is incorrect. Participation in advertising is not “general oversight and management,” and it is not “protection of his or her investment.” Advertising, by definition, is a driver of revenue for a company. And Representative Mullin’s own statements repeatedly made this point.

<sup>51</sup> See 18(a) Interview of Representative Mullin.

earned income from Mullin Plumbing would be within the outside earned income limit. Based on the equity that Representative Mullin did have in Mullin Plumbing, \$28,045 represents a reasonable return on his equity.

Of course, the reasonableness is not dispositive. In general, the Committee will require an actual apportionment of the payments to earned income versus return on equity. However, it bears emphasis that Representative Mullin initially approached the Committee voluntarily, after his election to the House, to discuss a range of issues related to his ownership of, and involvement with, the Mullin Companies. During those discussions, Committee staff did not discuss whether Representative Mullin could film new advertisements for the Mullin Companies, or whether doing so would raise an issue with the outside earned income limit. However, staff does appear to have said that Representative Mullin could continue to participate in the radio show, provided that he was not compensated. Unfortunately, the unique treatment of income from S-Corps does not appear to have been flagged during staff's discussions with Representative Mullin. If it had been, Representative Mullin might have adjusted his actions accordingly.

Moreover, because this matter began as an advisory matter, and Representative Mullin has consistently cooperated with that process, the Committee believes it would be appropriate to treat any conclusions regarding the payments Representative Mullin received as they would be treated in the advice and education context, and to advise Representative Mullin concerning his options in the future. The Committee regularly advises Members on how to wind down certain family-owned businesses when they are elected to Congress. That process can take an extended period of time, and the Committee does not punish Members who are not compliant with the applicable House Rules during a transition period, as long as they are making a good-faith effort to follow the Committee's advice. In response to the Committee's guidance on other issues concerning the Mullin Companies, Representative Mullin has made several changes to the ownership and practices of the companies, which reflect his good-faith efforts to follow the Committee's advice.<sup>52</sup>

Accordingly, based on all of the particular circumstances of this matter, the Committee determined to resolve the issue of the payments from Mullin Plumbing without any additional action.

With respect to the payments from Mullin West, it is unnecessary to assess whether the advertisements generated significant income for the company because Representative

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<sup>52</sup> In a submission to OCE, Representative Mullin stated: “[F]ollowing my November 2012 meeting with House Ethics staff, I and others involved in the Mullin businesses structured those businesses, and my participation in them, to accord with our understanding of Ethics staff guidance. In fact, we spent numerous business hours and thousands of dollars to implement this ethics guidance, including the hiring of a new chief executive officer to replace me.” See Letter from Representative Mullin to Representative Goss and Representative Skaggs, Nov. 8, 2013, at 2 (Attached as Exhibit 1). In addition, Representative Mullin transferred ownership of Mullin West to his spouse on December 31, 2012, on the advice of Committee staff. It is true that Representative Mullin continued to receive payments from Mullin West for several months in 2013. However, it appears these payments were the result of an automated disbursement process, which was not changed when the corporate transfer occurred.

Mullin was not an owner of the company. Prior to his election to Congress, the Committee recommended that Representative Mullin transfer ownership of Mullin West to his wife. Representative Mullin did transfer the company. However, due to an accounting error, Mullin West continued to make regular payments to Representative Mullin. Given his lack of ownership in Mullin West, such payments cannot be considered distributions. Moreover, Representative Mullin does not benefit from the protection of seeking the Committee's guidance, as the mistaken payments were inconsistent with the guidance. The money was paid into a joint account held by both Representative Mullin and his spouse. However, the Committee determined, to be in full compliance with the Committee's guidance, Representative Mullin should return those payments to Mullin West.

*D. Receipt of Compensation for Service as a Director or Officer*

The Ethics in Government Act (EIGA) states, "a Member . . . shall not . . . serve for compensation as an officer or member of the board of any association, corporation, or other entity."<sup>53</sup> House Rule XXVI, clause 2, provides that Title I of EIGA "shall be considered Rules of the House as they pertain to Members . . . of the House." Accordingly, House Rule XXV, clause 2(d), incorporates EIGA's prohibition against Members serving for compensation as an officer or member of a board of a corporation, association, or other entity. Based on Representative Mullin's apparent statement to OCE that he served on the Board of Directors for each of the Mullin Companies, and his receipt of payments from two of the companies in 2013, OCE found "Representative Mullin may have received earned income for his service as an officer and as a board member."<sup>54</sup> However, if Representative Mullin told OCE that he was a Director, it appears he was mistaken. The record is clear that the Mullin Companies do not have Directors, and thus Representative Mullin could not have received compensation for service as such.

The record is less clear with respect to Representative Mullin's role as an officer of the Mullin Companies. There is evidence that Representative Mullin continued to serve as President of some or all of the Mullin Companies after he became a House Member. However, it appears that if Representative Mullin did so, it was largely on a nominal basis, and his actual responsibilities in the day-to-day operation of the companies were significantly reduced after 2012.<sup>55</sup> Further, the Committee found no evidence that any of the payments Representative Mullin received from the Mullin Companies were intended to be, or could fairly be characterized as, payments for his service as an officer of the Mullin Companies. Thus, the Committee did not find that Representative Mullin violated House Rule 25, clause 2(d).

## VI. CONCLUSION

After an extensive review, the Committee found that this matter raised several novel questions regarding the application of House rules and other standards of conduct to a Member's efforts to maintain and promote a family business. These questions were further

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<sup>53</sup> 5 U.S.C. app. § 501(a)(1).

<sup>54</sup> See OCE's Referral at 15.

<sup>55</sup> See n.41, *supra*.

complicated by the procedural posture of the matter, which began when Representative Mullin consulted Committee staff after his election to the House in order to ensure he and his family businesses would operate consistent with the applicable rules. As Representative Mullin was working with Committee staff to bring his family businesses into compliance, OCE began its separate review, and eventually referred allegations to the Committee that related to issues which were part of the Committee's advisory process. While these issues would typically be treated as advisory matters, and the Member would be given time to bring his businesses into compliance, OCE's Referral compelled the Committee to treat the issues as an investigative matter.

Ultimately, the Committee determined that Representative Mullin made a good faith effort to seek the Committee's informal guidance on numerous issues with respect to his family business. Although the Committee acknowledges that its informal, staff-level advice is not a categorical shield from future adverse actions, such advice is nevertheless necessary to enable the House community to successfully navigate standards of conduct. Members and their staff are encouraged to diligently request the Committee's advice and, upon doing so, may rely on the advice to engage in the vetted actions. In this case, Representative Mullin sought advice from the Committee staff about his family business, and appears to have substantially complied with most of that advice.

To the extent that Representative Mullin substantially complied with the Committee's advice, it would be inequitable to subject his conduct to sanction. However, the Committee determined that, to bring Representative Mullin into full compliance with the Committee's guidance, he must return \$40,000 mistakenly paid to him in 2013 by a company that he transferred to his wife in 2012.

Representative Mullin complied with the advice he received regarding his participation in advertisements for his family business. However, the Committee believes that, going forward, the House would be better served by different guidance with regard to Member participation in advertisements. Therefore, the Committee takes this opportunity to clarify its guidance with respect to Member participation in advertisements or other commercial endorsements of goods or services. Under no circumstances should a Member be actively involved in personally selling or endorsing good services in which the Member has a financial interest.<sup>56</sup>

Accordingly, the Committee unanimously voted to adopt this Report, and take no further action. Upon publication of this Report and repayment of \$40,000 to Mullin West, the Committee considers the matter closed.

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<sup>56</sup> The House has long recognized that Members may receive income from the royalties of book sales. This restriction does not change the Committee's longstanding guidance permitting Members' participate in the promotion of their own books, so long as the Member does so in their personal capacity and without using any official resources.

**VI. STATEMENT UNDER RULE XIII, 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.