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August 26, 2021

The Honorable Theodore E. Deutch, Chairman
The Honorable Jackie Walorski, Ranking Member
United States House of Representatives Committee on Ethics
1015 Longworth House Office Building
Washington, DC 20515-6228

RE: Response to the Office of Congressional Ethics Report and Findings

Dear Chairman Deutch and Ranking Member Walorski:

We represent Representative Tom Malinowski and I write in response to your letter to the Representative of July 28, 2021. In that letter, you stated that the U.S. House of Representatives Committee on Ethics (the "Committee") is conducting a review of allegations that Representative Malinowski did not file Periodic Transactions Reports ("PTRs") for stock transactions he made between 2019 and 2020, allegations which the Office of Congressional Ethics ("OCE") has reviewed and referred to the Committee. You offered Representative Malinowski an opportunity to respond to the OCE's Report concerning those allegations. Representative Malinowski appreciates the opportunity to address the allegations discussed in the OCE Report, and submits this response to the Report for the Committee's consideration.

As an initial matter, the OCE Report confirms the limited nature of the allegations concerning Representative Malinowski. After conducting a thorough investigation, the OCE's referral to this Committee concerns only Representative Malinowski's inadvertent failure to file PTRs in a timely and complete fashion. These are not new allegations—Representative Malinowski has already publicly acknowledged his failure to make such timely and complete filings, and, as discussed in more detail below, has voluntarily taken numerous steps in recent months to bring himself in compliance with his disclosure obligations. Moreover, the OCE Report expressly confirms that all of Representative Malinowski's trading activity was conducted by a third-party investment manager, Gagnon Securities ("Gagnon"), without his involvement—Representative Malinowski did not control or direct any of the trading activity at issue, and in fact the OCE Report specifically notes that Representative Malinowski had no discussions with Gagnon about his portfolio or any of the trades that Gagnon entered on his behalf. The OCE

therefore categorically dismissed any allegations of insider trading by Representative Malinowski. OCE Report at 9 n.26 ("[T]he OCE found that [Representative] Malinowski did not direct any trades or speak with Gagnon about his portfolio, and therefore no further discussion of insider trading occurs in this report.") (internal citation omitted).

In addition, all of the issues raised in the OCE Report already have been addressed by Representative Malinowski. Since he became aware of the issues with his PTRs earlier this year, Representative Malinowski has worked diligently to correct his reports and put in place measures to prevent any future problems. To that end, Representative Malinowski fully cooperated with the OCE investigation into his trading activity, filed additional PTRs and amended his financial disclosure filings to ensure complete transparency regarding his transactions, and paid all assessed late fees and committed to pay any additional applicable late fees associated with those reports. Furthermore, while not required by federal law or House Rules, Representative Malinowski also has voluntarily established a qualified blind trust ("QBT"), which will be responsible for managing his investments going forward. Transactions that occur within a QBT do not need to be disclosed on PTRs and therefore Representative Malinowski's establishment of the QBT will ensure that he should not have any PTR issues in the future.

In sum, the OCE's referral only concerns Representative Malinowski's inadvertent failure to file PTRs in a timely and complete fashion. Representative Malinowski already has publicly acknowledged the deficiencies with his prior financial disclosures, and he has taken the necessary steps both to address the issues with his prior filings and to ensure that such issues will not recur in the future. Accordingly, no further action by the Committee is warranted and this matter should be dismissed.

THE OCE REFERRAL IS LIMITED TO AN INADVERTENT FAILURE TO FILE PTRS

The OCE's findings, as reflected in its Report, make clear that this matter is limited to Representative Malinowski's inadvertent failure to file timely and complete PTRs. The OCE conducted a thorough investigation of the allegations concerning Representative Malinowski's trading activity, which included numerous document requests and witness interviews and with which Representative Malinowski fully cooperated. OCE Report at 7 ("[Representative] Malinowski, his staff, and his associates fully cooperated with this review. The Board recognizes and appreciate this cooperation."). As noted above, following its review, the OCE categorically dismissed any allegations of insider trading in its Report, concluding that "[Representative] Malinowski did not direct any trades or speak with Gagnon about his portfolio and therefore no further discussion of insider trading occurs in this report." OCE Report at 9 n.26 (internal citation omitted); *see also id.* at 7 n.18 ("The OCE found that [Representative] Malinowski did not direct Gagnon to engage in specific trades or otherwise provide direction to Gagnon about his investments."). The OCE Report does not identify any potential concerns about Representative Malinowski's conduct or compliance with applicable law other than his failure to file timely and complete financial disclosures and the Board's recommendation to this Committee is thus confined to that issue.

The OCE Report further confirms that the errors that Representative Malinowski made with respect to his PTRs were inadvertent and principally the product of a failure to submit draft filings that he timely prepared and technical mistakes in how he disclosed certain complex

financial transactions in which Gagnon engaged, such as short sales and call options. *Id.* at 9 ("Prior to March 5, 2021, [Representative] Malinowski entered reportable PTR transactions into the online reporting system, but he failed to hit the 'submit' button, which would have finalized the transactions in the online reporting system and made them publicly available on the website of the Clerk of U.S. House of Representatives."); *id.* at 12 n.50 ("Without specific guidance from the Committee regarding the disclosure of short sales, the OCE could not determine an exact number of transactions that [Representative] Malinowski omitted from his corrective PTR between January 1, 2019 and January 20, 2021."). There is no indication in the OCE Report that any of the deficiencies in Representative Malinowski's filing represented an effort to mislead or conceal any of his trading activity, which is unsurprising in light of the fact that all of his trading activity was conducted by a third-party investment manager without his involvement. Indeed, the OCE Report acknowledges the potential challenges inherent in disclosing complex instruments, noting in particular that the Committee has provided no guidance on how to disclose short sale transactions. *Id.* at 12 n.52 (noting that the Committee's Instruction Guide on Financial Disclosure Statements and Periodic Transaction Reports, "provides no explanation for how to properly report short sale transactions in a PTR or annual financial disclosure statement."). In short, the OCE Report broadly confirms what Representative Malinowski already publicly acknowledged—he inadvertently failed to file his PTRs in a timely and complete fashion and he has worked hard to correct his reports since becoming aware of the issue. *Id.* at 11 ("In the wake of his initial public admissions and the initiation of the OCE's review, [Representative] Malinowski took various steps to address his PTR filing failures.").

THE ISSUES RAISED IN THE OCE REPORT HAVE BEEN FULLY ADDRESSED

Since he became aware of the issues with his PTRs earlier this year, Representative Malinowski has worked diligently both to remedy the deficiencies in his financial disclosures and to put in place measures to prevent any future problems. As a result of those efforts the issues identified in the OCE Report have been fully addressed and no further action from this Committee is warranted. Indeed, Representative Malinowski would have addressed these issues sooner if, as is customarily the case, he had received notice from this Committee about the obvious discrepancies between his PTRs and his annual filings following the submission of his 2019 annual financial disclosure report.¹

First, Representative Malinowski hired outside counsel to conduct a thorough review of his past trading activity from the start of his tenure as a Member of Congress and, based on that review, filed additional PTRs and annual financial disclosure statements to ensure complete disclosure of his trading activity. Representative Malinowski has also paid all assessed late fees,

¹ As the OCE Report observes, "[t]he [Committee's] Instruction Guide explains that the Committee reviews and compares assets and transactions identified by filers in one report against those found in other reports to ensure compliance with disclosure requirements" and that "[w]ith respect to PTRs, the Instruction Manual states: 'if you have a transaction that was reported on a PTR but is not reported on the FD Statement or vice versa, or if the information reported on the PTR and FD Statement is not the same, the Committee may contact the filer regarding the omission or conflicting information if the explanation is not apparent from the filing.'" OCE Report at 9 n.27. In this case, however, Representative Malinowski was never contacted by anyone from the Committee regarding his PTR issues. *See id.* ("It does not appear [Representative] Malinowski was contacted by the Committee regarding his failure to file PTRs associated with the transactions listed in his 2019 annual financial disclosure statement.").

and has committed to pay any additional applicable late fees, associated with his failure to file timely PTRs.

Second, while not required to do so, Representative Malinowski has taken an additional step to ensure that these issues do not recur and voluntarily established a QBT under the Ethics in Government Act ("EIGA"). Representative Malinowski worked closely with this Committee over the last several months to establish the TPM Blind Trust, a QBT approved by this Committee which will manage Representative Malinowski's investments going forward. Under the EIGA, the trustee of the QBT is specifically precluded from informing Representative Malinowski as to what assets are held in the trust, and, as a result, Representative Malinowski is not required to file any PTRs relating to the trust's trading activities. *See* Committee Instruction Guide on Financial Disclosure Statements and Period Transaction Reports for Calendar Year 2020 at 44 ("PTRs are not required to be filed for transactions in a 'Qualified Blind Trust' as defined in section 102(f)(3) of the EIGA."). Thus, by voluntarily establishing a QBT, Representative Malinowski will not have any PTR filing obligations in the future.

CONCLUSION

In the Matter of Allegations Relating to Representative Vernon G. Buchanan, the Committee noted that financial disclosure is complex² and the appropriate remedy in cases of inadvertent filing mistakes, where no other rule is implicated, is to have the filer correct the disclosures to ensure that they are complete.³ That is the situation here. The OCE referral is limited to failure to file timely and complete PTRs, and Representative Malinowski has already taken all necessary steps to fully address those issues. In fact, he has taken the additional step of, with this Committee's guidance, voluntarily establishing a QBT to prevent these issues from ever recurring. The Committee therefore should take no further action and dismiss this matter.

Sincerely yours,



Charles E. Borden
Samuel C. Brown

² *In the Matter of Allegations Relating to Representative Vernon G. Buchanan*, 112th Cong., 2nd Sess. (July 10, 2012) at 5 ("In fact, between 30% and 50% of all Financial Disclosure Statements reviewed by the Committee each year contain errors or require a corrected statement.").

³ *Id.* ("[U]nless there is some evidence that errors or omissions are knowing or willful, or appear to be significantly related to other potential violations, the Committee notifies the filer of the error and requires that he or she submit an amendment, which is then publicly filed. Once the amendment is properly submitted, the Committee takes no further action.").

Declaration

I, Representative Tom Malinowski, declare (certify, verify, or state) under penalty of perjury that the response and factual assertions contained in the attached letter dated 8.26, 2021, relating to my response to the July 28, 2021, Committee on Ethics letter, are true and correct.

Signature:



Name:

Representative Tom Malinowski

Date:

8.26, 2021