House Calendar No. 154

114TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
114–795

IN THE MATTER OF ALLEGATIONS RELATING TO REPRESENTATIVE DAVID MCKINLEY

REPORT

OF THE

COMMITTEE ON ETHICS

SEPTEMBER 28, 2016.—Referred to the House Calendar and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ETHICS,
Washington, September 28, 2016.

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 Allegations Relating to Representative David McKinley."

Sincerely,

CHARLES W. DENT,
Chairman.
LINDA T. SÁNCHEZ,
Ranking Member.

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IN THE MATTER OF ALLEGATIONS RELATING TO REPRESENTATIVE DAVID MCKINLEY

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Mr. DENT, 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

For more than thirty-five years, the Ethics in Government Act (EIGA) has prohibited a Member of Congress from (1) "receiving compensation for affiliating with or being employed by a firm . . . which provides professional services involving a fiduciary relationship," and (2) "permit[ing] his name to be used by any such firm[.]"[1] House Rules have included a corresponding prohibition for almost twenty-five years.[2] The Committee has consistently applied these restrictions to certain firms providing professional services, including but not limited to medicine, law, and architecture. Notably, the restrictions on the use of a Member's name are absolute and are not tied to the receipt of compensation by the Member or any other affiliation with the firm. These restrictions can seem onerous to new Members, particularly for those who have worked hard over many years to build a business and their own professional reputation. However, these restrictions are an important part of the House's conflicts of interest protections, and they are applied equally to all Members.

As a part of its advisory function, the Committee routinely provides new Members with confidential guidance on how to comply with the fiduciary restrictions. EIGA expressly grants the Committee sole authority to administer these restrictions for Members

[1] 5 U.S.C. app. § 502(a).
[2] House Rule XXV, cl. 2.

of the House.[3] Thus, every two years the Committee instructs newly elected Members who are affiliated with firms that implicate the fiduciary restrictions to take steps to comply with the statute. This guidance can take the form of either informal advice provided by the Committee's nonpartisan professional staff or formal advisory opinions issued by the Chairman and Ranking Member of the Committee.[4]

The fiduciary restrictions apply immediately upon a Member's swearing-in. However, extricating a Member from a firm, whether through winding down the firm or a sale of the Member's interest along with a concomitant name change, can take time.[5] Thus, the Committee will take no adverse action against a Member who continues to be affiliated with a firm that provides professional services involving a fiduciary relationship, so long as the Member is working with the Committee in good faith to comply with the restrictions. If a Member fails to work with the Committee in good faith, or simply ignores the Committee's guidance, the Committee has no choice but to take corrective action.

In 1981, Representative David McKinley founded the engineering firm now known as McKinley & Associates (the Firm), where he was a principal and worked as an engineer until his election to Congress in 2010. The Firm also provides architectural services. From at least November 2010, until June 2011, the Committee advised Representative McKinley regarding the Firm. The Committee's advice, provided both informally and in a formal advisory opinion letter dated June 24, 2011, instructed Representative McKinley that the Firm, which carries his name, would have to change its name, given its fiduciary responsibilities.

Representative McKinley did not follow the Committee's advice. Instead, after receiving the Committee's June 24, 2011, letter, Representative McKinley ceased communicating with the Committee and sold his shares in the Firm to the Firm's Employee Stock Option Plan (ESOP), with the Firm's name intact. When Representative McKinley filed his calendar year 2011 Financial Disclosure Statement, on May 15, 2012, that statement indicated that the Firm still operated as McKinley & Associates. The Committee then contacted Representative McKinley, reiterated its guidance, and sought an explanation of Representative McKinley's efforts to comply with the fiduciary restrictions. Representative McKinley responded that, due to the sale of the firm, he was now powerless to change the name of the Firm, and absolved from doing so under the law.[6]

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[3] 5 U.S.C. app. § 503(1)(A).

[4] Formal advisory opinions confer upon the requesting individual protection from any "adverse action [by the Committee] in regard to any conduct that has been undertaken in reliance on a written opinion if the conduct conforms to the specific facts addressed in the opinion." Committee Rule 3(k). In addition, the Committee is precluded from using information provided to the Committee by a requesting individual "seeking advice regarding prospective conduct . . . as the basis for initiating an investigation," provided that the requesting individual "acts in good faith in accordance with the written advice of the Committee." Committee Rule 3(l).

[5] Some new Members attempt to convince the Committee that the fiduciary restrictions do not apply to their firm. The Committee considers any well-reasoned argument, but such consideration can delay the advisory process.

[6] Representative McKinley also argued that, despite previous Committee guidance to the contrary, the Firm should be permitted to continue to operate under its current name given the relationship of Representative McKinley's family name to the engineering industry in West Virginia. As Section III discusses, the Committee considered these arguments but concluded that they were either incorrect or insufficient to affect the outcome.

Given Representative McKinley's actions, the Chairman and Ranking Member authorized Committee staff, pursuant to Committee Rule 18(a), to investigate potential violations of EIGA and House Rules related to the Firm, its name, and its operations. Committee staff reviewed documents received from Representative McKinley and from the Firm, and interviewed the President of the Firm, who also serves as trustee for the ESOP. Following its investigation, the Committee concluded that Representative McKinley's decision to sell the Firm, with the name intact, violated EIGA and the House rules, even though Representative McKinley relied on the advice of his attorney when making that decision. Therefore the Committee voted to issue this Report, along with a Letter of Reproval to Representative McKinley for his conduct.

II. HOUSE RULES, LAWS, REGULATIONS, AND OTHER STANDARDS OF CONDUCT

EIGA Section 502(a) prohibits a Member from "receiv[ing] compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship," and from "permit[ting] his name to be used by . . . a firm, partnership, association, corporation, or other entity [that provides professional services involving a fiduciary relationship.]"[7] For both of these prohibitions, a threshold question is whether the entity in question provides services involving a fiduciary relationship. The statute does not define fiduciary. Generally, however, a fiduciary duty implies an obligation to act in another person's best interests or for that person's benefit, or a relationship of trust in which one relies on the integrity, fidelity, and judgment of another.[8] By statute, the Committee has the sole authority to administer these restrictions for Members of the House.[9]

The concern posed by these sorts of services is twofold: primarily, the House was concerned that a Member who held a fiduciary duty to a private client or clients might be susceptible to unique problems of conflicts of interest in his official duties, but also, the House believed the compensation ban was necessary to fully effectuate its ban on honoraria, which it worried could reemerge in the form of professional fees.[10] The Ethics Task Force that developed these rules advised that "in order for the underlying purposes to be achieved, 'the term fiduciary [should] not be applied in a narrow, technical sense.'"[11] The Task Force thus said that it "intend[ed] the ban to reach, for example, services such as legal, real estate, consulting and advising, insurance, medicine, *architecture*, or financial."[12] The Committee, in interpreting the ban, has relied on that list of professions, as well as the treatment of the

[7] 5 U.S.C. app. §502(a). This Section of EIGA has been incorporated into the House Rules at House Rule XXV, cl. 2.

[8] *See Black's Law Dictionary* 658, 1315 (8th ed. 2004).

[9] 5 U.S.C. app. §503(1)(A).

[10] *See House Ethics Manual* (2008) at 215 (hereinafter *Ethics Manual*) (*citing* House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101st Cong., 1st Sess. (1989)).

[11] *Id.*

[12] House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101st Cong., 1st Sess. at 16 (1989) (emphasis added).

particular industry under state agency law with respect to fiduciary duties, and regulations issued for the executive branch.[13]

If indeed a Member has an association with a firm providing fiduciary services under this definition, Section 502 bans both the receipt of compensation and the use of the Member's name. Note that the use of the Member's name is specifically not tied to compensation, so a Member cannot avoid that part of the ban simply by foregoing any compensation for use of the name. The ban, however, does not apply where the use of the Member's name in fact reflects a "family" name. The *Ethics Manual* provides an illustrative example:

> Member Jane Doe is a certified public accountant. Prior to her election, she was employed by the accounting firm of Doe & Moe, named for its founder and her father, Joe Doe. Since the firm was *not actually named* for her, it does not have to change its name upon her election.[14]

Based on that advice, and based on the legislative history of Section 502,[15] the "family name" exception is fairly specific—it refers to situations in which the "name" of the firm does not actually refer to the Member, but rather to someone in his or her family.

Another statute, 5 U.S.C. app. § 501, prohibits firms that practice before federal agencies from using the name of a Member of Congress in advertising the business.

As a practical matter, when Members are elected to the House and have associations with either of these sorts of businesses, the Committee consistently advises them that the appropriate course of action is to cease receipt of any compensation and to remove their name from the business and its materials.

Finally, House Rule XXIII, clauses 1 and 2, provide that a Member "shall behave at all times in a manner that shall reflect creditably on the House," and "shall adhere to the spirit and the letter of the Rules of the House."

III. BACKGROUND

A. HISTORY OF MCKINLEY & ASSOCIATES[16]

Prior to Representative McKinley's election to the House, he worked as a licensed professional engineer at the Firm, of which Representative McKinley was also an officer and director. According to its Web site, the Firm opened its doors in 1981. Representative McKinley told the Committee that he left a large industrial construction firm and "struck out to be a sole practitioner in architecture and engineering practice."[17] The Firm has operated as "McKinley & Associates" since 1989; prior to that, Representative

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[13] *Ethics Manual* at 216.

[14] Id. at 222 (emphasis added).

[15] *See* House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101st Cong., 1st Sess. at 16 (1989) ("the fact that a Member, officer, or employee is presently associated with a law firm founded by, and still bearing the name of, his father would not require the firm to drop the 'family' name.").

[16] As discussed more fully below at Section III.C–E, the facts regarding the nature of the Firm, its predecessors, Representative McKinley's ownership of it, and Representative McKinley's father's involvement with it have been the subject of much confusion, mostly due to incorrect representations made by Representative McKinley's former counsel. This section, rather than deal with those ambiguities, attempts to compile the facts about the Firm as the Committee currently understands them, after its investigation.

[17] Representative McKinley Appearance.

McKinley operated a sole practitioner's office focused on engineering services known as "McKinley Engineering," which he folded into the Firm once it began offering architectural services as well.

The Firm "engages in the businesses of professional engineering and architecture through its employed professionals."[18] West Virginia law deems architecture—the primary service provided by the Firm—to be a profession that involves fiduciary duties.[19]

The Firm has three offices, located in Wheeling, West Virginia; Charleston, West Virginia; and Washington, Pennsylvania, and employs more than 40 individuals. The Firm provides services in the Pittsburgh Tri-state region and other mid-Atlantic states. Its Web site indicates that past clients have included many state- and local-level government entities, as well as federal entities such as the U.S. Postal Service, Department of Defense, the National Aeronautics and Space Administration, and the Federal Aviation Administration. With respect to the Postal Service contract, according to the current President of the Firm, the Postal Service has a certification process for eligibility to perform design, construction, and renovation services for its buildings located within a given region. The firm has historically submitted an application for, and received, that certification. There is no guarantee that the Firm will receive any work after being certified, nor is it required to perform work that arises. The certification has a five-year term, during which qualified firms are eligible for selection to perform work as the Postal Service assigns it. The Firm most recently submitted its certification in August 2010, prior to Representative McKinley's election, and has removed his name from all contracting materials since his election, except for the name at the top of the letterhead.

In January 2007, the Firm established a partial ESOP. In an appearance before the Committee, Representative McKinley stated that he formed the ESOP after "my attorney and my financial advisor advised me that as we get older . . . we need to think about ownership transition . . . because I am not going to practice forever."[20] Representative McKinley explained that he did not want to sell the firm to a larger company, because he believed "they would have picked out the best people, and then everyone else would have been gone."[21] "So, what we did in respect for our employees, out of the three offices, we set up an ESOP."[22] The ESOP purchased 30 percent of the company at that time and "they had the right to purchase the remaining 70 percent."[23]

Upon his election to Congress, Representative McKinley still owned approximately 70 percent of the Firm's common stock, with the remaining 30 percent owned by the Firm's employees under the ESOP. Currently, the ESOP owns 100 percent of the Firm's equity, which it purchased via a loan for which Representative McKinley currently holds the note. (On his Financial Disclosure Statement for 2015, Representative McKinley reported two entries for "McKinley & Associates ESOP Notes Receivable," one worth between

[18] Exhibit 1.
[19] *See* W.V. Code §§ 30–12–2(4), 30–12–4. As noted in more detail *infra*, Representative McKinley has disputed and continues to dispute the finding that the Firm provides fiduciary services covered by EIGA. His dispute is wholly unsupported by the law. *See infra* n. 70.
[20] Representative McKinley Appearance.
[21] *Id.*
[22] *Id.*
[23] *Id.*

$1,000,001 and $5,000,000 and one worth between $100,001 and $250,000.[24] Representative McKinley told the Committee there is "somewhere around $3 million probably left, 3.5 maybe" on the notes.[25]) Representative McKinley also owns the building in which the Firm leases its office space; the Firm leases space back to Representative McKinley for a personal office unrelated to his official duties. Representative McKinley's wife serves as Secretary of the Firm's Board and is a Vice President of the Firm. His daughter-in-law is an employee of the Firm and partial owner of the ESOP, and his oldest son is the ESOP's financial advisor.

Representative McKinley's father, Johnson B. McKinley, was also a licensed professional engineer. Johnson McKinley maintained a one-man office as a consulting engineer in Wheeling, West Virginia, from the 1950s until his retirement in the 1980s. Johnson McKinley's practice during those years was most commonly called "Johnson B. McKinley, Consulting Engineer," but Johnson McKinley also appears to have done business under the following names:

- Engineer—J.B. McKinley
- Eng'r—J.B. McKinley
- J.B. McKinley, Eng'r
- J.B. McKinley, P.E.
- J.B. McKinley Engineers
- Johnson B. McKinley
- Johnson B. McKinley, P.E.
- Johnson McKinley Consulting Eng'r
- Johnson McKinley Consulting Engineer[26]

Although this list did not include the name "McKinley Engineering," Representative McKinley, through his counsel, has stated that the name "Johnson B. McKinley Engineering" was also used at some point. Regardless, it is notable that each iteration of Johnson B. McKinley's business appears to have used not only his last name, but also either his first name or first and middle initials. This fact distinguishes Representative McKinley's firm, McKinley & Associates, from each of his father's businesses.

Representative McKinley worked with his father for approximately two years prior to establishing the Firm in 1981, which ultimately became "custodian of all of the drawings, files, and other assets accumulated" by Representative McKinley's father during his career as an engineer, and also currently serves many of the same clients that his father did.[27] Representative McKinley's letters stress that the name "McKinley" has been associated with engineering services in the Wheeling area since approximately 1950. Representative McKinley, through counsel, has also asserted that the Firm also made several payments to Johnson McKinley, acting as a consultant to the Firm, in the 1980s.[28] However, Johnson

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[24] Representative McKinley Financial Disclosure Statement (2015).

[25] Representative McKinley Appearance.

[26] Exhibit 2. Note that "Eng'r" is a common abbreviation for "Engineer." The abbreviation for "Engineering" is "Eng'g." *See, e.g., The Bluebook: A Uniform System of Citation* (20th Ed.), at Table 6.

[27] Exhibit 3.

[28] This assertion is based solely on Representative McKinley's recollections. Representative McKinley's counsel noted that Representative McKinley does not have access to any payment records from this period, which was over 30 years ago. *See* Letter from J. Baran and R. Walker to Chairman Dent and Ranking Member Sanchez, Apr. 19, 2016, at 1–2.

McKinley was never on the payroll of the Firm, and maintained his own business when his son started the Firm in 1981.

B. INITIAL REQUESTS FOR ADVICE AFTER REPRESENTATIVE MCKINLEY'S ELECTION

Representative McKinley has told the Committee that on the night of his election to the House, November 2, 2010, one of his corporate consultants "surprisingly asked me, he said, are you sure you are going to be able to continue your relationship with your company?" To answer this question, Representative McKinley turned to Committee staff several days later. On November 5, 2010, following a call with Representative McKinley, Committee staff provided informal guidance via email, which stated staff's opinion that the Firm would need to change its name, based on the legal regime discussed at Section II.[29] While Representative McKinley, in his appearance before the Committee, characterized this informal advice as a "maybe," his reaction at the time made clear that he understood that the guidance was quite clear. As he wrote to associates, "How absurd is that advice. They expect me to change the name of my company!!! . . . I told her that her advice was BS."[30] Later, when an unnamed Committee staff member told Representative McKinley during new Member orientation, on or about November 14, 2010, that he may have to change the firm's name, he replied that the next time they heard from him it would be through his attorney.[31] At this time, Representative McKinley also personally met with the then-Chairman of the Committee, Representative Jo Bonner, and expressed his concerns. Representative Bonner apparently mentioned the possibility of a waiver—although, because there is no record of the meeting, it is unclear what he meant by that—and suggested that Representative McKinley speak to the then-counsel to the Committee Chairman.

Almost immediately upon receiving staff's informal advice, Representative McKinley sought alternative advice from other sources. On November 10, 2010, an official with the National Republican Congressional Committee (NRCC) sent an email to Representative McKinley, recounting the NRCC official's conversation with a former counsel to the Committee, stating that "Mr. McKinley, if he doesn't want to worry about changing the name of his firm, should probably think about who he plans to divest his interest to. If it happens to be a familial relative with the same name, he would most likely not have to change the name of the whole firm. If it is to a different individual, it likely would not be able to stay with his name on it."[32]

This email from the NRCC official was the first of many discussions between Representative McKinley and his advisors about selling his stake in the Firm to obviate some or all of the ethical questions surrounding it. Importantly, as discussed more fully below, Representative McKinley did not inform Committee staff of those discussions until after he had received the Committee's formal opinion that he was required to change the Firm's name, and after

[29] Exhibit 4 ("The informal opinion of the Committee staff is that these [fiduciary services] restrictions would necessitate changing the name of your firm.")
[30] *See id.*
[31] See Exhibit 6 at 7.
[32] Exhibit 7 (emphasis added).

he had already agreed to sell the Firm, with the name intact. Further, based on the Committee's investigation, the matter of Representative McKinley selling his stake in the Firm is only partially related to his election to the House or the requirements of EIGA. While it is true that Representative McKinley may have mistakenly viewed full divestment as a solution to the ethical issues the Firm presented for him, it is not the only reason for such a sale. According to statements by the Firm's attorney and its current president, Representative McKinley and others at the Firm had long intended to convert the Firm to a fully-employee-owned business, irrespective of Representative McKinley's political ambitions.[33] Moreover, at least this initial email from the NRCC official recognized that selling the Firm was not likely to remove the requirement to change its name.

Eventually, however, Representative McKinley and his advisors developed the incorrect theory that selling the Firm would indeed allow it to continue operations as "McKinley & Associates." On November 24, 2010, Representative McKinley received an email from his attorney, Charles J. Kaiser. Mr. Kaiser, a West Virginia attorney who "focuses his practice on corporate law, commercial law and corporate reorganizations,"[34] and who, to the Committee's knowledge, had not represented any individual before this Committee, advised Representative McKinley that "If McKinley & Associates is considered to be a firm providing professional services involving a fiduciary relationship, then it appears that you are left with two choices: (1) change the name, or (2) completely divest yourself of your interest in the company (this appears to include [Mrs. McKinley] as well.)"[35] Mr. Kaiser provided no citation to authority to support his assertion that the divestiture would negate the need for a name change. Nor did he provide any reasoning for his analysis, which was contrary to the assessment provided by the former Committee counsel consulted by the NRCC official.

Mr. Kaiser repeated his analysis in an email to the NRCC official on November 29, 2010.[36] Again, he failed to provide any rationale for why selling the firm to the ESOP would resolve the problem of the Firm's name. The next day, Mr. Kaiser wrote a letter to the then-Counsel to the Chairman of the Committee. Mr. Kaiser was not nearly as certain of his position in that letter, noting the Firm's desire to "explore the possibility of retaining the name McKinley & Associates, Inc. if Congressman-elect McKinley would sever his other relationships with the business."[37]

A week later, on December 7, 2010, then-Counsel to the Chairman and Committee staff responded to Mr. Kaiser's letter via telephone; Mr. Kaiser memorialized his recollection of that conversation in an email to Representative McKinley, the NRCC official, and an employee of the Firm.[38] Mr. Kaiser explained that the staffers had provided their opinion that the Firm would have to change its name unless it qualified for the "family name exception."[39] He

[33] See Exhibit 8; Interview of Firm President.
[34] Phillips, Gardill, Kaiser & Altmeyer, PLLC, "Kaiser, Charles J." *available at* http://www.pgka.com/profiles_detail.php?profile_ID=7 (last accessed May 17, 2016).
[35] Exhibit 9.
[36] Exhibit 10.
[37] Exhibit 1.
[38] Exhibit 11.
[39] *Id.*

noted that staff suggested that Representative McKinley request a written advisory opinion, but that "[b]ecause the Committee will have a number of similar written advice requests from new Members, it may well take some time to work through all of the opinions and the name can remain the same until the opinion is rendered."[40] Finally, Mr. Kaiser's own words demonstrate that he recognized, at this early juncture, that the question of the name of the Firm was distinct from questions of Representative McKinley's compensation or position on the board of the Firm: "[b]ecause *the 'family name exception' does not eliminate the other two prohibitions* (i.e. compensation and management affiliation), I believe that [Representative McKinley] will have to deal with the management structure and ownership of McKinley & Associates, Inc. in any event."[41]

C. REPRESENTATIVE MCKINLEY'S FORMAL ADVISORY OPINION

In early January 2011, Representative McKinley submitted a formal request for an advisory opinion regarding the name of the Firm. In that request, Representative McKinley's attorney provided the following statement regarding Johnson McKinley's affiliation with the Firm:

> McKinley & Associates, Inc. *and its predecessor McKinley Engineering* were the outgrowth of two licensed professional engineers that have worked in the Wheeling Area since approximately 1950. Johnson B. McKinley, [Representative] McKinley's father, was a licensed professional engineer who maintained an office as consulting engineer in Wheeling for nearly 40 years. During most of those years Johnson B. McKinley maintained a one-person office, but David B. McKinley and Johnson B. McKinley worked together for 2 years prior to Johnson B. McKinley's retirement, and McKinley & Associates, Inc. is the custodian of all the drawings, files, and other assets accumulated by Johnson B. McKinley over his career as a licensed professional engineer.[42]

This statement appears to have led Committee staff to believe—incorrectly—that Johnson McKinley's firm was named McKinley Engineering. In fact, the letter's reference to the Firm's "predecessor" was actually a reference to *Representative McKinley's own prior practice*, not that of his father. But, as is clear from the excerpted passage, there is no reference to this prior practice, only to the businesses operated by Johnson McKinley. Staff therefore concluded that, if there was an appropriate "family name" for the business, it would be McKinley Engineering.

Additionally, Representative McKinley's request did not refer to any sale of Representative McKinley's interest in the Firm. Rather, the request stated that Representative McKinley would continue to hold his equity "in a blind trust that will be held for so long as he remains a Member of the House of Representatives or otherwise

[40] *Id.*
[41] *Id.* (emphasis added).
[42] Exhibit 3(emphasis added).

holds an elected federal office."[43] Representative McKinley conceded that the trust arrangement would not, in fact, be blind: "Congressman McKinley will of course know that the trust holds his stock, unless and until sold; however, Congressman McKinley will receive no compensation from McKinley & Associates, Inc. and will not be entitled to exercise voting rights."[44]

Representative McKinley's formal request for advice painted a much different picture of his strategy than that which was actually taking place at the time. As early as November 29, 2010, the Firm's management was discussing the potential to complete a sale of Representative McKinley's stake to the ESOP.[45] And Mr. Kaiser's internal discussions with Representative McKinley and his team repeatedly referenced the sale as a fully-fleshed alternative pathway to EIGA compliance. But for whatever reason, Representative McKinley's letter did not reference that plan.

A few weeks after Representative McKinley submitted his request for a formal advisory opinion, Mr. Kaiser had a teleconference with the Committee's then-Director of Financial Disclosure. According to Mr. Kaiser's recollection of the conversation, the Director of Financial Disclosure informed him that the family name exception would apply to the Firm's name, and that a name change would not be required.[46] The then-Director of Financial Disclosure does not recall this conversation, and the Committee does not have its own record of it. Thus, the Committee does not know what Mr. Kaiser told the Director of Financial Disclosure regarding the facts of the matter on this call, who initiated the call, or for what purpose. Without this information, it is difficult for the Committee to judge precisely why the then-Director of Financial Disclosure may have believed that the Firm would not be required to change its name. Regardless, it must be noted that, according to Mr. Kaiser's summary of the call, the then-Director of Financial Disclosure only stated the *staff's* view regarding resolution of the matter; it was clear that only the Committee could provide a final and formal opinion on Representative McKinley's written request for guidance.

By March 31, 2011, a different Committee counsel had taken over the responsibility for the advisory opinion after the departure of the Director of Financial Disclosure from the Committee's staff. The newly assigned Committee staffer spoke with Mr. Kaiser that day and informed him that staff would recommend that the Chairman and Ranking Member issue an advisory opinion recommending that Representative McKinley change the name of the Firm. Representative McKinley approached Representative Bonner, who denied knowing about the Director of Financial Disclosure's previous recommendation.[47]

Meanwhile, Representative McKinley's plan to sell his equity in the Firm continued, independently from his interactions with the Committee.[48] On April 11, 2011, Representative McKinley and the

[43] *Id.*
[44] *Id.*
[45] Exhibit 12.
[46] Exhibit 13.
[47] Exhibit 14.
[48] Representative McKinley, in a submission to the Committee, argues that, in fact, his plan to sell his stake to the ESOP had been "abandoned" based on the Director of Financial Disclosure's informal, staff-level advice in January 2011. *See* Exhibit 6 at 19. But there is no other evidence that the sale went on hold, or, even if it did, when precisely the process stopped and then started again. For example, Representative McKinley's original request for advice con-

ESOP entered into a Memorandum of Understanding (MOU) committing to a sale of Representative McKinley's stake upon a valuation of the Firm's equity.[49] At this time, both Representative McKinley and executives at the Firm understood staff's preliminary guidance that the Firm would need to change its name. Neither the Firm nor Representative McKinley contacted the Committee to notify them of the MOU, the change in plans with respect to the blind trust, or any other aspect of the sale. Nor is there any indication that Representative McKinley told then-Chairman Bonner, when they spoke immediately after Committee staff's March 31, 2011 call with Mr. Kaiser, that Representative McKinley was proceeding with plans to sell the Firm, with the name intact.

On April 13, 2011, a Committee counsel reminded Mr. Kaiser that the Committee was still waiting for a written brief he had offered to provide regarding the issue of whether engineers or architects were fiduciaries under West Virginia law.[50] The next day, Mr. Kaiser sent a letter to the Committee counsel setting out his arguments. Mr. Kaiser began the letter by saying, "I have delayed in responding to check the facts cited in this letter."[51] Notably, he again did not mention the sale, nor did he correct the misimpression the original letter gave regarding the name of Johnson McKinley's practice.[52] Mr. Kaiser copied Representative McKinley on the letter.[53]

On June 24, 2011, the Chairman and Ranking Member of the Committee issued an advisory opinion on these questions to Representative McKinley.[54] It is clear from the letter that the Committee, or its then-Chairman and Ranking Member, believed that Representative McKinley remained the majority owner of the Firm,[55] and the advisory opinion made no reference to Representative McKinley's April 11, 2011, agreement to sell the firm. The letter advised Representative McKinley that the Firm would need to change its name. The letter, in describing the facts upon which the Committee relied in coming to this determination, explained:

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templated not a sale of his stake, but the transfer of that equity into a blind trust, and at no point did he correct the record to state that he intended to sell the firm. Moreover, Representative McKinley never explained to the Committee that, because of its informal, staff-level guidance, he was withdrawing any part of his request for formal advice.

[49] Exhibit 15.

[50] Exhibit 17.

[51] Exhibit 16.

[52] *Id.*

[53] *Id.*

[54] See Exhibit 21.

[55] *See id.* at 1 ("In January 2007, the Firm established a partial Employee Stock Ownership Plan (ESOP). You own approximately 70% of the Firm's common stock, with the remaining 30% owned by the Firm's employees under the ESOP.") Representative McKinley's counsel strenuously argues that the six months during which the Committee deliberated before providing its formal advice in response to Representative McKinley's request constitutes an unreasonable delay. Exhibit 6 at 22. This ignores that at least some of the deliberation occurred due to a back-and-forth between Representative McKinley's attorneys and the Committee regarding the legal issues in the case. As late as April 14, 2011, Mr. Kaiser sent the Committee a letter arguing that engineers and architects did not carry fiduciary duties. See Exhibit 17. This letter came only after Committee staff reminded Mr. Kaiser that the Committee was waiting on such a submission. *See id*. After reading those arguments, the Committee determined them to be without merit. *See infra* at n. 70. But the task of examining such arguments requires time. Because the Committee needed to take such time as was necessary to address Representative McKinley's arguments in a deliberate and thorough manner, the length of time this matter took was attributable in large part to Representative McKinley's own part in the process. Indeed, it is inherently inconsistent of Representative McKinley to first avail himself of the Committee's willingness to hear his side of the matter, and then argue afterwards that the considered nature of the process took too long.

> In the case of the Firm, the Committee accepts your representation that the current Firm can reasonably be seen as a practical continuation of McKinley Engineering, the business originally established in 1954 by your father, Johnson McKinley, for whom it was named. However they are legally and factually distinct entities.

The Committee also advised, however, that the Firm could change its name to McKinley Engineering, so long as it made a clear association between the Firm and Representative McKinley's father, consistent with the family name exception contained in the rules. Prior to issuing the formal advisory opinion, staff informally explained its recommendation to Representative McKinley's counsel, and provided Representative McKinley with the opportunity to withdraw the request for an advisory opinion.

As noted above, the conclusion that McKinley Engineering was a name that fit within the family name exception was based on a factual error—the Committee's belief that Representative McKinley's reference to that name as a "predecessor" meant that Johnson McKinley had used that name for his practice. He had not. In an email to his advisers, Representative McKinley noted the Committee's mistake: "This makes no sense. [T]hink about it: McKinley Engineering is OK but McKinley & Associates is a problem. My father's company was not McKinley Engineering and we never represented that it was. That name was the one I used as a sole proprietor for the early years of the company."[56] However, the factual error in the advisory opinion appears to be based largely on the vague and confusing syntax of Representative McKinley's counsel's introduction to the history of the Firm, which described McKinley Engineering as a "predecessor" of the Firm and discussed his father's involvement in it in the same breath, without distinguishing between the two. Additionally, when staff contacted Representative McKinley's counsel prior to the issuance of the letter, in order to explain its content, Representative McKinley's counsel did not correct the factual error at that time.

Representative McKinley consulted for a brief period with attorney Stefan Passantino, who contacted Committee staff on August 12, 2011.[57] Mr. Passantino explained that Johnson McKinley had not practiced at "McKinley Engineering," but rather at "J.B. McKinley Engineering."[58] A Committee attorney explained that she was unable to change the factual record upon which the advisory opinion was based, but that Representative McKinley could write to the Committee to explain the misunderstanding.[59] Committee staff further explained that the opinion would not likely be changed absent a significant change in facts.[60] Representative McKinley never did write in to the Committee to correct the record, although he apparently approached Representative Bonner on the floor of the House and stated, "what the [heck] is this," and ex-

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[56] Representative McKinley referred to himself as a "sole proprietor." This is consistent with his statement in an appearance before the Committee that he "struck out to be a sole practitioner." *See* Exhibit 18; Representative McKinley Appearance.

[57] *See* Exhibit 20.

[58] This contention is consistent with representations by Representative McKinley's current counsel, but is not supported by a review of corporate records that McKinley & Associates itself performed. *See* Exhibit 2.

[59] Exhibit 20.

[60] *Id.*

plained the factual error.[61] According to Representative McKinley, during that conversation, which was several days after the Committee issued its formal advisory opinion, Representative McKinley stated that the Committee's misunderstanding regarding the origins of the Firm's name did not matter anymore "because he had already sold the company."[62]

Six months after receiving the Committee's letter explaining the need to change the Firm's name, on December 31, 2011, Representative McKinley and the ESOP had finally formalized their agreement for the ESOP to purchase Representative McKinley's shares, via a loan for which Representative McKinley held the note. The agreement to sell apparently did not include an agreement to change the name, and the name has not been changed. Because of legal requirements, the sale closed four months later, on April 30, 2012.[63]

D. FURTHER COMMITTEE ACTION AND INQUIRY

Representative McKinley filed an annual Financial Disclosure Statement for 2011, as required by EIGA, on May 15, 2012. This Financial Disclosure Statement listed the Firm—still doing business as McKinley & Associates—as a source of interest income based on a note receivable held by Representative McKinley. Based on this and other publicly available information, the Committee concluded that the Firm had not changed its name as advised by the Committee. Accordingly, the Chairman and Ranking Member of the Committee sent Representative McKinley a letter on August 24, 2012, stating:

> The Committee expects you to change the name of the Firm, as directed. Failure to do so may be viewed as a knowing violation of the Ethics in Government Act and House Rule XXV, clause 2, and may result in further proceedings against you by the Committee. The Committee thus requests a detailed explanation of the status of your efforts to change the name of the Firm, and what that name will be. If the Firm intends to use the name McKinley Engineering, please inform the Committee how the Firm will indicate the clear association between the name and your father.[64]

After receiving the letter, Representative McKinley telephoned the then-Committee Staff Director and Chief Counsel, and informed him that he believed the issue had been resolved because he had sold the Firm to the ESOP. Representative McKinley also disagreed with many of the facts as stated in the original advisory opinion letter. The Staff Director and Chief Counsel responded by requesting that Representative McKinley respond to the Committee's second letter with a request that the Committee re-examine the issue based on accurate facts. The Staff Director and Chief Counsel told Representative McKinley that the Committee would "start from scratch." This conversation appears to be the first time

[61] Exhibit 6 at 23.
[62] *Id.*; Exhibit 22 at 6.
[63] Exhibit 19 at 5.
[64] Exhibit 23 (Letter from Chairman Bonner and Ranking Member Sanchéz to Representative McKinley, Aug. 24, 2012, at 1).

in which Representative McKinley notified the Committee of the sale of his interest in the Firm.

In a letter dated September 14, 2012, Representative McKinley responded through counsel to the Committee's August 24, 2012 letter. Representative McKinley noted that the Firm had been sold to the ESOP, and that he no longer functioned as an owner, board member, executive, employee, or consultant of the Firm. Representative McKinley also noted:

> 'McKinley' is a well-known family and historical name in West Virginia. The 'McKinley' name in engineering and building design was originally established in West Virginia by Representative McKinley's father, Johnson B. McKinley, and was reinforced by him through his long, public association with McKinley & Associates. Entirely independent of Representative McKinley's status as a Member of Congress, 'McKinley & Associates' has long been—and remains—an established brand name in the provision of the highest-quality engineering, architectural, and interior design services.

However, Representative McKinley admitted that his father's practice had operated under business names such as "Johnson B. McKinley, Consulting Engineer," "Johnson B. McKinley Engineering," and "Penn Construction." McKinley & Associates, Inc. was first used in 1989, when Representative McKinley changed the name of the Firm (then "McKinley Engineering Company") to reflect the fact that the Firm had begun to offer architectural services. Moreover, while Representative McKinley and his father worked together at his father's firm from 1971 to 1973, Representative McKinley's father "maintained his own business" when his son struck out on his own in 1981.[65] Representative McKinley nonetheless argued that his father had:

> played an instrumental and very public role in solidifying and expanding the reputation of [the Firm]. . . . Particularly during those periods when [Representative] McKinley was required to be absent from the Firm to attend the state legislature, Johnson B. McKinley served as the eyes and ears for the Firm . . . [and] attended many meetings with clients as the representative of McKinley & Associates; he walked many project sites with owners as the representative of McKinley & Associates.[66]

The Committee sent separate requests for information to Representative McKinley and the Firm on March 18, 2013. Representative McKinley responded on May 1, 2013, providing a 30-page letter and 554 pages of documents. In his response, Representative McKinley repeated his assertion that he acted in good faith and on the advice of counsel in selling the Firm. He argued that the months-long history of his interactions with the Committee and its staff left him with the impression that he had resolved ethics concerns regarding the Firm. He also argued that, while Johnson B. McKinley never worked as an on-the-payroll employee of the Firm, he assisted his son on two projects in 1981, and that "Johnson B.

[65] *Id.* at 4.
[66] *Id.*

McKinley's interest and activities in assisting his son's business did not depend on compensation, so to focus exclusively on records of financial compensation in this context is to focus too narrowly."[67]

In July 2015, the Committee notified Representative McKinley that it was considering the adoption of a public Report and Letter of Reproval regarding this matter. Before the Committee decided how to resolve this matter, Representative McKinley was invited to be heard in writing and/or in person. Representative McKinley opted to both provide multiple written submissions, via counsel, and to appear in person before the Committee. The Committee carefully considered all of Representative McKinley's written submissions and his appearance before the Committee while deliberating how to resolve the matter. Ultimately, the Committee determined that the appropriate resolution of this matter was to issue this Report, along with a Letter of Reproval to Representative McKinley for his conduct.

House and Committee Rules impose some limitations on public disclosure of investigative matters in the period of time shortly before an election (the so-called "blackout rule"). In some situations, the Committee is prohibited from making certain public statements, while in others the Committee has the option of adhering to the rule. In general, the Committee adheres to the spirit of these limitations, which are intended to provide fairness to respondents and confidence in the ethics process. In this matter, the Committee has determined to issue this report at this time because of the unique circumstances of the matter.

Representative McKinley has been on notice of the Committee's intent to resolve this matter since July 2015. But Representative McKinley did not personally review the proposed resolution until November 2015, and did not offer a substantive written response to the Committee's proposed resolution of the matter until February 2016. In June 2016, the Committee invited Representative McKinley to appear before the Committee in July 2016 to be heard in person. Representative McKinley informed the Committee that he did not believe that was sufficient time for him to prepare and asked if he could appear in September 2016, instead. The Committee granted that request, subject to a clear written caution that if he chose that course the blackout rule would not apply to any final resolution of the matter. Representative McKinley chose to delay his appearance until September 2016. Although he appeared before the Committee prior to the start of the blackout period, the Committee's deliberations continued into the blackout period, and the Committee concluded its deliberations and voted to approve the final resolution within the blackout period.

IV. FINDINGS

A. EIGA SECTION 502 AND HOUSE RULE XXV

Representative McKinley and his counsel have argued that the Committee's initial advisory opinion contained factual errors and legal infirmities, and should be revised to permit the Firm to continue to operate as "McKinley & Associates." His arguments boil down to three points: (1) that the Committee made a factual error

[67] Exhibit 6 at 28.

when it stated that "McKinley Engineering" was a family name, given that Johnson McKinley never used that name in his practice; (2) that the "McKinley" in "McKinley & Associates" should be read to include Johnson McKinley, because of the McKinley reputation in the West Virginia engineering and design community, and because of Johnson McKinley's role in assisting his son's practice; and (3) that the statute and House Rules should be read to permit the use of the name in this case, where the danger of a conflict of interest is low. The Committee has reviewed his arguments, and judged them either incorrect in their own right, or insufficient to affect the outcome.

First, Representative McKinley points out that his father apparently never used the name "McKinley Engineering," as the Committee stated in its advisory opinion. Setting aside the fact that the Committee's confusion resulted from the vague and confusing syntax of his counsel's request, and setting aside the additional fact that his own submissions repeatedly misstated the names his father used for his practice, and setting aside the third fact that Representative McKinley never wrote to the Committee to correct the record until over a year later, it is true that the "family name" suggested in the Committee's advisory opinion is not actually a "family name." Representative McKinley argues that, consequently, "there appears to be just as much basis for the Committee to determine that 'McKinley & Associates' is a family name as there is for the Committee to determine that 'McKinley Engineering' is a family name." This is true. However, the correct conclusion is the opposite: based on these new facts neither "McKinley Engineering" *nor* "McKinley & Associates" qualify as a family name, because both refer solely to Representative McKinley's business and not to any of his father's businesses, all of which included his father's first and last name or initials. As Representative McKinley told the Committee in September 2016, "I struck out to be a *sole practitioner* in architecture and engineering practice."[68] The fact that the Committee misread Representative McKinley's original statement of facts has no bearing on whether the facts at present support the use of the exception.

Second, Representative McKinley argues that, irrespective of the factual error, the Committee failed to account for certain other facts supporting a finding that "McKinley & Associates" is a family name. Specifically, Representative McKinley argues that, because of his family's historical reputation in West Virginia, and particularly his father's reputation as an engineer, the "McKinley" name is a brand upon which the Firm trades, based on not just Representative McKinley's work prior to his election, but his family's goodwill in the area and in the industry. This argument, while internally consistent, is simply not on all fours with the text of the statute or the Committee's longstanding guidance. The logic behind the concept that businesses with family names are not covered by Section 502 is that certain family businesses *are not actually named for the Member,* and therefore do not violate Section 502.

Johnson McKinley's reputation, no matter how sterling, cannot retroactively stand in for the "McKinley" for whom the Firm is actually named. Johnson McKinley was never on the Firm's payroll.

[68] Representative McKinley Appearance (emphasis added).

He kept his own practice when his son started the Firm in the 1980s. He did not appear on the Firm's letterhead and, to the best of anyone's recollection, never served as anything more than an outside advisor or consultant. The Firm does not use a family name. It uses Representative McKinley's name. EIGA prohibited that use the moment he became a Member of Congress.

Third, Representative McKinley argues that, because the Committee has expansively interpreted or applied Section 502 in other areas—specifically, medicine—the Committee should engage in a flexible reading of the statute in this case, to reach the conclusion that the Firm's use of "McKinley & Associates" does not pose a risk for "trading on the prestige of [a] Member[]."[69] Representative McKinley believes such a risk is low because the McKinley name is associated not only with him but with his father and ancestors, and also because architectural services do not pose the same hazards in this regard as certain other fiduciary industries such as law or lobbying.[70] This argument—which amounts to a request for a waiver—fails for at least three reasons. First, the arguments about the "McKinley brand" simply restate the arguments discussed above, and fail for the same reason. Second, while it may be true that an architect may not be as susceptible to the problems Section 502 was intended to address as some other professionals, the risk still exists that a Member will have some level of divided loyalty. Further, it is not inconceivable that an architecture firm could trade on the prestige of a Member of Congress—governments, after all, do build buildings from time to time. Finally, with respect to the Committee's guidance on the practice of medicine, the Committee has created a limited exception to the *compensation ban*, insofar as Members who are doctors accept fees for medical services that do not exceed the "actual and necessary expenses incurred" by the Member in connection with the practice.[71] The Committee created this waiver because doctors must continue to practice to keep their licenses intact in some situations, and to maintain insurance coverage. Notably, though, the waiver *does not extend to the ban on using the Member's name*, and the Committee has historically advised Members who are doctors that their practices must remove mention of their name upon their election.

Based on the foregoing, Representative McKinley violated EIGA Section 502 and House Rule XXV by permitting the Firm to continue to operate using his name.

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[69] Exhibit 19 at 10–11.

[70] This argument could be considered a descendant of the arguments Representative McKinley made prior to the issuance of the Committee's advisory opinion, that architects and engineers are not fiduciaries under West Virginia law. See Exhibit 17 at 2. This argument is infirm for at least two reasons. First, the Committee is not bound by state law determinations on the question of who is and is not a fiduciary; state law is simply one authority among others to assist in answering the question. The fact that another one of these authorities—the legislative history of EIGA itself—*specifically lists architecture as one of the professions with which Congress was concerned* is probably enough to tilt the scales against Representative McKinley's argument on its own. See House Bipartisan Task Force on Ethics, *Report on H.R. 3660,* 101st Cong., 1st Sess. at 16 (1989). But even if it were not listed, West Virginia state law on architects is actually quite clear—the licensure of architects requires that they meet the definition of "good moral character," which is defined as "such character as will enable a person to discharge the fiduciary duties of an architect *to his client* and to the public. . . ." W.V. Code 30–12–2(4) (emphasis added). The fact that architects have a concomitant duty to the public is of no moment—once state law holds them to a fiduciary standard with respect to their individual clients, the question has been answered.

[71] Ethics Manual at 387.

B. HOUSE RULE XXIII, CLAUSES 1 AND 2

Normally, matters such as this are handled by the Committee as a matter of advice and education, and that is how this matter began. Representative McKinley received advice from the Committee, in the form of informal staff-level guidance and in the form of an official advisory opinion letter. The Committee's letter carried with it a "safe harbor" for actions Representative McKinley might have taken in accordance with it.[72]

Representative McKinley also received advice from his former counsel, Mr. Kaiser. Mr. Kaiser's letter advised Representative McKinley that he could engage in the course of action he preferred—keeping the name "McKinley & Associates" on the Firm's door and selling the Firm, with that name, to the ESOP. That is the course of action Representative McKinley ultimately took. This course of action resulted in a number of consequences that accrued to his benefit: the name "McKinley & Associates" was a part of the Firm's valuation, increasing the Firm's value when he sold it. Moreover, should Representative McKinley leave Congress and return to his previous career, the Firm still bears his name, easing his transition back to practice. What this course of action did not accomplish, however, was compliance with relevant statutes and House Rules.

If Representative McKinley had relied instead on the advice provided by the Committee there would be little question of the protection such reliance would have afforded him. Such protection is, as mentioned above, written into the Committee Rules and EIGA.[73] Indeed, the Committee takes very seriously its obligation to provide sound and dispassionate advice to the Members of this House. Nothing in this Report should be read to discourage Members from coming to the Committee with their questions about the ethical ramifications of their conduct, and the Committee has historically helped a great many Members achieve the goals of their work while keeping within the boundaries of the rules and the law.[74] The disclosure in this Report of Representative McKinley's appeals to that process is not in any way a repudiation of the Committee's longstanding commitment to providing Members with confidential counsel[75] and safe harbor for acting in good faith in response to the Committee's advice.[76] On the contrary, the only way the Committee can retain credibility in performing these services for Members is to publicly address those rare situations in which Members disregard the Committee's advice or fail to disclose full and accurate facts during the advisory process. Such is the case here.

However, relying on the advice of one's private counsel, while it does not confer the same sort of safe harbor as reliance on the Committee, can potentially mitigate the seriousness of a violation, insofar as it makes it less likely that a Member acted in bad faith. Members of Congress are entitled, as all Americans are, to consult with an attorney to inform their decision-making about a variety

[72] *See* Committee Rule 3(k) ("The Committee may take no adverse action in regard to any conduct that has been undertaken in reliance on a written opinion if the conduct conforms to the specific facts addressed in the opinion").

[73] Committee Rule 3(k); 5 U.S.C. app. § 503(1)(A).

[74] Comm. on Ethics, *In the Matter of Allegations Related to Representative Tom Petri,* H. Rept. 113–666, 113th Cong. 2d Sess. at 9 (2014) (hereinafter *Petri*).

[75] *See* Committee Rule 7.

[76] *See* Committee Rules 3(k), (l); *Petri* at 6–9.

of situations. In other contexts, courts have held that where someone "(1) fully disclosed all material facts to his attorney before seeking advice, and (2) actually relied on his counsel's advice in the good faith belief that his conduct was legal," such reliance on the advice of counsel might show an absence of wrongful intent or bad faith.[77] The evidence suggests that Representative McKinley did indeed disclose all pertinent facts to Mr. Kaiser, and Representative McKinley appears to have actually relied on the advice Mr. Kaiser gave him. However, neither Representative McKinley nor Mr. Kaiser ever disclosed a key fact to the Committee when seeking the Committee's guidance on the Firm's name: the fact that if Representative McKinley did not get the answer he wanted from the Committee, he intended to sell the firm, with his name attached, to the ESOP.

Representative McKinley has asserted that his decision to rely on Mr. Kaiser's advice, rather than the Committee's guidance, was not made in bad faith. He further states: "I have since come to understand that the advice of my then attorney in explaining and interpreting to me House Committee on Ethics requirements and guidance, and my reliance on that advice were mistaken. I regret relying on that advice."[78] The Committee appreciates this acknowledgement. But even negligent violations of relevant statutes and House rules have recently resulted in the issuance of letters of reproval.[79] Further, Representative McKinley failed to take any steps to determine whether his own attorney's advice was reasonable. He never asked Committee staff whether selling the Firm would resolve the problem with the Firm's name, and told the Committee he was unaware whether his attorney asked that question. (There is no evidence that he did).[80] Had he asked that essential, and obvious, question, the Committee could have told him that he could not sell the Firm with his name attached. Representative McKinley's failure to ask this question is inexplicable in light of the advice he had previously solicited and received from a former Committee counsel—who was the counsel to two former Committee Chairmen—that he would likely have to change the Firm's name to sell it.

The Committee has long stated that Members have a "duty of reasonable inquiry," which requires them to take "reasonable care"

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[77] *See, e.g., See United States v. Rice, 449 F. 3d 887, 897 (8th Cir. 2006); see also United States v. West,* 392 F. 3d 450, 447 (D.C. Cir. 2004) ("A defendant may avail himself of an advice of counsel defense only where he makes a complete disclosure to counsel, seeks advice as to the legality of the contemplated action, is advised that the action is legal, and relies on that advice in good faith.")

[78] *See* Exhibit 22.

[79] *See, e.g., Comm. on Ethics, In the Matter of Representative Don Young,* H. Rept. 113–487, 113th Cong. 2d Sess (2014); Comm. on Ethics, In the Matter of Allegations Relating to Representative Shelley Berkley, H. Rept. 112–716, 112th Cong. 2d. Sess. (2012).

[80] The actions of Representative McKinley's attorney suggest that even he may not have believed that selling the Firm would resolve the legal prohibition against continuing to provide fiduciary services while using the Member's name. On April 14, 2011, just three days after Representative McKinley agreed to sell the Firm, Mr. Kaiser sent a letter to Committee staff with additional arguments for the claim that engineering and architecture are not fiduciary services. If Mr. Kaiser believed that selling the Firm resolved these issues—and actually made it impossible for Representative McKinley to change the Firm's name—the natural reaction would have been to inform the Committee of the sale and withdraw the request for a formal Advisory Opinion. Instead, Mr. Kaiser continued to argue that Representative McKinley was not required to change the Firm's name.

to avoid violations of applicable standards of conduct.[81] That duty is heightened when a Member is "placed on notice of an ethical problem."[82] When a Member has such notice of a potential problem, the Member should ask the Committee, not a private attorney, for guidance. In these circumstances, the Committee has found that a reproval may be appropriate even when the Member sought legal advice from other sources—but not the Committee—and where any violation of the Rules or law was unintentional.[83]

Here, Representative McKinley was placed on notice in November 2010 that there was a problem with the name of his company, McKinley & Associates, and that, pursuant to federal law, the firm could not continue to operate under that name. His attorney advised him that he could remedy this problem by selling the company. This advice, which Mr. Kaiser did not explain or provide any reasoning for, was contrary to the plain meaning of the applicable federal statute, which provides that a Member may not "permit his name to be used by . . . a firm, partnership, association, corporation, or other entity [that provides professional services involving a fiduciary relationship.]"[84] By selling the Firm, with his name attached, Representative McKinley did exactly that. Indeed, this was the conclusion that another attorney, who was previously a counsel to the Committee, gave to Representative McKinley. In these circumstances, the duty of reasonable inquiry required Representative McKinley, or his attorney, to ask the Committee whether selling the company would resolve the issue. Instead, when Representative McKinley was told that staff would recommend the Committee issue an Advisory Opinion that required the Firm to change its name, he decided to sell the Firm quickly, with the name intact.[85] Representative McKinley never notified the Committee of this plan until it was completed. Thus, Representative McKinley did not satisfy his duty to inquire whether his actions complied with federal law. Moreover, even if Representative McKinley believed his actions were consistent with what the law required, that belief was mistaken, as the Committee would have informed him, had he only

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[81] *See* House Comm. on Standards of Official Conduct, *In the Matter of Representative Richard H. Stallings,* H. Rept. 100–382, 100th Cong. 1st Sess. 5 (1987) (hereinafter *Stallings*).

[82] *See id.*

[83] In *Stallings*, the Committee found that Representative Stallings was unaware of the applicable House Rule and had no intent to violate it. Representative Stallings also contacted the Federal Election Commission—but not the Committee—before taking the actions at issue, and took steps to remedy his violation of House Rules when he was informed of it. Based on these mitigating circumstances, the Committee did not recommend a sanction, such as reprimand or censure, to be issued by the House. However, the Committee still found that a public reproval was warranted. *See Stallings* at 5–6. It is worth noting that much of the mitigation found in Stallings—namely the Member's ignorance of the applicable rule and his attempt to remedy the violations once he learned of them—was not present in this matter. *See id.*

[84] 5 U.S.C. app. § 502(a).

[85] *See* Exhibit 6, at 18–19 (explaining that Representative McKinley "abandoned" the plan to sell the Firm to the ESOP when he believed the Firm's name would not have to change, and revived that plan after receiving a contrary opinion from Committee staff on March 31, 2011).

asked.[86] In these circumstances, Committee precedent holds that a public reproval is appropriate.[87]

After considering all of the circumstances in this matter, the Committee concluded that a letter of reproval is the appropriate action both to express its dissatisfaction with Representative McKinley's actions, as well as to encourage Members to more properly utilize the Committee's advice function.

C. EIGA SECTION 501

In addition to the problems that the Firm's name poses in terms of EIGA Section 502 and House Rule XXV, the Firm advertises to the public that it has performed work for certain federal government clients, including the National Aeronautics and Space Administration, United States Postal Service, Department of Defense, "Veterans Administration," Economic Development Administration, Department of Housing and Urban Development, Federal Aviation Administration, and Mine Safety and Health Administration.[88] In the Firm President's interview and in the Firm's submission to the Committee, the Firm indicated that only the U.S. Postal Service remains as a client of the Firm. While the contracting process may not be one that would be amenable to influence, the plain language of Section 501 prohibits using the name of a Member in advertising a business that practices before the United States. Here, that name is a part of the Firm's advertising insofar as it is also the name of the Firm, notwithstanding the fact that Representative McKinley's full name no longer appears anywhere else.

The Firm is not within the Committee's adjudicatory jurisdiction. Nevertheless, in order to provide the Firm with an opportunity of its own to comply with the law, the Committee has authorized the Chairman and Ranking Member to send a letter to the Firm informing them of its interpretation of the facts and application to the law, and urging them to change the name or cease working with the U.S. Postal Service.

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[86] In his appearance before the Committee, Representative McKinley was asked why he sold the Firm, 11 days after being told the Firm would have to change its name, "without waiting for a final opinion from the people, the only people, who are entitled to give that opinion, and not your attorney." Representative McKinley explained "[m]y fear was January 5," because he had been told he needed to resolve the issue of the Firm's name before he took office. However, Representative McKinley did not even submit his request for an Advisory Opinion until January 3, 2011, and his attorney continued to send legal briefs to Committee staff after he entered an agreement on April 11, 2011, to sell the Firm. More importantly, when Committee staff suggested that Representative McKinley request a formal Advisory Opinion from the Committee, they explained that the Committee's response would take some time, but *"the [Firm] name can remain the same until the [advisory] opinion is rendered." See* Exhibit 11. The actual timing on the transactions required to complete the sale of the Firm also raise questions about Representative McKinley's claim that he felt the need to act quickly. Representative McKinley told the Committee that the MOU committed him to sell the Firm to the ESOP, but did not set a sale price; that price could only be determined at the end of the calendar year, and thus the sale could not be finalized before then. *See* Exhibit 6, at 25. Given this, it does not seem that rushing to sell the Firm—before receiving the Committee's Advisory Opinion—would remove the "January 5" issue, as the sale could not be finalized until 2012, regardless.

[87] *See Comm. on Ethics, In the Matter of Allegations Related to Representative Phil Gingrey,* H. Rept. 113–664, 113th Cong. 2d Sess. 25 (2014) (finding violations of House Rules, and issuing a reproval, even though "the Committee credited Representative Gingrey's assertion that he believed his actions were consistent with House Rules."); Comm. on Ethics, *In the Matter of Allegations Relating to Representative Shelley Berkley,* H. Rept. 112–716, 112th Cong. 2d Sess. 10 (2012) (reproval was appropriate even though "[t]he ISC found that Representative Berkley mistakenly believed the rules governing what assistance her office could provide to her husband's practice required only that they treat him in the same manner by which they treated any other constituent."); *see also Stallings* at 5–6 (Committee issued a public reproval where the Member was unaware of the applicable House Rule and did not intend to violate it).

[88] *See* McKinley & Associates, "McKinley & Associates—Portfolio {Government}," *available at* http://www.mckinleyassoc.com/government.htm (last accessed September 27, 2016).

V. CONCLUSION

Representative McKinley wanted the Firm to continue to operate while he was a Member in the same fashion it had prior to his election. It was the view of the Committee, and of the Chairman and Ranking Member of the Committee in the 112th Congress, that this was impossible under EIGA, at least as far as the name of the Firm was concerned. The Committee communicated this view to Representative McKinley repeatedly, through a variety of channels. Two different staffers with years of experience interpreting these rules advised him of this interpretation, and the Chairman and Ranking Member of the Committee adopted that interpretation formally in an advisory letter to him. A former staff member of the Committee, who was consulted by an NRCC official on Representative McKinley's behalf, independently reached the same conclusion as the Committee, and cautioned that the Firm likely could not be sold to a non-family member without changing the name.

Representative McKinley also received advice from a private attorney and relied on that attorney's counsel in taking a course of action that diverged from the one recommended by the Committee. The choice to follow his own counsel's advice, rather than the Committee's opinion, ultimately led Representative McKinley to sell the Firm with his name still attached, which left him powerless to effectuate the Committee's advice, and which effectively stymied the Committee's oversight of a Member's compliance with EIGA.[89] The Committee disapproves of such tactics.

Based on his violations of House Rules and federal law, the Committee has sent a letter of reproval to Representative McKinley for his conduct in this matter. The Committee has also sent a letter to the Firm advising them of the Committee's position with respect to the legality of the use of the name "McKinley & Associates." Upon the issuance of these letters and the publication of this Report, the Committee will consider this matter closed.

VI. STATEMENT UNDER HOUSE RULE XIII, CLAUSE 3(C)

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.

[89] 5 U.S.C. app. § 503(1)(A).

APPENDIX A

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ETHICS,
Washington, September 28, 2016.

Member's Personal Attention:

Hon. DAVID MCKINLEY,
House of Representatives,
Washington, DC.

DEAR REPRESENTATIVE MCKINLEY: On September 27, 2016, the Committee on Ethics (Committee) voted to issue you this letter of reproval in response to your knowing disregard of the Committee's advice regarding the name of your former engineering and architecture firm, McKinley & Associates (the Firm), in a fashion that resulted in a violation of House Rules and the Ethics in Government Act (EIGA), 5 U.S.C. app. § 502(a). The Committee has also voted to adopt and publish the attached Report to the House of Representatives.

The conduct for which you are being reproved includes your choice to ignore advice provided by this Committee, given from at least November 2010 until June 2011, both informally and in a formal advisory opinion letter dated June 24, 2011, in which the Committee counseled that the Firm should change its name, given its fiduciary responsibilities and the consequences that such responsibilities triggered under House Rules and EIGA. Instead of complying with the advice of the Committee, which has the sole authority under EIGA to administer these restrictions for Members of the House, you chose not to change the name of the Firm, and instead sold your interest in the Firm, with the name intact. Further, you did not inform the Committee of this action until after you had taken it.

With respect to this conduct, you violated 5 U.S.C. app. § 502, which provides that a Member shall not "permit [his] name to be used by" firms providing professional services involving a fiduciary relationship. Such behavior is also prohibited by House Rule XXV, clause 2. In failing to comport with this standard, you also violated House Rule XXIII, clauses 1 and 2, which state that "[a] Member . . . shall behave at all times in a manner that shall reflect creditably on the House," and "shall adhere to the spirit and the letter of the Rules of the House."

The Committee found that prior to your election to the House, you worked as a licensed professional engineer at the Firm, which you established and at which you were also an officer and director. The Firm used the name "McKinley & Associates'" since 1989; prior to that, you operated a sole practitioner's office in West Virginia, focused solely on engineering services, known as "McKinley Engineering," which you folded into the Firm once it began offering architectural services. Under West Virginia law, architecture is a profession that involves fiduciary duties. While your father was also a licensed professional engineer, and while you and your father had informal professional relationships throughout your career until his retirement, your father did not establish or co-found the Firm, was never on the payroll of the Firm, and maintained his own separate business when you started the Firm.

After you were elected to the House in 2010, you sought the advice of Committee staff regarding the Firm. Staff's original advice

was that the Firm would need to change its name. You disagreed with that advice, and responded to it in two independent ways. First, you continued to dispute, through counsel, the Committee's advice, in an attempt to change the Committee's position. The Committee considered your arguments, but you and your counsel were repeatedly advised that the Committee would likely require you to the change the name of the Firm.[1] On June 24, 2011, the Committee issued a formal advisory opinion to you, informing you that House Rules and federal law required the Firm to change its name.[2] Second, based on your own counsel's legal advice, you began the process of selling your interest in the Firm to the Firm's Employee Stock Option Plan (ESOP), without changing the name. While you and the Firm had contemplated the sale prior to your election to the House, the process of selling the Firm took some time, culminating in a formal agreement of sale on December 31, 2011 (six months after the Committee's advisory opinion), and a closing date of April 30, 2012. Despite the Committee's advice, at no point in the process of selling the Firm did you require that the Firm change its name, based on the contrary advice of your own lawyer, which misconstrued the rules and relevant federal law. The Firm still uses the name McKinley & Associates today.

With respect to EIGA Section 502 and House Rule XXV, the Firm used and continues to use your name while providing fiduciary services. Specifically, architecture is a service defined as one involving fiduciary responsibilities—both as a matter of West Virginia law and within the legislative history of EIGA itself The statute and House Rule were designed to prevent conflicts of interest between a Member's duty to the public and his fiduciary duties to his client. As a practical matter, when Members are elected to the House and have associations with these sorts of businesses, the Committee consistently advises them that the appropriate course of action is to cease receipt of any compensation and to remove their name from the business and its materials.[3] Having disregarded this advice, you acted in a manner contrary to House rules and federal law.

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[1] You have contended that at some point in early 2011, in one telephone conference with one Committee staffer, that staffer informed you that you would not need to change the Firm's name. As more fully discussed in the accompanying Report, the evidence of precisely what transpired during that informal conference is unclear, and in any event, cannot override the consistent and contrary opinion of the Committee and its staff throughout the advisory process, much less the formal advisory opinion issued later that year. On March 31, 2011, your attorney was informed by Committee counsel that the staff would recommend that the Committee issue a formal advisory opinion concluding that you must change the Firm's name. You signed a Memorandum of Understanding, in which you agreed to sell the Firm without changing its name, 11 days later.

[2] The Committee's letter advised you that it would be permissible to change the name of the Firm to "McKinley Engineering," on the basis that your father had operated a business using that name. As discussed more fully in the accompanying Report, this was a factual error that appears to be based largely on vague and confusing syntax in a submission by your own lawyer. That factual error notwithstanding, you did not choose to rename the Firm "McKinley Engineering," and you did not request that the Committee revise its opinion to accord with accurate facts, despite notice and opportunity to do so.

[3] The Committee is aware of your position, taken repeatedly throughout this process, that the Finn's name refers not only to you, but to your father. Accordingly, you wish to rely on an exception to EIGA and House Rule XXV permitting an entity that provides fiduciary services to continue using the name of a Member where that name is associated with a family business. The accompanying report provides a fulsome view of the Committee's analysis of the family name exception, but in short, it does not apply here. Your father's reputation in the West Virginia engineering community notwithstanding, the facts of this case demonstrate that the Firm is not named for your father. It is named for you. EIGA prohibits the use of your name now that you are a Member of Congress.

Your disregard for the Committee's advice and processes not only led to a substantive violation of these principles, it impaired the Committee's function in enforcing the standards set by your peers. Thus, your actions failed to comply with the spirit and letter of House Rules, and did not reflect creditably on the House.

Accordingly, based on your conduct in this matter, the Committee has 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,

CHARLES W. DENT,
Chairman.
LINDA T. SÁNCHEZ,
Ranking Member.

APPENDIX B

EXHIBIT 1

PHILLIPS, GARDILL, KAISER & ALTMEYER, PLLC
LAWYERS

JAMES C. GARDILL
CHARLES J. KAISER, JR.
H. BRANN ALTMEYER *
WILLIAM A. KOLIBASH
EDWARD M. GEORGE, III
DENISE KNOUSE-SNYDER
TODD M. KILDOW **
RICHARD N. BEAVER
J. CHRISTOPHER GARDILL
ROBERT D. PLUMBY *
ANDREW R. THALMAN***

* ALSO ADMITTED IN OHIO
** ADMITTED WV PA AND OH
*** ALSO ADMITTED IN PENNSYLVANIA

61 FOURTEENTH STREET
WHEELING, WEST VIRGINIA 26003

JOHN D. PHILLIPS
(1906-2000)

OF COUNSEL
ROBERT J. SAMOL ***

TELEPHONE
(304) 232-[redacted]

FAX
(304) 232-4918

November 30, 2010

Kelle Strickland, Esq.
Counsel to the Ranking Republican Member
Committee on Standards of Official Conduct
HOUSE OF REPRESENTATIVES
Washington, DC
Via E-Mail

RE: McKINLEY & ASSOCIATES, INC.

Dear Kelle:

Thank you for taking my call earlier today.

I represent McKinley & Associates, Inc. which is a West Virginia corporation that engages in the businesses of professional engineering and architecture through its employed professionals who hold licenses to practice professional engineering and architecture in a number of states including West Virginia. The stock in the corporation is owned principally (approximately 70%) by David B. McKinley, the newly elected Member of the House of Representatives from the First Congressional District of West Virginia. The other thirty percent of the stock in the company is owned by an ESOP for the employees of McKinley & Associates, Inc., both the licensed professionals and others. Congressman-elect McKinley is the founder of the business and a licensed professional engineer himself.

We have been reviewing the House Ethics Manual in order to advise Congressman-elect McKinley regarding his options concerning the business and his relationship with it while he remains a Member of Congress. Under West Virginia law we must file with the WV Board of Architects and the West Virginia Professional Engineers Board when there is a change in the supervising professional for the firm. Accordingly, this should be done prior to the time that Congressman-elect McKinley is sworn into office in Washington.

To the best of my knowledge McKinley & Associates, Inc. does not contract directly with the federal government or any federal agencies. However, many construction projects that McKinley & Associates, Inc. designs or supervises may be with state or local governments or boards that may receive federal funds either directly or indirectly.

What concerns us specifically is the language of the Ethics Reform Act and the related House Ethics Rules as they apply to professionals and specifically the definition of "professions

(85009.1)

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that provide services involving a fiduciary relationship". On page 215 of the House Ethics Manual, there is the statement that this definition includes the practice of law, the sale of insurance, and the sale of real estate. On page 216 it is stated that the ban is intended to reach services such as legal, real estate, consulting and advising, insurance, medicine, architectural or financial. There are three specific prohibitions that apply to professions involving a fiduciary relationship: (1) the prohibition against receiving compensation from the practice of a covered profession; (2) the prohibition against receiving compensation for affiliating with an entity that provides covered professional services; and (3) the prohibition against permitting one's name to be used by an entity that provides covered professional services. Congressman-elect McKinley is currently the supervising professional engineer for McKinley & Associates, Inc., the President, member of the Board of Directors and majority shareholder. Congressman-elect McKinley is not a licensed architect but rather a licensed professional engineer, but the business of McKinley & Associates, Inc. is both the practice of architecture and professional engineering through its duly-licensed employees.

Paramount among our concerns is the future use of the name: McKinley & Associates, Inc. Over more than twenty years in the region considerable goodwill and name-recognition has accrued to this name. Moreover, Congressman-elect McKinley's deceased father, though not associated with the current firm, was also a licensed professional engineer and had a long career in the area. Much of the company's goodwill that has accrued as a result of the name would be lost if the name must be changed. Accordingly, we would like to explore the possibility of retaining the name McKinley & Associates, Inc. if Congressman-elect McKinley would sever his other relationships with the business by for example: (a) selling his stock to the ESOP in return for a note payable over a period of years; (b) alternately giving or selling his stock to his wife or children; (c) resigning as an officer and director; and (d) having the company designate other professionals as its supervising architect and supervising professional engineer. If you believe that McKinley & Associates, Inc. can escape being designated as engaging in a "profession that involves a fiduciary relationship" by requesting a waiver or clarification of the definition, please advise as to the best way to go about that process. Obviously, if we could simply keep the status quo so far as the name and stock ownership of the business is concerned that would be most desirable to Congressman-elect McKinley, even if he must take a sabbatical so far as his employment and other responsibilities toward the firm while a Member.

In the event you would like to discuss these matters further, please do not hesitate to contact me. Thank you for your assistance.

Very truly yours,

Charles J. Kaiser, Jr.

CJK/sls

cc: Congressman-elect David B. McKinley

[80009.1]

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EXHIBIT 2

From: David Carenbauer [redacted]@mckinleyassoc.com>
Sent: Wednesday, September 05, 2012 2:43 PM
To: 'David B McKinley'
Subject: Johnson B. McKinley names

Mr. McKinley,

I saw drawings from around 1954 through 1992, and these are the variations of the names I saw (the one in bold is the one I saw the most):

ENGINEER – J.B. McKINLEY

ENG'R – J.B. McKINLEY

J.B. McKINLEY, ENG'R

J.B. McKINLEY, P.E.

J.B. McKINLEY ENGINEERS

JOHNSON B. McKINLEY

JOHNSON B. McKINLEY, P.E.

JOHNSON B. McKINLEY, CONSULTING ENGINEER

JOHNSON McKINLEY CONSULTING ENG'R

JOHNSON McKINLEY CONSULTING ENGINEER

Thanks,

David

EXHIBIT
2

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EXHIBIT 3

PHILLIPS, GARDILL, KAISER & ALTMEYER, PLLC
LAWYERS

JAMES C. GARDILL
CHARLES J. KAISER, JR.
H. BRANN ALTMEYER *
WILLIAM A. KOLIBASH
EDWARD M. GEORGE, III
DENISE KNOUSE-SNYDER
TODD M. KILDOW **
RICHARD N. BEAVER
J. CHRISTOPHER GARDILL
ROBERT D. PLUMBY *
ANDREW R. THALMAN***

61 FOURTEENTH STREET
WHEELING, WEST VIRGINIA 26003

JOHN D. PHILLIPS
(1904-2000)

OF COUNSEL
ROBERT J. SAMOL ***

TELEPHONE
(304) 232-[redacted]

FAX
(304) 232-4918

* ALSO ADMITTED IN OHIO
** ADMITTED WV PA AND OH
*** ALSO ADMITTED IN PENNSYLVANIA

January 3, 2011

Committee on Standards of Official Conduct
U.S. HOUSE OF REPRESENTATIVES
HT-2, The Capitol
Washington, DC 20515

RE: Member-elect David B. McKinley (1st Dist. W. Va.)
McKINLEY & ASSOCIATES, INC.

Greetings:

Please be advised that we represent McKinley & Associates, Inc., a West Virginia corporation (hereafter often referred to as the "Company") that provides professional engineering and architectural services through its employees who are professional engineers and licensed architects under the laws of West Virginia, Ohio, and Pennsylvania. The Company is controlled by David B. McKinley, a licensed professional engineer, who was recently elected as a Member of the U.S. House of Representatives for the First Congressional District of West Virginia. Congressman-elect McKinley has directed us to submit this letter to the Committee in order to advise the Committee concerning the steps that he has taken to comply with the House Ethics Manual and to seek a waiver of the application of certain Rules which we believe should not be applied to the Company.

Approximately 70% of the common stock of McKinley & Associates, Inc. is owned by Congressman-elect McKinley. The remaining common stock (approximately 30%) is owned by an Employee Stock Ownership Plan ("ESOP") whose beneficiaries include the employees of McKinley & Associates, Inc. who are licensed as engineers and architects as well as those additional non-licensed employees of the Company. The Company has approximately 40 employees located in offices in Wheeling and Charleston, West Virginia, and in Washington, Pennsylvania, and is believed to be one of the largest architectural/engineering firms in the State of West Virginia.

McKinley & Associates, Inc. and its predecessor McKinley Engineering were the outgrowth of two licensed professional engineers that have worked in the Wheeling area since approximately 1950. Johnson B. McKinley, David B. McKinley's father, was a licensed professional engineer who maintained an office as consulting engineer in Wheeling for nearly 40 years. During most of those years Johnson B. McKinley maintained a one-person office, but David B. McKinley and Johnson B. McKinley worked together for 2 years prior to Johnson B. McKinley's retirement, and McKinley & Associates, Inc. is the custodian of all of the drawings,

EXHIBIT 3

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files, and other assets accumulated by Johnson B. McKinley over his career as a licensed professional engineer. McKinley & Associates, Inc. also assumed many of the same clients and businesses after his father's retirement in the 1980s. Until recently, West Virginia law required engineering and architectural firms to be owned in large part by licensed engineers and architects themselves. Ownership restrictions remain in place for other states where the Company provides these services. Congressman-elect McKinley in addition holds the promissory note by which the ESOP purchased its stock in the Company from him and is also guarantor on the Company's bank loans that are used for its operations.

West Virginia law requires a licensed professional engineer to supervise the engineering work of the Company. Tim Mizer, P.E. has been registered with the West Virginia Board of Professional Engineers as the supervisor for all of the employees of the firm engaged in licensed professional engineering. Likewise, the West Virginia Board of Architecture requires that companies conducting such business in the State register a licensed architect with the Board to be the supervisor for all employees of the firm involved in the practice of architecture. Mr. Gregg Dorfner, A.I.A. has been registered as the supervisor of architects for McKinley & Associates, Inc. Except for the fact that these gentlemen are employees of the Company and beneficiaries of the ESOP, neither of them have any relationship to David B. McKinley.

Prior to being sworn in as a Member of the House of Representatives, David B. McKinley will resign as an officer and director of McKinley & Associates, Inc. and place his stock in a blind trust that will be held for so long as he remains a Member of the House of Representatives or otherwise holds an elected federal office. Congressman McKinley will of course know that the trust holds his stock, unless and until sold; however, Congressman McKinley will receive no compensation from McKinley & Associates, Inc. and will not be entitled to exercise voting rights. The promissory note payable to David B. McKinley by which the ESOP purchased the stock that it holds in the Company will continue to be paid in accordance with its terms. The terms of this note were arrived at through a third-party appraisal of the Company on behalf of the ESOP and predates by many years Mr. McKinley's election to the House of Representatives.

We are seeking an advisory opinion and, depending upon the outcome of the advisory opinion, two specific waivers related to the House Ethics Manual as it applies to Congressman-elect McKinley and McKinley & Associates, Inc. The advisory opinion has to do with the operations of McKinley & Associates, Inc. not being considered to be "professions that provide services involving a fiduciary relationship".

We assert that the professional engineering and architectural services provided by McKinley & Associates, Inc. are not the type of professional services that involve a fiduciary relationship and are, therefore, not of the kind of professional services that were intended to be prohibited under the House Ethics Manual and Title 5 – Appendix 4 – section 502 of the United States Code. The language "fiduciary relationship" is not defined in either the federal law or the House Ethics Manual. Generally however, a fiduciary relationship is one that connotes a high level of trust between the parties such that a fiduciary is required to act in a manner that makes

the other party's interests paramount to that of the fiduciary. While this may apply with respect to lawyers, real estate brokers, and insurance representatives, the same cannot be said for engineers and architects. To the contrary, an engineer and an architect are duty bound to protect the public from poor designs and improper construction methods. While a lawyer is legally required to keep his communications and in some cases even his relationship with a client strictly confidential, this is not the case with respect to an engineer or an architect. In most cases the services of an engineer or an architect are only engaged after a public bidding contest seeking the lowest bid for the work. Moreover, the engineer's or architect's workproducts, the drawings, are generally submitted to public authorities – that is, state and county building inspectors and licensing bureaus – in order to obtain the appropriate governmental authority and necessary permits to proceed with the construction work. Thus, nearly all of the work of an architect or an engineer is within the purview of the public, unlike that of a lawyer or a business consultant where most of their work occurs outside of the public view.

If the Committee agrees with our assertion that McKinley & Associates, Inc. is not a firm that provides professional services involving a fiduciary relationship, then Member-elect David B. McKinley's resignation as an officer and director of the Company, placing the stock titled in his name in a blind trust, and rejecting any form of compensation from the Company other than the continued payment of principal and interest on a pre-existing promissory note from the ESOP which acquired the Company stock should eliminate any potential violation of the Rules by isolating Congressman McKinley from the Company.

If the Committee on Standards of Official Conduct is not persuaded that McKinley & Associates, Inc. is a firm that does not provide professional services involving a fiduciary relationship; we believe that the Company can nonetheless continue to use its existing name despite the fact that David B. McKinley is a Member of the U.S. House of Representatives because the Company qualifies for the family name exception. As previously noted, David B. McKinley is the second generation of his family to be licensed as a professional engineer in the State of West Virginia and to practice his profession using the name McKinley associated with engineering in the City of Wheeling. Thus the company's name is as much related to the reputation of Johnson B. McKinley as it is to David B. McKinley. The company's inability to use its existing name would also create a severe hardship for all of the current employees of the firm, both its professional employees and its other employees. Because of the McKinley & Associates, Inc. ESOP, the employees are dependent upon the continued success of the firm not only for their compensation but also for their retirement savings. Accordingly, if McKinley & Associates, Inc. is deemed to be a firm that provides professional services involving a fiduciary relationship (and it should not be), McKinley & Associates, Inc. should nevertheless be permitted to retain its existing name under the well-recognized family name exception.

The final waiver that is being sought for McKinley & Associates, Inc. is the continued affiliation of David B. McKinley as personal guarantor of the Company's existing lines of credit. McKinley & Associates, Inc. has an existing line of credit with Wesbanco Bank, Inc. in the amount of $350,000. This line of credit is used to support the Company's on-going cash requirements for salaries and other operating expenses and is essential for the Company's

continued operation. Congressman-elect McKinley as the largest shareholder of the Company has personally guaranteed the line of credit, and it is unlikely that the existing loan can continue without his personal guarantee. Nevertheless, Congressman-elect McKinley is willing to keep his personal guarantee in place after he has transferred his interest in the Company to a blind trust and resigned as an officer and director. This will allow the Company time to make other financial arrangements and not threaten the employment of the approximately 40 employees who rely upon the Company for their livelihood. The only other shareholder of the Company, the ESOP, is unable to guarantee the Company's bank loans. However, it is expected that McKinley & Associates, Inc. itself will be able to generate sufficient cash internally so that it can both reduce the need for its lines of credit and so that it can, over time, accumulate financial assets that can substitute for Congressman-elect McKinley's personal guarantee. Accordingly, this waiver would permit David B. McKinley to continue to act as the personal guarantor of the existing loans of McKinley & Associates, Inc. indefinitely and such personal guarantee would not be considered an "improper affiliation" between the Member and the Company since Congressman-elect McKinley would have no authority to direct the Company's activities.

In the event you would like additional facts or would care to confer further regarding these matters, please do not hesitate to contact me. A copy of the Trust created to hold Congressman-elect McKinley's stock in McKinley & Associates, Inc. is enclosed. Thank you for your assistance and cooperation.

Very truly yours,

Charles J. Kaiser, Jr.

CJK/sls
Enclosure

cc: Congressman-elect David B. McKinley

[illegible]

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EXHIBIT 4

From:	Dixon, Carol <Carol.Dixon@mail.house.gov>
Sent:	Friday, November 05, 2010 5:04 PM
To:	dmckinley@[redacted]
Cc:	Chisam, Blake
Subject:	House outside employment restrictions

Mr. McKinley-
Per our conversation earlier today, following is additional information regarding the outside employment restrictions applicable to Members of the House. For the sake of completeness, I am attaching the link to the entire *House Ethics Manual*, and the relevant chapter is Chapter 5, entitled "Outside Employment and Income," pages 185-246. While the entire chapter provides useful guidance, the pages specifically dealing with the fiduciary restrictions are pages 213-223. In particular, pages 221-222 cover the issue of the name of the firm. The informal opinion of the Committee staff is that these restrictions would necessitate changing the name of your firm, since it is one that provides fiduciary services and currently utilizes your name. You can seek a formal determination on that question from the Chair & Ranking Member of the Committee by written request, should you choose to do so.

I am happy to address any questions you have about your business as you prepare to take office, including more specific details on submitting a written request to the Committee. Feel free to have your attorney contact me directly if that is more convenient.

http://ethics.house.gov/Media/PDF/2008_House_Ethics_Manual.pdf

- Carol

Carol E. Dixon, Counsel
Committee on Standards of Official Conduct
HVC-227, Capitol Visitor Center
Washington, DC 20515
(202) 225-7103
carol.dixon@mail.house.gov

EXHIBIT 5

rom: David B McKinley <[redacted]@mckinleyassoc.com>
Sent: Saturday, November 06, 2010 12:51 AM
To: 'mbaker@[redacted]'
Cc: 'Tim Garon'
Subject: FW: House outside employment restrictions

How absurd is that advice. They expect me to change the name of my company!!! Does she really expect me to believe that every lawyer or CPA in Congress has changed the name of their firm if they wish to continue doing business with government? I told her that her advice was BS and we'll start again but with our corporate attorney the next time. Think about it: hiding behind a name change makes it OK to do business with the Federal government. Unbelievable..... I have not read the manual as yet but her "informal opinion" is disturbing.

From: Dixon, Carol [mailto:Carol.Dixon@mail.house.gov]
Sent: Friday, November 05, 2010 5:04 PM
To: dmckinley@[redacted]
Cc: Chisam, Blake
Subject: House outside employment restrictions

Mr. McKinley-
Per our conversation earlier today, following is additional information regarding the outside employment restrictions applicable to Members of the House. For the sake of completeness, I am attaching the link to the entire *House Ethics Manual*, and the relevant chapter is Chapter 5, entitled "Outside Employment and Income," pages 185-246. While the entire chapter provides useful guidance, the pages specifically dealing with the fiduciary restrictions are pages 213-223. In particular, pages 221-222 cover the issue of the name of the firm. The informal opinion of the Committee staff is that these restrictions would necessitate changing the name of your firm, since it is one that provides fiduciary services and currently utilizes your name. You can seek a formal determination on that question from the Chair & Ranking Member of the Committee by written request, should you choose to do so.

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http://ethics.house.gov/Media/PDF/2008_House_Ethics_Manual.pdf

- Carol

Carol E. Dixon, Counsel
Committee on Standards of Official Conduct
HVC-227, Capitol Visitor Center
Washington, DC 20515
(202) 225-7103
carol.dixon@mail.house.gov

EXHIBIT 5

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EXHIBIT 6

Wiley Rein LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

May 1, 2013

Jan Witold Baran
202.719[redacted]
[redacted]@wileyrein.com

The Honorable K. Michael Conaway, Chairman
The Honorable Linda T. Sanchez, Ranking Member
Committee on Ethics
U. S. House of Representatives
1015 Longworth House Office Building
Washington, DC 20515

Re: *Committee Request for Information, March 18, 2013*

Dear Chairman Conaway and Ranking Member Sanchez:

Congressman David B. McKinley, through counsel, respectfully submits to the Committee on Ethics his responses to the requests for information set forth by the Committee in its March 18, 2013 letter. Documentary materials responsive to the Committee's requests are included on an accompanying disk at Bates Numbers DBM00000001 through DBM00000554.

Rep. McKinley did not knowingly or intentionally violate any law, standard of conduct, or Committee directive with respect to use of the name McKinley & Associates by his now former firm. Indeed, as the Committee will see from the responses and materials p rovided, based on his understanding of the relevant standards and legal compliance options as explained to him by attorney Charles J. Kaiser, Rep. McKinley believed that he had resolved ethics concerns with respect to the name of McKinley & Associates when he entered into a Memorandum of Understanding ("MOU") with the company's Employee Stock Ownership Plan ("ESOP") on April 11, 2011. Through this MOU, Rep. McKinley 1) committed to the sale of all his remaining stock in the company to the ESOP and 2) agreed that he had "no further control over the ownership and operations of McKinley & Associates, Inc." Previously, attorney Kaiser had advised then Congressman-elect McKinley consistently that there were two compliance options with respect to the House ethics restrictions on providing professional services involving a fiduciary relationship: either change the name of the company or divest his interest in the company.

By entering into the MOU with the McKinley & Associates ESOP on April 11, 2011, then Congressman-elect McKinley believed that he had taken satisfactory good faith steps to effectuate this second compliance option as described by attorney Kaiser, that is, divestment of his interest in the company. As to what representatives of McKinley & Associates knew of Committee guidance at that time, prior to signing and entering into the MOU on behalf of the McKinley &

Associates ESOP on April 11, 2011, ESOP Trustee Ernest Dellatorre (also a member of the company's management team) had been informed of recent guidance from Committee staff counsel that she was going to recommend that the Committee determine that the name "McKinley" would have to be removed from the company's name; other representatives of McKinley & Associates also knew of this guidance at that time. (In January 2011, McKinley & Associates personnel had also been apprised of Committee Counsel Stan Simpson's guidance that McKinley & Associates would not need to change its name because the company qualified as a "family business.")

Notwithstanding his good faith belief that he had resolved ethics concerns over the use of the name McKinley & Associates by his former company by entering into the MOU with the ESOP in April 2011, Rep. McKinley regrets that he did not respond more formally at the time to the Committee's letter to him dated June 24, 2011 (but received June 27, 2011), in which the Committee informed him that "a name change [of the company] is required under current rules . . . ." In considering the question of Rep. McKinley's responsiveness, the Committee should keep a number of important factors in mind.

First, as summarized above and explained in more detail below, as of June 24, 2011, Rep. McKinley believed that he had taken appropriate and satisfactory ethics compliance steps with respect to McKinley & Associates when he entered into the MOU with the ESOP more than two months earlier.

Second, within a few days of receiving the letter from the Committee on June 27, 2011, Rep. McKinley told then Ethics Committee Chairman Jo Bonner on the House floor that he had already sold the company to which Chairman Bonner replied, in substance, that he wished it had not come to that. Through this exchange with the Chairman, Rep. McKinley believed that he had effectively provided notice to the Committee of his action and of the status of the company.

Third, by the time he received the Committee's letter on June 27, 2011, Rep. McKinley had not been treated well by the Committee process. In January 2011, a Committee counsel informed his attorney that he agreed that "McKinley & Associates qualified as a 'family business' and so the name would not need to be changed." More than two months later, another Committee counsel informed the attorney that, in a potential total reversal of the Committee's apparent position, she

was going to recommend that the Committee determine that the name "McKinley" would have to be removed from the company's name. The Committee did not provide its formal written guidance on this matter to Rep. McKinley – via the June 24, 2011, Committee letter – until almost six full months after Rep. McKinley's attorney submitted his letter requesting written Committee guidance.

For these and other reasons discussed below, the Committee's process regarding and handling of this matter was seriously flawed. Rep. McKinley was concerned and upset by this process. However, Rep. McKinley believes that he may have allowed these understandable concerns to affect his responsiveness to the Committee and, if he did, he regrets having done so. He believes he should have responded in a more formal manner to the Committee's June 24, 2011, letter to inform the Committee of the good faith compliance steps he had already taken.

This letter incorporates all arguments supporting the continued use of the name "McKinley & Associates" by Rep. McKinley's former firm that were previously made to the Committee through undersigned counsels' September 14, 2012, letter submitted on behalf of Rep. McKinley. (Bates Numbers DMB00000527-38.) Although the Committee's March 18, 2013, letter seeks information and documents as part of an investigation, Rep. McKinley urges the Committee not to lose sight of the important advisory question underlying this whole matter, that is, whether "McKinley & Associates" is a "family name" under a long-recognized exception to the restrictions on providing fiduciary services imposed by the Ethics in Government Act. The Committee's implicit determination in June 2011 that "McKinley & Associates" is not a "family name" was not required by the facts, by the relevant laws and standards, by legislative history, or by policy. Indeed, all of these factors – the facts, laws and standards, legislative history, policy – provide substantial and sound support for a different, *de novo* determination by the Committee, a determination that "McKinley & Associates" is a "family name" or that its use by the company is otherwise permissible under the relevant fiduciary profession restrictions.

We urge the Committee to review Rep. McKinley's September 14, 2012, letter in its entirety. However, the following quoted paragraphs from that letter provide a summary of the substantial basis for determining that use of the McKinley & Associates name is not contrary to the restrictions relating to fiduciary professions:

> [A] number of factors support your approval of continued use of the name "McKinley & Associates" by Rep. McKinley's former firm. "McKinley" is a well-known family and historical name in West Virginia. The "McKinley" name in engineering and building design was originally established in West Virginia by Rep. McKinley's father, Johnson B. McKinley, and was reinforced by him through his long, public Association with McKinley & Associates. Entirely independent of Rep. McKinley's status as a Member of Congress, "McKinley & Associates" has long been – and remains – an established brand name in the provision of the highest-quality engineering, architecture, and interior design services.
>
> As the legislative history of the Ethics in Government Act makes clear, the Act's restrictions (and the parallel restrictions under House Rule XXV) on the use of a "Member's name" are intended to address "cases where outside interests attempt to trade on the prestige of Members of Congress." This concern does not exist with McKinley & Associates. The company trades on the "McKinley" name as an historical name in West Virginia and as a "family name" in engineering and building design. The company trades on – indeed, relies upon – the name "McKinley & Associates" as an established and well-known brand name in its field.

As explained above and supported in detail below, at the time Rep. McKinley received the Committee's June 24, 2011, letter, he believed that he had already taken sufficient good faith steps to resolve any ethics concerns arising in connection with McKinley & Associates such that the company's continued use of that name was permissible. Rep. McKinley did not act with any bad intent in this matter, including in not responding more formally to the Committee's June 24, 2011, letter. However, regardless of any position the Committee may take with respect to Rep. McKinley's responsiveness to its June 24 letter, the Committee may and should reconsider its previous determination with respect to use of the name McKinley & Associates by Rep. McKinley's former company. The Committee may now make a more fully informed determination. The Committee should determine that continued use of the name "McKinley & Associates" by the company is not contrary to law, rule, or regulation and is, therefore, permissible.

Although submitted by counsel on his behalf, the responses and materials provided with this letter were thoroughly reviewed by Rep. McKinley, were authorized and confirmed by him as accurate to the best of his knowledge, recollection, and belief at this time, and were approved and authorized by him for submission to the Committee, as was this letter. It should be noted that the Committee's request for details on conversations and interactions covers a period of two and half years; the request for information regarding Rep. McKinley's father goes back decades. Understandably, there may have been communications and there may be information responsive to the Committee's request which the Congressman does not recall at this time. With respect specifically to his wife and other members of his family, including his four adult children, Rep. McKinley believes he had numerous communications or discussions with them on matters relevant to the Committee's request which he does not now specifically recall. He also believes that he likely complained to other individuals, including other Members, about some of the matters covered in this letter, but he does not recall specific conversations.

Note that, to the extent that discussion and documentation in the following responses of communications between Rep. McKinley and attorney Charles J. Kaiser may be viewed as constituting a waiver by the Congressman of attorney-client privilege with respect to communications with Mr. Kaiser, with respect to any other communications between Rep. McKinley and any other counsel, no such waiver is intended to be implied, and none should be inferred.

With respect to the log of privileged or protected communications requested in Committee Request 1, please note that, as previously discussed with and agreed to by Committee Counsel, communications with undersigned counsel – who were initially retained by the Congressman to assist in responding to the Committee's August 24, 2012, letter – and communications in connection with obtaining information in response to the Committee's March 18, 2012, letter, are attorney-client privileged and/or work product protected and are not separately entered or noted on a log. A privilege log is provided herewith at Exhibit A with respect to withheld communications involving other counsel.

Thank you for your careful consideration of the information and documents provided by Rep. McKinley in response to the Committee's requests.

Response to Committee Requests 1 and 4

In Request 1 of its March 18, 2013, letter to Rep. McKinley, the Committee asked the Congressman to provide it with "any and all details of meetings, conversations, or other interactions . . . after your election to the U.S. House of Representatives regarding the use of your name by the Firm." In Request 4, the Committee asked the Congressman to "state the steps you took, if any, in response to the Committee's letter dated June 24, 2011" and asked related questions. Committee Requests 1 and 4 are both addressed in the discussion below.

Rep. McKinley first became aware of possible concerns regarding the continued use of his name by the firm McKinley & Associates in communications with Ms. Carol E. Dixon, Counsel to the Committee, on November 5, 2010. In an email of that date to the Congressman (Bates Number DMB00000003), Ms. Dixon referenced a related call earlier that same day and stated: "The informal opinion of the Committee staff is that these [fiduciary] restrictions would necessitate changing the name of your firm, since it is one that provides fiduciary services and currently utilizes your name."

Rep. McKinley's understandably strong response to this "informal opinion" on the use of his name by the firm can be seen by his November 6, 2010, email to Martin Baker, a direct mail consultant to his campaign: "How absurd is that advice. They expect me to change the name of my company . . . I have not read the manual as yet, but her 'informal opinion' is disturbing." (Bates Numbers DMB00000004-05.) Rep. McKinley explained what he viewed as "absurd" at this time when he wrote in this email: "hiding behind a name change makes it OK to do business with the Federal government. Unbelievable." Note that the Tim Garon "cc'd" on this email was the Political Director of the National Republican Congressional Committee ("NRCC") at the time.

On the morning of November 9, 2010, Andy Sere – then Regional Press Secretary for the NRCC and soon thereafter to become Rep. McKinley's first congressional chief of staff – reached out to the Congressman by email to say that Tim Garon had mentioned the Committee "lawyer's opinion on your company's name" and to ask if there had "been any further developments." Mr. Sere stated that he was going to make a few calls to see "how this issue has been handled in the past with other members in similar situations." Later that day, Mr. Sere emailed Rep. McKinley to

let him know that he had spoken with two people on the issue: John Tosch, apparently a corporate attorney for Rep. Vern Buchanan; and Todd Ungerecht, who had been counsel to Rep. Doc Hastings during his tenure as Chairman of the Ethics Committee. (Bates Numbers DMB00000020-22.)

On November 10, 2013, Andy Sere followed up with an email to Rep. McKinley into which he appears to have "cut and pasted" the content of an email from "a GOP lawyer who used to work on the ethics committee, to whom I previously referred." (Bates Number DMB00000023.) It appears that this "GOP lawyer" may have been Todd Ungerecht, but Rep. McKinley does not know if it was he. In this email, the "GOP lawyer" discussed whether "engineering consulting" is covered by the restrictions on "fiduciary professions" and provided his thoughts on how the Congressman's divestment of his interest in the firm could affect any necessity to change the name of the firm, depending on to whom he divested his interest.

Rep. McKinley recalls that orientation activities for his class of new Members began on about November 14, 2010. During this orientation period, Rep. McKinley recalls speaking about his business holdings with a young woman from the Ethics Committee staff after the ethics presentation. The Committee staffer stated that it was possible that Rep. McKinley would have to sell his company and might have to change the name of the company as well. Rep. McKinley asked the staffer what he was supposed to do if he was a one-term congressman and had no business to return to. Rep. McKinley recalls that the staffer responded by asking, either naively or cavalierly, "Wouldn't you just start a new business?" Rep. McKinley told the staffer that the next time she heard from him it would be through his attorney. The Congressman recalls that Mary McKinley, his wife, was part of this discussion. (Materials that appear to have been provided to Congressman-elect McKinley at, or in connection with, orientation are included at Bates Numbers DMB00000006-19.)

Sometime during the new Member orientation period in 2010, Rep. McKinley spoke in person with Rep. Jo Bonner, then Ranking Member and soon to become Chairman of the Ethics Committee, about the informal opinion of Committee staff that he might have to change the name of McKinley & Associates and/or sell his interest in the company. Rep. McKinley recalls Rep. Bonner saying there was a possibility of his receiving a waiver with respect to matters concerning McKinley & Associates, including with respect to the name of the company. Rep. McKinley

also recalls Rep. Bonner advising him to get in touch with Kelle Strickland, his Counsel for Ethics Committee matters.

On their drive back to West Virginia after orientation, Rep. McKinley and his wife talked about the opinions provided by Ethics Committee staff regarding McKinley & Associates. Sometime after he arrived back in West Virginia, Rep. McKinley contacted attorney Charles J. Kaiser.[1] On November 17, 2010, attorney Kaiser wrote to Rep. McKinley at McKinley & Associates. This letter was headed "Business Restructuring" and in it Mr. Kaiser provided a brief overview of "a series of Rules that apply to professional businesses." (Bates Numbers DMB00000025-26.) From the documents collected and provided with this response, it appears that Rep. McKinley and Mr. Kaiser spoke about the House ethics issues on November 22, 2010, although Rep. McKinley does not recall if that was the date on which he first spoke to Mr. Kaiser about these matters. (Bates Numbers DMB00000027-28.) Rep. McKinley recalls that Mr. Kaiser was surprised by the ethics restrictions as applied to McKinley & Associates.

On November 23, 2010, Rep. McKinley followed up with an email to Mr. Kaiser, forwarding Andy Sere's November 10 email (referenced above) and summarizing points and questions covered in their discussion the previous day, including: "Keeping the name McKinley as the corporate identity is a huge and over-riding priority"; "Would simply selling to the ESOP make this [moot]?"; and "What is the waiver that has been discussed by Bonner?" (Bates Numbers DMB00000027-28.) Later on November 23, Rep. McKinley forwarded to Mr. Kaiser the November 9 emails from Andy Sere, discussed above. (Bates Numbers DMB00000029-30.)

On Wednesday, November 24, 2010 – the day before Thanksgiving – at 5:04 PM, Mr. Kaiser sent a highly significant email to Rep. McKinley in which, as the attorney advising Rep. McKinley on complying with House ethics requirements, Mr. Kaiser framed for Rep. McKinley the issues and the options for action

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[1] With respect to the legal and ethics issues raised by Mr. McKinley's election to Congress, Mr. McKinley understands that, through early to mid-April 2011, Mr. Kaiser was providing legal advice and counsel to both Mr. McKinley and McKinley & Associates (which, until April 11, 2011 – as explained below – was both 70% owned by and controlled by Mr. McKinley). McKinley & Associates paid for these legal services.

available to him. With regard to the "company name change," Mr. Kaiser wrote and advised Rep. McKinley as follows:

> The question as to the change of name boils down to whether McKinley & Associates is considered to be a firm "providing professional services involving a fiduciary relationship." An example of this definition in the Rules is a company providing architectural services, but we can certainly ask for a ruling and argue that it does not apply to you because you are not an architect. If the ruling comes back favorable, you can keep your interest in the company, but not work or receive earned income from it. **If McKinley & Associates is considered to be a firm providing professional services involving a fiduciary relationship, then it appears that you are left with two choices: (1) change the name, or (2) completely divest yourself of your interest in the company (this appears to include Mary as well).** Please understand that your situation is different than family businesses that do not provide professional services (i.e. car dealerships), though I think the logic got lost when this Rule/law was formulated. In addition, it is important for you to understand that this is not simply a House Rule, but a federal statute.

(Bates Numbers DMB00000033-34.) (Emphasis added.)

This clearly stated analysis from Mr. Kaiser – **either** change the company name **or** divest yourself of your interest in the company – established a firm framework of understanding for Rep. McKinley through which he viewed his obligations under House ethics standards with respect to McKinley & Associates. This framework, to a very significant and persistent extent, guided his subsequent actions regarding his interest in McKinley & Associates, regarding the use of that name by the company, and regarding his understanding of, and steps taken in response to, Ethics Committee communications on these issues in 2010 and 2011.

The extent to which Mr. Kaiser's email of November 24, 2010, both galvanized Rep. McKinley's understanding of the options for compliance available to him and prompted him to preliminary action to effectuate one of these options can be seen in two emails from November 29, 2010. In the first email – sent by Rep. McKinley

to his cousin Jon in response to a congratulatory message – Rep. McKinley talked about orientation, his House office assignment and swearing in, and then added: "In the meantime I apparently have to wrap up ownership of my A/E practice to comply with the Federal ethics rules." (Bates Number DMB00000044.)

In the second email of November 29, Lynn Adams, Office Manager for McKinley & Associates and a member of the company management team, forwarded to Rep. McKinley the agenda for the upcoming company management meeting. Item 2 on this agenda is "ESOP buyout," that is, discussion of having the McKinley & Associates ESOP – which already owned 30% of the company's stock – purchase the remaining 70% of shares owned by Rep. McKinley. (Bates Number DMB00000057.) As this second email indicates, in November 2010, Rep. McKinley spoke to personnel of McKinley & Associates – including Lynn Adams, Ernie Dellatorre and, likely, others – about company-related issues arising from House ethics standards, but he does not recall specific conversations.

Also on the morning of November 29, 2010, Mr. McKinley had an exchange of emails with Andy Sere and Mr. Kaiser in the morning in which Rep. McKinley forwarded Mr. Kaiser's November 24 email to Mr. Sere and asked Mr. Kaiser to "coordinate" with Mr. Sere, who by that time had become Rep. McKinley's Chief of Staff. On November 29, by email, Mr. Sere also asked Rep. McKinley if he had "talked to Jo Bonner's staffer" and recalled that "NRCC Counsel Jessica Furst" had given Rep. McKinley a "name and contact info" for this purpose. (As discussed below, Rep. McKinley met and spoke with Ms. Furst about ethics-related issues during the orientation period in Washington, D.C.) Mr. Sere stated to Rep. McKinley in this same email: "It does seem like we'll have to ask for a ruling." And, by email later that morning, Mr. Sere told Rep. McKinley: "Just talked with CJ [Kaiser]. We discussed possible next steps . . . will advise later today. (Bates Numbers DMB00000035-43, 45-51.)

It appears that Mr. Sere and Mr. Kaiser then talked on the phone on the morning of November 29, 2010. Based on a summary email about that call from Mr. Kaiser to Mr. Sere, copied to Rep. McKinley, Mr. Kaiser provided Mr. Sere with essentially the same analysis and the same two compliance options he presented to Rep. McKinley in the November 24, 2010, email discussed above: "If McKinley & Associates is considered to be a firm providing professional services involving a fiduciary relationship, it appears that there are two choices: (1) change the

name; or (2) completely divest DBMcK's interest in the company (this appears to include David's wife as well)." (Bates Number DMB00000052.) (Emphasis added.) Mr. Sere followed up later that day with two more emails, sent to Mr. Kaiser and Rep. McKinley, relating to his apparent notification to NRCC "in-house counsel [Jessica Furst] of the issue." Mr. Sere also refers to a proposed discussion on the issue with NRCC "outside counsel," but it appears that this discussion did not occur that day and Rep. McKinley does not specifically recall if it did occur at some later time. (Bates Numbers DMB00000053-56.) In closing out this particular email exchange on the morning of November 30, 2010, Rep. McKinley, in an email to Mr. Sere and Mr. Kaiser, turned the focus of his attorney's steps to "[Mr.] Bonner's staff," noting: "Bonner had confidently suggested that something could be worked out and not to worry; he then turned me over to Kelle, his committee counsel. I am anxious to hear what Bonner's people have to add to this discussion." (Bates Numbers DMB00000058-59.)

As the emails included at Bates Numbers DMB00000061-63 show, Mr. Kaiser spoke with both Jessica Furst and Kelle Strickland on November 30, 2010. Before reviewing more information about these discussions, however, it is worth noting the strength and urgency of Rep. McKinley's concern at this time about the future of the company to which he had devoted 30 years of his life. In an email to Mr. Sere and Mr. Kaiser sent at 11:46 AM on November 30, 2010, Rep. McKinley wrote: "Think about it: if a member-elect were 40 years old and had started his own firm 15 years previously, forcing him to divest himself of the company ownership and changing the name leaves him with what to return to if he were defeated two years later? Bonner said there is a solution; what is it." (Bates Number DMB00000060.)

According to the December 1, 2010, email from Mr. Kaiser to Rep. McKinley (Bates Number DMB00000068), when Mr. Kaiser spoke to Ms. Furst on November 30, after she "reviewed all of the email traffic," Ms. Furst "confirmed [his] concerns," presumably about the stark choice facing Rep. McKinley: either change the name of the company or divest his interest in it. In this same email, Mr. Kaiser notes that he also spoke to Kelle Strickland on November 30, telling Rep. McKinley, "I explained the issues and the background and told her that I would place all of this in a letter to her so that she could advise the best way to proceed."

Mr. Kaiser attached the letter to Ms. Strickland to his email to Rep. McKinley, which is discussed below. (Bates Numbers DMB00000069-70.)

In concluding his December 1 email to Rep. McKinley, Mr. Kaiser makes a point about the restrictions on the practice of the designated "fiduciary professions" that explains and underscores the frustration of many non-lawyer Members and Senators covered by these restrictions: "Adding architects and engineers to a legal prohibition that was clearly intended to apply to lawyers and business advisers makes no logical sense – if a lobbyist is intending to curry favor with a Congressman he can do it just as easily by purchasing a car from the car dealership as he can by hiring the architect to design his house." As an historical observation, Mr. Kaiser's statement is pretty close to the mark. There is certainly support for the conclusion that the drafters of the "fiduciary profession" restrictions – many of whom were lawyers – did not want to single out the legal profession as being singularly susceptible to creating the potential for a financial conflict, so the restrictions were made to apply to a category created and defined more broadly, the "professions that provide services involving a fiduciary relationship." But, importantly and as Mr. Kaiser further notes in this email: "Nonetheless, the law is the law; and we must find a way to comply with it." That is what Rep. McKinley tried to do, and believed he did, following his understanding of the law as it had been explained to him.

In his November 30, 2010, letter to Kelle Strickland (Bates Numbers DMB00000069-70), Mr. Kaiser sought guidance "in order to advise Congressman-elect McKinley regarding his options concerning the business [McKinley & Associates] and his relationship with it while he remains a Member of Congress." As the following quoted paragraph shows, Mr. Kaiser's letter to Ms. Strickland was informed by the same two-option understanding and framework he set out for Rep. McKinley in the November 24 email quoted above –that is, Rep. McKinley could either change the company name or divest his interest in the company – although in the letter to Ms. Strickland Mr. Kaiser also explored the possibility of a "waiver" exempting McKinley & Associates from the fiduciary profession restrictions:

> Paramount among our concerns is the future use of the name: McKinley & Associates, Inc. Over more than twenty years in the region considerable goodwill and name-recognition has accrued to

> this name. Moreover, Congressman-elect McKinley's deceased father, though not associated with the current firm, was also a licensed professional engineer and had a long career in the area. Much of the company's goodwill that has accrued as a result of the name would be lost if the name must be changed Accordingly, we would like to explore the possibility of retaining the name McKinley & Associates, Inc. if Congressman-elect McKinley would sever his other relationships with the business by for example: (a) selling his stock to the ESOP in return for a note payable over a period of years; (b) alternately giving or selling his stock to his wife or children; (c) resigning as an officer and director; and (d) having the company designate other professionals as its supervising architect and supervising professional engineer. If you believe that McKinley & Associates, Inc. can escape being designated as engaging in a "profession that involves a fiduciary relationship" by requesting a waiver or clarification of the definition, please advise as to the best way to go about that process. Obviously, if we could simply keep the status quo so far as the name and stock ownership of the business is concerned that would be most desirable to Congressman-elect McKinley, even if he must take a sabbatical so far as his employment and other responsibilities toward the firm while a Member.

With regard to Mr. Kaiser's statement in this November 30, 2010, letter that Rep. McKinley's father – Johnson B. McKinley – was "not associated with the current firm," this statement was not accurate. Although the elder McKinley does not appear to have been an on-the-payroll employee of McKinley & Associates, he was "associated" with the firm as a consultant and otherwise, as we have described for the Committee previously in our September14, 2012, letter (Bates Numbers DMB00000527-38) and as we also describe in our response below to Committee Request 2.

While awaiting a response to the letter to Ms. Strickland – and in conformity with the guidance and framework of understanding provided by Mr. Kaiser – Rep. McKinley continued to take steps preparatory to selling McKinley & Associates, as a legal alternative to changing the company name. Two email exchanges between Lynn Adams, of McKinley & Associates, and George B. Sanders, Jr., attorney for

the McKinley & Associates ESOP, show Rep. McKinley's increasing focus on selling his remaining 70% interest in the company to the ESOP (or 60% to the company and 10% to another individual) as soon as possible. In a December 2, 2010, exchange of emails with the subject heading "Urgent Question" (Bates Number DMB00000071-73) Ms. Adams wrote to Mr. Sanders, with a copy to Rep. McKinley: "Mr. McKinley would like to know what stock valuation date would be used if he were to sell his remaining 70% of McKinley & Associates, Inc. to the ESOP on 1/5/11 . . . He needs this information to make an informed decision concerning the Company prior to taking office in the U.S. House in early January due to House ethics rules." In his response, Mr. Sanders noted: "If David is going to do this, we need to start ASAP. I am not sure we could get it done by 1/5/2011 but would surely come close."

By December 10, 2010, a plan for Rep. McKinley to resolve potential ethics issues by selling his remaining interest in the company was closer to execution, as Ms. Adams' email to Mr. Sanders, copied to Rep. McKinley, shows: "It appears as though we may be moving toward the sale of the remaining McKinley stock, or at least 60% of it [10% would go to another individual], to the ESOP . . . [U]nderstanding that this transaction and valuation will take time, our local attorney [apparently Mr. Kaiser] has indicated that **as long as we can initiate the sale by January 5, 2011, we would be demonstrating good-faith and could complete the sale later in the year.**" (Bates Numbers DMB00000090.) (Emphasis added.) Attorney Sanders' December 12, 2010, response to Ms. Adams, also copied to Mr. McKinley, may be read as confirming the "local attorney's" point (cited by Ms. Adams in her email) that, even if Rep. McKinley's sale of the company were not completed until later in the year, initiation of the sale by January 5, 2011, would show Rep. McKinley's good faith in the effort to comply with congressional ethics requirements. (Bates Numbers DMB00000093-94.)

A number of other email exchanges during this same period relate to efforts by Rep. McKinley to resolve ethics issues arising in connection with McKinley & Associates before he took office in January 2011. As reflected in an email from Ms. Adams to Rep. McKinley, dated December 3, 2010 (Bates Number DMB00000076), it appears that at a McKinley & Associates management meeting held on December 2, 2010, there was discussion of the possibility of splitting the company to create an engineering company that *could* retain the name McKinley & Associates and an architectural firm with a different name. Ms. Adams asked Mr.

Kaiser for his opinion on this possibility and inquired about "the prohibitions from putting the company into Mary's name" in a December 7, 2010 email. (Bates Numbers DMB00000077-78.) In a December 10 email to Ms. Adams, copied to Rep. McKinley, Mr. Kaiser discussed the "problem with Mary McKinley being a significant owner of McKinley & Associates." (Bates Number DMB00000092.) In a December 14, 2010, email to Mr. Kaiser, copied to Rep. McKinley, Ms. Adams asked for guidance with respect to whether other steps – closing Rep. McKinley's corporate card, discontinuing use of Mary McKinley's personal card for company purchases, and designating new officers – might be needed to dissociate Rep. McKinley and his wife from McKinley & Associates before he took office. (Bates Numbers DMB00000096-102.)

While Rep. McKinley, attorney Kaiser, and personnel at McKinley & Associates were taking the steps described above for Rep. McKinley and his wife to sell their interests in McKinley & Associates, if necessary, to comply with House ethics standards, Mr. Kaiser heard back from Ms. Strickland in response to his November 30, 2010, letter to her. Mr. Kaiser informed Rep. McKinley, in a December 7, 2010, email that Ms. Strickland had consulted with Carol Dixon and "[t]hey are both of the opinion that while McKinley & Associates, Inc. is providing professional services involving a fiduciary relationship that the company may be able to avoid changing the name under the 'family name exception' based upon the similar name of Johnson B. McKinley, Consulting Engineer. She suggested that we request written advice from the Committee and lodge this letter prior to David being sworn in on January 5, 2011." Mr. Kaiser advised, however, that despite the informal Committee staff guidance that the company "may be able to avoid changing the name," the transfer of the company would likely have to proceed: "Because the 'family name' exception does not eliminate the other two prohibitions (i.e. compensation and management affiliation), I believe that David will have to deal with the management structure and ownership of McKinley & Associates in any event. This will have to be accomplished prior to January 5 and should be done in time so that we can explain the reorganization to the Committee in the letter requesting the opinion on the name." (Bates Number DMB00000079.)

After Ms. Strickland advised Mr. Kaiser to seek written advice from the Committee, Rep. McKinley and Mr. Kaiser communicated on a number of occasions on drafts of the letter and on questions related to the request for Committee guidance on complying with the restrictions on a Member's providing

professional service involving a fiduciary profession. (Bates Numbers DMB00000095, DMB00000103-63.) Lynn Adams, a member of the management team at McKinley & Associates, participated in or was copied on many of these email communications. As these email communications show, during the process of drafting a letter to the Committee the possibility of Rep. McKinley putting his interest in McKinley & Associates in a blind trust was added to the compliance options to be put before the Committee.

On January 3, 2011, at 3:53 PM, Mr. Kaiser emailed a signed letter to the Ethics Committee seeking an advisory opinion on matters relating to Rep. McKinley's interest in McKinley & Associates and on permitting McKinley & Associates "to retain its existing name under the well-recognized family name exception." (Bates Numbers DMB00000164-78). (Note that, although Mr. Kaiser emailed this signed letter to Kelle Strickland and Daniel Taylor at the Committee on January 3, the copy of the letter in the Committee's files, provided to Rep. McKinley in connection with the Committee's current request for information, bears a date of January 14, 2011.) Mr. Kaiser informed the Committee in this letter that "[p]rior to being sworn in as a Member of the House of Representatives, David B. McKinley will resign as an officer and director of McKinley & Associates, Inc. and place his stock in a blind trust that will be held for as long as he remains a member of the House of Representatives or otherwise holds an elected federal office."

Rep. McKinley recalls that sometime between his election to Congress and his being sworn in on January 5, 2011, he spoke with former Ohio Congressman Charlie Wilson about the informal guidance he had received from Ethics Committee staff with regard to his relationship with McKinley & Associates. Mr. Wilson – who had two businesses bearing the Wilson name in Ohio during his congressional tenure – told Rep. McKinley he did not think McKinley & Associates would have to change its name. Rep. McKinley also recalls speaking with Rep. Westmoreland at the Members' Retreat in January 2011, about these matters; Rep. McKinley recalls that at some point Rep. Westmoreland recommended that Rep. McKinley might want to confer with attorney Randy Evans.

A January 12, 2011, email indicates that Rep. McKinley had a brief contact with attorney Harry Buch regarding the letter pending before the Ethics Committee. (See entry on privilege log at Exhibit A.) Mr. Buch, in addition to being the

proposed trustee listed on the materials submitted to the Committee with Mr. Kaiser's January 3, 2011, letter, was also an attorney for Rep. McKinley.

On January 25, 2011, attorney Kaiser received a crucial telephone call from Stan Simpson, Counsel at the Ethics Committee. As Mr. Kaiser informed Rep. McKinley the next day, in an email copied to Ms. Adams of McKinley & Associates management, Mr. Simpson notified Mr. Kaiser in this call "**[t]hat the staff agreed with our assertion that McKinley & Associates does not provide professional services involving a fiduciary relationship . . . Mr. Simpson also agreed that McKinley & Associates qualified as a 'family business' and so the name would not need to be changed.** He stated that as a result of the first point, there is no need for blind trust to hold your stock in McKinley & Associates." (Bates Numbers DMB00000185-86.) (Emphasis added.) Mr. Simpson's guidance to Mr. Kaiser, although oral and informal, could not have been clearer or more absolute: the name of McKinley & Associates would not need to be changed.

On January 26, 2011, Mr. Kaiser forwarded to Mary McKinley his January 25, 2011, email summarizing his call with Committee Counsel Simpson. It appears that on January 26, Mrs. McKinley and Mr. Kaiser also spoke by phone about Mr. Simpson's guidance. (See Bates Numbers DMB00000187-89 for this email and for what appears to be a page of notes by Mrs. McKinley on a January 26 call with Mr. Kaiser.)

Despite the clarity and specificity of Ethics Committee Counsel Stan Simpson's advice to Mr. Kaiser that McKinley & Associates did not provide professional services involving a fiduciary relationship and that the name McKinley & Associates would not need to be changed, more than two full months later – on March 31, 2011 – Mr. Kaiser received a call from another Committee Counsel, Heather Jones, completely contradicting Mr. Simpson's advice. Mr. Kaiser immediately informed Lynn Adams of the call. Then, in an "urgent" March 31, 2011, email to Mr. McKinley (Bates Number DMB00000216) – and copied to Ernie Dellatorre and Tim Mizer, both of McKinley & Associate management – Ms. Adams summarized the new Ethics Committee guidance from Ms. Jones: "She says that Stan Simpson, who provided the Ethics' position to him on you and the company is no longer with them and that she is going to recommend that the House Committee take a stand that you do have a fiduciary relationship and

also that the McKinley name must be removed from the company." (Emphasis added.)

It is well known, based on media reports, that, during this period of time in early 2011, the Ethics Committee was undergoing considerable organizational turmoil, with some Members and staff apparently under suspicion by other Members and staff. To some extent this confusion within the Committee staff appears to be reflected in Chairman Bonner's reaction when Rep. McKinley spoke with him about Ms. Jones' call. In an April 2, 1011, email to Mr. Kaiser (Bates Number DMB00000207-08), Rep. McKinley summarized his call with the Ethics Committee Chair:

> Lynn [Adams, of the McKinley & Associates management team] has informed me that a different determination may be being considered. Consequently I have already spoken with Congressman Jo Bonner on Friday. He recommended that I get back to him next week because his staff was already gone for the day. He claimed he remembered some of our previous discussions but showed no awareness of an earlier recommendation by his staff. Nevertheless but [sic] he was not particularly pleased that another decision may be forthcoming and one that reversing [sic] an earlier and more encouraging solution.

Whatever was going on internally within the Committee, it is difficult to understand how the Committee could permit two of its staff counsel to provide entirely contradictory advice to a Member on a matter of such vital personal importance to him and of such financial importance not only to the Member, but also to his family, to his company, and to the many people employed by that company and dependent on it for their livelihood. This was not an abstract legal problem for Rep. McKinley or for the management and employees of McKinley & Associates. So it cannot be difficult for the current leadership and Members of the Committee to appreciate how the Committee's apparent 180 degree turnabout in its advice surprised, shocked, and bewildered Rep. McKinley.

In response to the Committee's reversal of opinion on the issues of whether McKinley & Associates provides services involving a fiduciary relationship and whether the company could retain its name, Rep. McKinley and members of

McKinley & Associates management team determined to proceed with the plan for Rep. McKinley to transfer his remaining ownership interest in the company to the McKinley & Associates ESOP. This plan had been abandoned when Committee Counsel Stan Simpson advised on January 25 that the company would not have to change its name. Rep. McKinley cannot recall whether the idea to proceed with this transfer was his or whether it originated with Ernie Dellatorre or someone else at McKinley & Associates; after Ms. Jones's call to Mr. Kaiser on March 31, 2011, Rep. McKinley did discuss this matter with Mr. Dellatorre and others at McKinley & Associates, but he does not recall the details of any specific discussion.

On April 11, 2011, Mr. McKinley and Mr. Dellatorre, as ESOP Trustee, entered into and signed a Memorandum of Understanding ("MOU") on the "ESOP Purchase of Remaining McKinley & Associates Shares." (Bates Number DMB00000217.) Rep. McKinley believes that Mr. Dellatorre drafted this MOU. The MOU provided as follows:

> As a result of your resignation as President of McKinley & Associates and our conversation last week regarding the potential for a perceived conflict with your ownership of the company during your term in Congress, this letter will serve as our memorandum of Understanding that the ESOP will purchase your remaining shares in McKinley & Associates. Once the share value is determined and the transferring document is approved, your remaining shares will be purchased by the ESOP. Payment for the shares will be similar to the funding you provided for the purchase of the original ESOP Shares.
>
> Details on the stock valuation, the financing for the ESOP purchase, and the final transaction date will be detailed in a subsequent document to be developed by counsel for both of our signatures.
>
> **It is our mutual understanding that by agreeing to this Memorandum of Understanding that you will have no further control over the ownership and operations of McKinley & Associates, Inc.**

(Emphasis added.)

The Committee should recall that, at the time he signed and entered into this MOU with Rep. McKinley, Mr. Dellatorre knew of the Committee's likely reversal of its position on whether the company could maintain the name McKinley & Associates. Mr. Dellatorre had been copied on Lynn Adams March 31, 2011, email in which she stated that Committee Counsel Heather Jones was "going to recommend that the House Committee take a stand that you do have a fiduciary relationship and also that the McKinley name must be removed from the company."

Rep. McKinley entered into the MOU with Mr. Dellatorre and the ESOP on April 11, 2011, with the good faith understanding that – by committing to complete the transfer of his interest when a share value could be determined and by also committing specifically that, as of the date of the MOU, he had "no further control over the ownership and operations of McKinley & Associates, Inc." – he would be in compliance with the advice and framework for understanding previously provided to him by attorney Kaiser. Rep. McKinley believes he did not confer with Mr. Kaiser on the MOU, however. Rep. McKinley recalls that Mr. Kaiser took a "just change the name" stance in response to hearing from Heather Jones on March 31, 2011, that she was going to recommend that the company be required to change its name. Rep. McKinley understood Mr. Kaiser's stance as advocating what Mr. Kaiser saw – as a practical matter – as easiest option to put into effect. Rep. McKinley viewed Mr. Kaiser's practical stance, however, as being entirely consistent with Mr. Kaiser's guidance with respect to the two legal options for compliance – either change the company name or divest his interest – that were available to Rep. McKinley.

On April 14, 2011, Mr. Kaiser emailed a signed letter to Ms. Jones at the Committee explaining why the Committee would be in error if it found that McKinley & Associates was a firm providing professional services involving a fiduciary relationship. (Bates Numbers DMB00000222-26.) Mr. Kaiser sent his letter to Ms. Jones on April 14 following an April 13, 2011, email from Ms. Jones to him "reminding" him "that the Committee on Ethics is waiting on your brief regarding whether architects and engineers are fiduciaries under West Virginia law." (Bates Numbers DMB00000476-80.) Mr. Kaiser's argument in this April 14, 2011, letter is summed up in the following paragraph:

> West Virginia imposes fiduciary responsibilities only upon consulting engineers, not professional engineers. Moreover, the House Rules were intended to apply to areas where a professional had fiduciary responsibilities to his or her client which could necessarily conflict with the responsibilities of a Member of Congress. As has been shown, West Virginia law states clearly that the fiduciary responsibility of as licensed professional engineer or licensed architect is to the **public, not the client**. Thus the dangers that the House Rules were trying to guard against do not apply in this particular instance.

(Emphasis added.)

In this April 14, 2011, letter to Ms. Jones, Mr. Kaiser also reiterated "the history of the professional engineering firm within the McKinley family." By reiterating this history, Mr. Kaiser demonstrated that the name McKinley & Associates is a "family name," subject as such to a recognized Committee exception to the prohibition on a Member "permitting" his name to be used by an entity that provides professional services involving a fiduciary relationship.

By email on April 14, 2011, at 4:52 PM (Bates Numbers DMB00000222-26), Mr. Kaiser forwarded to Rep. McKinley and to Ms. Adams, at McKinley & Associates, a copy of this signed letter to Ms. Jones at the Ethics Committee. In this email, Mr. Kaiser notes that he "added the paragraph at the end reiterating the relationship between the Johnson McKinley engineering practice and the present-day McKinley & Associates." However, Rep. McKinley does not recall discussing drafts of the letter to Ms. Jones with Mr. Kaiser.

On May 2, 2011, apparently at the request of Andy Sere, Ms. Jackie Barber, then Deputy General Counsel at the NRCC, emailed Mr. Sere about laws and standards applicable to participation in a contract with the federal government by a Member or by a corporation with a relationship with a Member. (Bates Number DMB00000233.)

More than two months later, On June 23, 2011, Mr. Kaiser heard again from Ms Jones at the Committee. Mr. Kaiser described this call in a June 24, 2011, email to Rep. McKinley, copied to Ms. Adams at McKinley & Associates (and included at Bates Number DMB00000235): "While she did not give me any indication as to

the Committee's decision on this matter, she wanted confirmation from me that you had resigned your position as an officer and director of McKinley & Associates. I told her that your resignation letters were signed and delivered prior to your being sworn into office as a Member of Congress."

On June 27, 2011 – almost *six months* after his counsel submitted a letter to the Committee on January 3, 2011, seeking a formal Committee advisory opinion – Rep. McKinley received word in a phone call from Chairman Bonner that a letter would be forthcoming. In an email that same day at 5:29 PM to Mr. Kaiser, Rep. McKinley summarized the key point of the call with Chairman Bonner: "He says we must change the name of the company to McKinley Engineering." (Bates Number DMB00000237.) Kelle Strickland forwarded the actual letter – dated June 24, 2011 – to Rep. McKinley by email at 5:55 PM on June 27, 2011. (Bates Numbers DMB00000245-51.) As to why, in his June 27 call with Chairman Bonner, Rep. McKinley "countered with the option of selling the company to [his] wife or son" – notwithstanding the fact that the MOU was in place with the McKinley & Associates ESOP regarding transfer of shares and relinquishment of "control over the ownership and operations of the company" – Rep. McKinley believes he mentioned that option to see if the Committee would receive it favorably and in case the MOU could somehow be withdrawn in favor of that option. Rep. McKinley understood at the time, however, that he did not have control over the ownership and operations of McKinley & Associates, or the ESOP, and that the ESOP would have to agree to any modification of the terms of the MOU.

In reviewing the letter, Rep. McKinley quickly focused on a fundamental factual flaw in the Committee's analysis regarding what would qualify as a "family name" for the company, as he pointed out in a June 27, 2011, email to Mr. Kaiser: "This makes no sense. [T]hink about it: McKinley Engineering is OK but McKinley & Associates is a problem. My father's company was not McKinley Engineering and we never represented that it was. That name was the one I used as a sole proprietor for the early years of the company. Let's talk." (Bates Numbers DMB00000238-44.)[2]

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[2] The Committee's letter dated June 24, 2011, letter does state that Rep. McKinley's father, Johnson McKinley, "maintained a one-man office, McKinley Engineering, as a consulting engineer in Wheeling, West Virginia, beginning in 1954 until his retirement in the 1980s." It is not clear

Rep. McKinley recalls that, within a day or two of receiving the Committee's letter on June 27, 2011, he approached Chairman Bonner before the Speaker's podium on the floor of the House. With regard to the Committee's letter, Rep. McKinley recalls saying to Chairman Bonner, "what the [heck] is this," or some other similarly expressive phrase. Rep. McKinley told Chairman Bonner that "McKinley Engineering" was the original name of *his* firm, not the name of his father's firm (as the Committee's letter incorrectly stated). Rep. McKinley recalls Chairman Bonner responding, in substance, that the Committee was not aware of this but had thought that "McKinley Engineering" was the name of his father's firm; Chairman Bonner said that this could make a difference to the Committee's determination. Rep. McKinley then responded that, in any event, it did not matter anymore because he had already sold his company, by which Rep. McKinley meant the arrangement put in place by the MOU. Chairman Bonner said that he did not know this and that he had hoped it would not come to this.

Shortly after receipt, Rep. McKinley shared the Committee's letter dated June 24, 2011, with members of management at McKinley & Associates.

With respect to steps taken in response to the Committee's latter dated June 24, 2011, Rep. McKinley reasonably believed that no such steps were necessary because – first through the MOU and then, at the end of 2011 and as discussed below, through the final redemption of his remaining shares by McKinley & Associates – he believed he had complied with the guidance from Mr. Kaiser that any ethics concerns that would arise for him in connection with the name "McKinley & Associates" would be resolved by either changing the company name or divesting his interest in the company. Rep. McKinley believed that the

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(Continued . . .)
where the Committee got the information – or the incorrect idea – that Rep. McKinley's father called his practice "McKinley Engineering." It does not appear to be in any written submissions that had been made to the Committee by counsel for the Congressman. Given Rep. McKinley's recollection and understanding that his father did *not* call his own practice "McKinley Engineering" and given that "McKinley Engineering" was the original name of McKinley & Associates, there appears to be just as much basis for the Committee to determine that "McKinley & Associates" is a family name as there is for the Committee to determine that "McKinley Engineering" is a family name. Therefore – and for the other reasons in fact, law, and policy set forth in the instant response letter and in the September 14, 2012, letter to the Committee from the undersigned counsel for Rep. McKinley – the Committee should reconsider its guidance on this point and determine that "McKinley & Associates" itself is a "family name."

MOU represented a satisfactory good faith effort to resolve the matter by complying with this second option. Rep. McKinley also believed that by the terms of the MOU – through which, as of April 11, 2011, he had given control over the ownership and operations of McKinley & Associates to the ESOP – he no longer had the power or authority to direct or control a change in the name of McKinley & Associates. Further, Rep. McKinley considered that, through his brief conversation with Chairman Bonner on the House floor soon after receiving the Committee's letter dated June 24, 2011 – in which he told the Chairman that he had sold the company – he had effectively notified the Committee about the action he had taken.

Nonetheless, Rep. McKinley regrets not having responded to the Committee's letter more formally at that time. Rep. McKinley was concerned and upset at the way the Committee had treated him. As described above, Rep. McKinley's concerns with the Committee's process in this matter included: being asked by Committee counsel why, if he had to sell McKinley & Associates, he could not just start another company when he left Congress; being advised by Committee counsel in January that the company *would not* have to change its name, hearing nothing from the Committee for two months, and, then being advised by a different Committee counsel that the company *would* have to change its name; hearing nothing from the Committee on this for more than another two months; having to wait a total of almost six months for a written response to his January 3, 2011, written request for formal written guidance on a matter of great personal and financial importance to him and to the management and employees of McKinley & Associates; learning that the Committee, in determining a "family name" for the business, relied upon a name for his father's business that did not exist and that, in any case, did not convey the actual business of McKinley & Associates. These are serious concerns that should not be minimized. However, Rep. McKinley believes that he may have allowed these concerns about the Committee's handling of this matter to affect his responsiveness to the Committee and, if he did, he regrets having done so; he believes he should have responded in a more formal manner to the Committee's letter dated June 24, 2011.

Documents indicate that, in late August 2011, Rep. McKinley had preliminary discussions with attorney Stefan Passantino in connection with this matter. Rep. McKinley did not sign an engagement letter with Mr. Passantino, but the Congressman considers these discussions to be covered by attorney-client

privilege. Documents related to these discussions have been entered on the privilege log accompanying these responses at Exhibit A.

On October 11, 2011, Congressman and Mrs. McKinley had dinner with former Congressman Tom Reynolds and his associate Sally. It appears that "ethics matters" were discussed at the dinner, including discussion relating to what the Congressman, in an email to Mr. Reynolds the next day, refers to as his "'fifth' child," i.e., McKinley & Associates. (Bates Number DMB00000252.) On October 13, 2011, Mr. Reynolds responded by email to Rep. McKinley, saying that he had spoken with an attorney and asking the Congressman to call him. Mr. Reynolds followed up with Rep. McKinley again by email on November 4, 2011, on their "previous discussion about your business ownership and the house ethics committee"; in this same email Mr. Reynolds forward the contact information for attorney Rob Kelner. (Bates Number DMB00000257.) It appears that Rep. McKinley did not follow up on this recommendation.

Sometime in the late fall of 2011, Rep. McKinley, perhaps because of discussions with Ernie Dellatorre or others at McKinley & Associates, turned his attention to consummating the sale of his remaining shares in McKinley & Associates to the ESOP, as contemplated by the MOU he signed and entered into on April 11, 2011. There are a substantial number of documents related to this transaction, included with these responses at Bates Numbers DMB00000260-458. Rep. McKinley also had a number of discussions with individuals, including attorneys Ben Sanders and Charles Kaiser, persons at McKinley & Associates, and possibly others, about this transaction. An email from Mr. Sanders, distributed on December 31, 2011, to Ernie Dellatorre, Gregg Dorfner, and Tim Mizer at McKinley & Associates, discussed the transaction, its timing, and its effect. (Bates Number DMB00000369-70.) In this email, also sent to Rep. McKinley, Mr. Sanders explained that, "[b]ecause of the press of other business, particularly David's duties as a newly elected member of the House of Representatives, a closing of that sale [committed to through the MOU] has not occurred." Mr. Sanders noted that, "although the [MOU] in [Rep. McKinley's] mind means for all intents and purposes he no longer has an ownership interest in the Company, the [MOU] is apparently insufficient evidence of that fact from the point of view of House ethics rules." Mr. Sanders further noted that, as of that date – i.e., December 31, 2011 – "requirements imposed on the ESOP by ERISA" made it impossible to finalize the transaction with the ESOP by the end of 2011. Therefore, because Rep. McKinley

wanted "to start 2012 without an ownership interest in the company," as of December 31, 2011, the corporation McKinley & Associates redeemed all of Rep. McKinley's remaining shares in the company "on the condition that the Company [would] assume [Rep. McKinley's obligation under the [MOU] to sell the shares to the ESOP as soon in 2012 as time [would] permit." So, as of December 31, 2011, the transfer of all of Rep. McKinley's remaining shares in McKinley & Associates, committed to in good faith in the April 2011 MOU, was finalized, albeit temporarily to the company rather than the ESOP. The company's sale of the shares to the ESOP was completed on April 22, 2012.

Because he reasonably believed that none were necessary, Rep. McKinley took no further steps in connection with this matter until he received the Committee's letter to him of August 24, 2012. In connection with that letter, Rep. McKinley had some preliminary contacts with Mr. Kaiser, but shortly after receiving the letter Rep. McKinley retained undersigned counsel. As previously noted, Rep. McKinley's communication with undersigned counsel in connection with that letter and with the Committee's letter of March 18, 2013, are covered by attorney-client privilege and are not separately noted or entered on the privilege log. Further, any communications by Rep. McKinley with others and any communication by others in connection with compliance with the Committee's request for documents and information as set forth in its March 18, 2013, letter are covered by attorney-client privilege and/or work product protection and are also not separately noted or entered on the privilege log.

Response to Committee Request 2

Committee Request 2 requests information and documents concerning the association of Johnson B. McKinley, Rep. McKinley's father, with McKinley & Associates.

Rep. McKinley believes that, to the extent that his father was paid by his firm, it was as a consultant. Johnson B. McKinley was not a paid employee, officer, director, owner, or contractor in connection with McKinley & Associates. With respect to Johnson B. McKinley's role as consultant to McKinley & Associates, or its predecessor firm McKinley Engineering Company,[3] Rep. McKinley provides

[3] As discussed above, although in its June 11, 2011, letter to Rep. McKinley the Committee required a change of the name of the company McKinley & Associates "to the name of your father's

two documents from September 1981 responsive to the Committee's request. The first is a September 1981 report on "Structural Steel Evaluation" undertaken by McKinley Engineering Company for Koppers Company, Inc. in Follansbee, West Virginia. (Bates Numbers DMB00000539-53.) As clearly stated at the beginning of the document, the report sets forth the results of the work of "J.B. McKinley, Engineer, Wheeling, West Virginia, at the request of Thurman Wilson, Koppers Co." "J.B. McKinley, Engineer" was Rep. McKinley's father. Similarly, a September 15, 1981, letter (Bates Number DMB00000554) from McKinley Engineering Company to the Mayor of Martins Ferry, Ohio, states: "A site inspection . . . was made by J.B. McKinley, Engineer, to determine the stability of an alley, sewer repairs, and construction methods."

At Bates Number DMB00000521, the Committee will find a narrative drafted by Rep. McKinley relating to his father and his professional association with his father. Rep. McKinley drafted this narrative after receiving the Committee's letter of August 24, 2012. Mary McKinley's comments on this draft narrative may be seen in an email from her to Rep. McKinley at Bates Numbers DMB00000460-61.

Apart from the information described above or provided in Rep. McKinley's September 14, 2012, letter to the Committee, Rep. McKinley does not have any other information or documents responsive to Committee Request 2. McKinley & Associates may have additional information or documents responsive to this request, but Rep. McKinley does not know if they do or, if so, what information or documents they may have.

(Continued . . .)
original business, McKinley Engineering," to the best of his knowledge his father never used or operated under the name McKinley Engineering and he does not know where the Committee got this information or why it came to this conclusion. Research done by McKinley & Associates employee David Carenbauer in connection with the Committee's August 24, 2012, letter to Rep. McKinley listed a number of names used by Johnson B. McKinley between 1954 and 1992 for his business, but McKinley Engineering is not one of these names. (Bates Number DMB00000524.) A piece of letterhead from Johnson B. McKinley from 1985 shows his use of the business name "Johnson B. McKinley, Consulting Engineer." (Bates Number DMB00000526.) Minutes of the regular meeting of the Council of Beech Bottom, West Virginia, for November 4, 1986 – available online in PDF form at http://beechbottomwv.org/pdfs/1986.pdf, at page 257 – refer to a "Johnson B. McKinley Engineering."

Rep. McKinley believes that, with respect to understanding and appreciating his father's connection with McKinley Engineering and McKinley & Associates, it is important for the Committee to focus on more than just pay records, financial transactions, or contracts alone. First, if some of the records sought by the Committee existed at one time, these records may have been created as much as 30 years ago, or more; for the Committee to base any determination on the absence of such records under these circumstances would be unsound. Second, Johnson B. McKinley's interest and activities in assisting his son's business did not depend on compensation, so to focus exclusively on records of financial compensation in this context is to focus too narrowly. Johnson B. McKinley was Rep. McKinley's father. There were family ties at work. Therefore, it is important for the Committee in this regard to review carefully the information on Johnson B. McKinley and his association with Rep. McKinley's business that is set out at pages 3 and 4 of Rep. McKinley's September 14, 2012, letter. (Bates Numbers DMB00000527-38.)

Response to Committee Request 3

Committee Request 3 asks for information and documents in connection with McKinley & Associates' contracts with or practices before the federal government.

As to any such current contracts, to Rep. McKinley's understanding the company still has an "open-ended" contract with the U.S. Postal Service, under which the company may do work upon request. Rep. McKinley does not know specifics as to the current status of this contract or as to the work, if any, currently being done by McKinley & Associates in connection with the contract. With respect to such specifics as the Committee is requesting in Request 3 on any current or previous contracts with the federal government, Rep. McKinley believes that such information is within the custody and control of McKinley & Associates; therefore, Rep. McKinley respectfully advises that the company would be the source of such information for the Committee.

Although not strictly responsive to this request, an additional point should be made here with respect to use of the name "McKinley & Associates" by Rep. McKinley's former firm. Under relevant procurement codes and regulations, and under other standards applicable to architects and engineers, no matter what name the Committee may determine that McKinley & Associates should operate under,

when the company bids for work with a government client that government client will necessarily see abundant documentation (relating to past projects by and qualifications of the firm) that the firm is the former "McKinley & Associates." In this way, short of closing down the company there appears to be no way to keep use of the "McKinley & Associates" name out of the government contracting process.

Responses to Committee Requests 5, 6, 7, and 8

Through the discussion and responses in this letter, and through the documents accompanying this letter, Rep. McKinley has attempted to comply with Committee Request 5 and 6 with respect to providing documents and, as solicited by the Committee in Request 8, has provided other information and documents that he hopes will assist the Committee.

With respect to Committee Request 7, regarding efforts taken to identify documents responsive to the Committee's request, reasonable and appropriate steps were taken identify such documents, including:

- Identifying and collecting hard copy documents in Rep. McKinley's possession.
- Distributing a document preservation and identification notice to official and campaign staff and collecting identified materials.
- Copying and searching Rep. McKinley's House email account. (Rep. McKinley understands, however, that the House has a 14 day retention policy for email.)
- Imaging and searching the hard drives of Rep. McKinley House desktop and laptop computers. (It appears that Rep. McKinley saved items locally and did not save items to the House network.)
- Imaging and searching text messages from Rep. McKinley's iPhone.
- Imaging and searching Mary McKinley's AOL email account.

Wiley Rein LLP

- Imaging and searching the computer used by Rep. McKinley in his non-official office at the Maxwell Center in Wheeling, West Virginia.

Although he is not able to identify specific items, Rep. McKinley believes there are likely to be documents responsive to the Committee's requests in the possession, custody, and control of McKinley & Associates and/or individual personnel at the company.

If the Committee has any questions about the responses or documents provided with this letter by Rep. McKinley, or wishes to discuss any aspect of this matter, please do not hesitate to contact Jan Witold Baran, at 202.719[redacted] or Robert L. Walker, at 202.719[redacted].

Sincerely,

Jan Witold Baran
Counsel for Rep. David B. McKinley

Robert L. Walker
Counsel for Rep. David B. McKinley

Attachments

cc: The Honorable David B. McKinley

EXHIBIT 7

From:	Andy Sere [redacted]@NRCC.org>
Sent:	Wednesday, November 10, 2010 6:27 PM
To:	dmckinley@[redacted]
Subject:	one person's opinion

David:

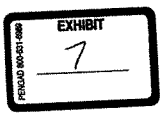
For what it's worth, below are the thoughts of a GOP lawyer who used to work on the ethics committee, to whom I previously referred.

Andy

1. *"Consulting firms" fall under the prohibition against receiving compensation for fiduciary professions (p. 216 of the House Ethics Manual), however, it does not explicitly list engineering—lists legal, real estate, consulting and advising, insurance, medicine, architecture or financial. A conservative reading of this rule would be that engineering consulting counts, and thus he can't continue receiving income from the firm while in the House.*

2. *As I mentioned on the phone, Mr. McKinley, if he doesn't want to worry about changing the name of his firm, should probably think about who he plans to divest his interest to. If it happens to be a familial relative with the same name, he would most likely not have to change the name of the whole firm. If it is to a different individual, it likely would not be able to stay with his name on it.*

Andy Seré
Regional Press Secretary
National Republican Congressional Committee
(202) 479-[redacted]- ofc
(713) 806-[redacted] - cell
[redacted]@nrcc.org



Maintain as Confidential

EXHIBIT 8

STITES & HARBISON PLLC
ATTORNEYS

400 West Market Street
Suite 1800
Louisville, KY 40202-3352
(502) 587-[redacted]
(502) 587-6391 Fax
www.stites.com

May 1, 2013

George B. Sanders, Jr.
(502) 681-[redacted]
(502) 779-8299 FAX
[redacted]@stites.com

Christopher Tate
U.S. House of Representatives
1015 Longworth House Office Building
Washington, D.C. 20515-6328

RE: McKinley & Associates, Inc.

Dear Mr. Tate:

I represent McKinley & Associates, Inc. Pursuant to our previous correspondence regarding the Committee on Ethics' letter of March 18, 2013 addressed to Timothy E. Mizer of McKinley & Associates, Inc., I am forwarding to your attention the documents and other information requested in the Committee's letter.

In identifying and producing the information responsive to the Committee's letter, the Company has made a search of the correspondence and email files of the Company's management, the global daily correspondence file maintained by the Company for the period from November 1, 2010 through the present, and any project files relevant to the matters raised in the letter. Documents and material resulting from the Company's search that fall within the Committee's request have been scanned onto the enclosed compact disc labeled "McKinley & Associates, Inc. Response to U. S. House of Representatives Committee on Ethics Letter of March 18, 2013" and numbered MCK 000001 through MCK 000117.

Documents MCK 000001 through MCK 000079 are in response to the numbered paragraph #1 of the Committee's letter of March 18, 2013. The Firm (as defined in the Committee's letter) has used its corporate name "McKinley & Associates, Inc." since its inception in 1989, and has use that name consistently, without change, from 1989 to the present. That name usage has not been the subject of conversations or communications with Representative David B. McKinley. Rather, conversations or communications between the Firm and Representative McKinley regarding the name of the Firm have been limited to the status of discussions between the Committee and Representative McKinley as to the extent to which the Committee would require him, as majority owner of the Firm, to cause the Firm to change its corporate name. Document MCK000079 is an email from Ernest Dellatorre to the undersigned in which he describes, at my request and specifically for transmittal to the Committee, any unwritten communications with Representative McKinley regarding the matters described in paragraph #1 of the Committee's letter. As such, it is not to be construed as a waiver of any attorney client privilege of the Firm regarding its communications with the undersigned as its attorney.

STITES & HARBISON PLLC
ATTORNEYS

Documents MCK000084, MCK000085, and MCK000088 through MCK 000117 are in response to paragraph #2 of the Committee's letter of March 18, 2013. I believe that the history of Johnson B. McKinley's business as a professional engineer and predecessor to McKinley & Associates is described in previous correspondence to the Committee from my predecessor, Charles Kaiser. The Firm is not in possession or control of the records of Johnson B. McKinley. The present McKinley & Associates is the natural continuation in the corporate form (and with expanded personnel) of the engineering business started by Johnson B. McKinley in 1954.

With respect to paragraph #3 of the Committee's letter, the Firm maintains a contract with United States Postal Service, a relationship that began more than 20 years ago, which is the only contract the Firm has with an agency of the federal government. Document MCK000080 lists the projects in which the Firm has recently been engaged by USPS between 2009 and the present, and shows a decline in that business over that period.

With respect to paragraph #4 of the Committee's letter, document MCK000081 contains a list of projects in which the Firm has been engaged since Representative McKinley's election to Congress in 2010. The Firm has engaged in each of these projects under its historic corporate name of McKinley & Associates without any change as a result of Representative McKinley's election in 2010. Document MCK000080 displays the revenues enjoyed by the Firm for a period that bridges Representative McKinley's election to Congress, which revenues have declined in each of the years following his election. Document # also contains information relevant to the importance of the Firm's historic corporate name and good will to the Firm's future and the future of its employee owners.

Beginning in 2008, the McKinley & Associates, Inc. Employee Stock Ownership Plan and Trust (the "ESOP") purchased 30% of the outstanding capital stock of the Firm, beginning a process that was intended to eventually result in the employees of the Firm owning 100% of the Firm. In December of 2011, acting on behalf of the ESOP, the corporation redeemed the balance of the capital stock owned by Representative McKinley and sold the shares to ESOP. As a consequence, the ESOP is now the 100% owner of the Company.

The Company is anxious to cooperate with the Committee in every way possible in proving any and all information required by the Committee. Please let me know at your convenience if you need additional information. The material submitted in response to the Committee's request contains confidential and proprietary information regarding the Company, its business, clients, customers, contracts and other confidential business information. The Company requests that to the maximum extent permissible, this information not be disclosed to the public or to competitors of the Company and be maintained by the Committee as confidential.

STITES & HARBISON PLLC
ATTORNEYS

Thank you very much for your attention to this matter, and I look forward to hearing from you if you need additional information.

Very truly yours,

George B. Sanders, Jr.

GBS:mem
Enclosure

EXHIBIT 9

From: Kaiser, Charles J. <[redacted]@pgka.com>
Sent: Wednesday, November 24, 2010 5:04 PM
To: David B McKinley
Subject: RE: Company name change...

David: I will be out of town on Friday, but I think that it might be a good idea to pick a time early next week to talk about the options. There are no prohibitions in West Virginia to continuing to use the name McKinley & Associates even though you are not an owner or an officer or director. You will have to notify both the Board of Architecture and the PE Board who the "Supervising Architect" and the "Supervising Professional Engineer" is with respect to the company once that is decided. You will not be able to stay on the Board or be an officer, but you can be paid the value of the stock if it is sold to the ESOP (i.e. you can be paid for your capital interest) or for income that you are entitled to receive as a result of completed work. Caution will be required with respect to how this is calculated. The question as to the change of name boils down to whether McKinley & Associates is considered to be a firm "providing professional services involving a fiduciary relationship". An example of this definition in the Rules is a company providing architectural services, but we can certainly ask for a ruling and argue that it does not apply to you because you are not an architect. If the ruling comes back favorable, you can keep your interest in the company, but not work or receive earned income from it. If McKinley & Associates is considered to be a firm providing professional services involving a fiduciary relationship, then it appears that you are left with two choices: (1) change the name, or (2) completely divest yourself of your interest in the company (this appears to include Mary as well). Please understand that your situation is different than family businesses that do not provide professional services (i.e. car dealerships), though I think the logic got lost when this Rule/law was being formulated. In addition, it is important for you to understand that this is not simply a House Rule, but a federal statute. Let me know the best time to talk Monday (or Sunday if that works better). Have a Happy Thansgiving. CJK

From: David B McKinley [mailto:[redacted]@mckinleyassoc.com]
Sent: Tuesday, November 23, 2010 3:50 PM
To: Kaiser, Charles J.
Subject: FW: Company name change...

More thoughts.

From: Andy Sere [mailto:[redacted]@NRCC.org]
Sent: Tuesday, November 09, 2010 5:53 PM
To: dmckinley@[redacted]
Subject: RE: Company name change...

David:

Just a quick update.

Rep. Vern Buchanan's (R-Fla.) 2006 campaign manager gave me the contact info for John Tosch, Buchanan's corporate attorney who handled all Vern's transition stuff. Will be interesting to see what he has to say when he gets back to me, since they obviously found some way around this (Buchanan's car dealerships are still called "Buchanan Automotive").

Also talked to Todd Ungerecht, who used to work for the Ethics Committee and now works for Rep. Doc Hastings (R-Wash.) on the Natural Resources Committee. He told me that there may be ways around this (one question he had was, to whom do you plan to divest the business - is

EXHIBIT 9

PENGAD 800-631-6989

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David H involved?), and he's going to take a look at the situation and provide some thoughts soon.

At the end of the day this will obviously be handled by attorneys, but until they get involved I'll keep trying to find out more background and will keep you posted.

Andy

Andy Seré
Regional Press Secretary
National Republican Congressional Committee
(202) 479-[redacted] - ofc
(713) 806-[redacted] - cell
asere@nrcc.org

-----Original Message-----
From: Andy Sere
Sent: Tuesday, November 09, 2010 10:28 AM
To: 'dmckinley@r[redacted]
Subject: Company name change...

David:

Tim mentioned to me this issue you're having with a lawyer's opinion on your company's name in light of your election to Congress.

Have there been any further developments on this?

I am going to make a few calls this afternoon to see what I can find out about how this issue has been handled in the past with other members in similar situations. Will let you know if I learn anything.

Andy

EXHIBIT 10

From:	Kaiser, Charles J. <[redacted]r@pgka.com>
Sent:	Monday, November 29, 2010 10:46 AM
To:	asere@[redacted]
Cc:	David B McKinley
Subject:	McKinley & Associates

Andy: It was nice to talk to you on the phone. As I explained we should get an understanding of how David wants to proceed with respect to McKinley & Associates, Inc. under West Virginia state law and the House Ethics Rules and then move to solve the Pennsylvania issues. There are no prohibitions under West Virginia law to continuing to use the name McKinley & Associates, Inc., even though David is no longer a stockholder or director or officer. David would have to notify both the WV Board of Architecture and the WV PE Board the names of the new "Supervising Architect" and "Supervising Professional Engineer" with respect to the company. David cannot remain a board member or officer of the company under the House Ethics Rules, but if he terminates his capital interest in the company, he can be paid the value of his stock if it is sold to the ESOP or the value based upon work completed in the past. The question regarding the change of name under the House Ethics Rules boils down to whether McKinley & Associates is considered to be a "firm providing professional services involving a fiduciary relationship." An example of this definition in the Rules is a company providing architectural services, but it could be argued that DBMcK is not an architect so it does not apply to him even though McKinley & Associates provides both architectural and engineering services. If McKinley & Associates is considered to be a firm providing professional services involving a fiduciary relationship, it appears that there are two choices: (1) change the name; or (2) completely divest DBMcK's interest in the company (this appears to include David's wife as well). Because of the professional nature of the firm, it is treated differently than other companies like auto dealerships. Moreover, there is a federal statute as well as the House Ethics Rules to contend with. Let me know how you would like to proceed.

Charles J. Kaiser, Jr., Esq.
PHILLIPS, GARDILL, KAISER & ALTMEYER PLLC.
61 Fourteenth Street
Wheeling, WV 26003
T: (304) 232-[redacted]
F: (304) 232-4918
e-mail: [redacted]@pgka.com

EXHIBIT 11

From:	Kaiser, Charles J. <[redacted]@pgka.com>
Sent:	Tuesday, December 07, 2010 10:25 AM
To:	David B McKinley
Cc:	Andy Sere; [redacted]@mckinleyassoc.com
Subject:	House Standards Response

Greetings: I heard back from Kelle Strickland last night regarding the "professions that provide services involving a fiduciary relationship" issue. Kelle is legal counsel to Rep. Jo Bonner, the Ranking Member of the House Ethics panel, and she consulted with Carol Dixon, who is Staff Director to the current Chair Rep. Zoe Lofgren. They are both of the opinion that while McKinley & Associates, Inc. is providing professional services involving a fiduciary relationship that the company may be able to avoid changing the name under the "family name exception" based upon the similar name of Johnson B. McKinley, Consulting Engineer. She suggested that we request written advice from the Committee and lodge this letter prior to David being sworn in on January 5, 2011. Because the Committee will have a number of similar written advice requests from new Members, it may well take some time to work through all of the opinions and the name can remain the same until the opinion is rendered. Because the "family name exception" does not eliminate the other two prohibitions (i.e. compensation and management affiliation), I believe that David will have to deal with the management structure and ownership of McKinley & Associates, Inc. in any event. This will have to be accomplished prior to January 5 and should be done in time so that we can explain the reorganization to the Committee in the letter requesting the opinion on the name. In addition, because McKinley & Associates has current contracts with the federal government, the House Ethics Manual requires a newly elected Member to consult with the contracting agency (see p. 202 of the House Ethics Manual). It appears that so long as the Member is the owner of stock in a corporation that is less than "substantially owned or controlled" that the corporation can continue to contract with the government agency. Here again, however, I would advise that decisions be made concerning the ownership issue so that we can advise the contracting agency specifically as to the ownership interests of Member McKinley. I am available to discuss this all day today, but I will not be available Wednesday or Thursday and only to a limited extent on Friday. Please let me know when you would like to discuss further. CJK

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EXHIBIT 12

From:	Lynn Adams <[redacted]@mckinleyassoc.com>
Sent:	Monday, November 29, 2010 6:13 PM
To:	David B. McKinley
Cc:	Tim Mizer
Subject:	Management Meeting Agenda Items

Tim and I put together this partial list for management meeting:

1. Energy Bill potential tax deductions for school projects
2. ESOP buyout
3. Need to settle with Jezerinac and Stafford on $38K and $21K, respectively
4. Certificate of Authority in WV in DBM name for consulting engineer
5. QA – Charlie's future role
6. Patriot Services scope
7. Explanation of contract-review with Owners; all instructions to contractors must go through us; contractor claims for time delays
8. Wage adjustments

Lynn E. Adams
Office Manager
McKinley & Associates, Inc.
32 Twentieth Street, Suite 100
Wheeling, WV 26003
Phone 304-233-[redacted]
Fax 304-233-4513

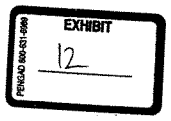

EXHIBIT 13

From:	Kaiser, Charles J. <[redacted]@pgka.com>
Sent:	Wednesday, January 26, 2011 10:05 AM
To:	David B McKinley
Cc:	Lynn Adams
Subject:	House Committee on Standards

David: I received a call from Mr. Simpson who is a staff member of the House Committee on Standards late yesterday afternoon. He advised me that the staff agreed with our assertion that McKinley & Associates does not provide professional services involving a fiduciary relationship. As you will recall this is the critical element that created the difficulties under the House Ethics Manual. Mr. Simpson also agreed that McKinley & Associates qualified as a "family business" and so the name would not need to be changed. He stated that as a result of the first point, there is no need for a blind trust to hold your stock in McKinley & Associates. There continues to be a strict prohibition on the part of Congressman McKinley using his elected office to solicit or to direct business to McKinley & Associates. Thus, for example, you could not specify earmarks or other federal funding for projects where McKinley & Associates is the project engineer and you could not contact any federal agencies on behalf of McKinley & Associates. However, you could be compensated by McKinley & Associates up to the earned income limits ($25,000 +/-) for employment with McKinley & Associates. And there are no limits in your receipt of unearned income (i.e. dividends) from your stock ownership of McKinley & Associates. Because of the conflict of interest rules (i.e. using a congressional office to solicit personal business), Mr. Simpson and I believe that it would still be advantageous for you to avoid service as an officer or director of McKinley & Associates and to create a simple voting trust for your stock. In other words, the stock would still be in your name but someone else will vote the stock. Because we do not have to follow the Blind Trust Rules, the trustee of the voting trust can be family members or a combination of related parties (i.e. the trustees could be the officers of McKinley & Associates and David H.). Give me a call when you can talk further about this so that I can get back to Mr. Simpson and eliminate the Blind Trust. Best Regards.

Charles J. Kaiser, Jr., Esq.
PHILLIPS, GARDILL, KAISER & ALTMEYER, PLLC.
61 Fourteenth Street
Wheeling, WV 26003
T: 304-232[redacted]
Fax: 304-232-4918 or 304-232-6907

[redacted]@pgka.com

****

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EXHIBIT 14

From: David B McKinley <[redacted]y@mckinleyassoc.com>
Sent: Saturday, April 02, 2011 3:15 PM
To: 'Kaiser, Charles J.'
Cc: 'WV01McKinleyDavid@[redacted]
Subject: RE: House Committee on Standards

Lynn has informed me that a different determination may be being considered. Consequently I have already spoken with Congressman Jo Bonner on Friday. He recommended that I get back to him next week because his staff was already gone for the day. He claimed he remembered some of our previous discussions but showed no awareness of an earlier recommendation by his staff. Nevertheless but he was not particularly pleased that another decision may be forthcoming and one that reversing an earlier and more encouraging solution. Please remember that McKinley and Associates is in many respects the successor company to Johnson B. McKinley. We have all of his drawings, files, correspondence and furniture.

From: Kaiser, Charles J. [mailto:[redacted]@pgka.com]
Sent: Wednesday, January 26, 2011 10:05 AM
To: David B McKinley
Cc: Lynn Adams
Subject: House Committee on Standards

David: I received a call from Mr. Simpson who is a staff member of the House Committee on Standards late yesterday afternoon. He advised me that the staff agreed with our assertion that McKinley & Associates does not provide professional services involving a fiduciary relationship. As you will recall this is the critical element that created the difficulties under the House Ethics Manual. Mr. Simpson also agreed that McKinley & Associates qualified as a "family business" and so the name would not need to be changed. He stated that as a result of the first point, there is no need for a blind trust to hold your stock in McKinley & Associates. There continues to be a strict prohibition on the part of Congressman McKinley using his elected office to solicit or to direct business to McKinley & Associates. Thus, for example, you could not specify earmarks or other federal funding for projects where McKinley & Associates is the project engineer and you could not contact any federal agencies on behalf of McKinley & Associates. However, you could be compensated by McKinley & Associates up to the earned income limits ($25,000 +/-) for employment with McKinley & Associates. And there are no limits in your receipt of unearned income (i.e. dividends) from your stock ownership of McKinley & Associates. Because of the conflict of interest rules (i.e. using a congressional office to solicit personal business), Mr. Simpson and I believe that it would still be advantageous for you to avoid service as an officer or director of McKinley & Associates and to create a simple voting trust for your stock. In other words, the stock would still be in your name but someone else will vote the stock. Because we do not have to follow the Blind Trust Rules, the trustee of the voting trust can be family members or a combination of related parties (i.e. the trustees could be the officers of McKinley & Associates and David H.). Give me a call when you can talk further about this so that I can get back to Mr. Simpson and eliminate the Blind Trust. Best Regards.

Charles J. Kaiser, Jr., Esq.
PHILLIPS, GARDILL, KAISER & ALTMEYER, PLLC.
61 Fourteenth Street
Wheeling, WV 26003
T: 304-232[redacted]
Fax: 304-232-4918 or 304-232-6907

cjkaiser@pgka.com

EXHIBIT 14

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EXHIBIT 15

McKINLEY & ASSOCIATES
ARCHITECTS • ENGINEERS • INTERIOR DESIGN

MEMORANDUM OF UNDERSTANDING

To: David McKinley

From: Ernest Dellatorre, ESOP Trustee

Subject: ESOP Purchase of Remaining McKinley & Associates Shares

Date: April 11, 2011

As a result of your resignation as President of McKinley & Associates and our conversation last week regarding the potential for a perceived conflict with your ownership of the company during your term in Congress, this letter will serve as our Memorandum of Understanding that the ESOP will purchase your remaining shares in McKinley & Associates. Once the share value is determined and the transferring document is approved, your remaining shares will be purchased by the ESOP. Payment for the shares will be similar to the funding you provided for the purchase of the original ESOP Shares.

Details on the stock valuation, the financing for the ESOP purchase, and the final transaction date will be detailed in a subsequent document to be developed by counsel for both of our signatures.

It is our mutual understanding that by agreeing to this Memorandum of Understanding that you will have no further control over the ownership and operations of McKinley & Associates, Inc.

By signing below, both parties agree to the above terms.

David B. McKinley, PE

4-11-11
Date

Ernest Dellatorre, ESOP Trustee

4-11-11
Date

The Maxwell Centre · Suite 100 / Thirty-Two Twentieth Street / Wheeling, WV 26003
Phone 304-233-0140 / Fax 304-233-4613 / E-Mail corporate@mckinleyassoc.com

PENGAD 800-631-6989 EXHIBIT 15

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EXHIBIT 16

From:	Kaiser, Charles J. <[redacted]@pgka.com>
Sent:	Thursday, April 14, 2011 4:51 PM
To:	WV01McKinleyDavid@[redacted]
Cc:	David B McKinley; Lynn Adams
Subject:	Response to Ms. Heather Jones
Attachments:	McKinley House Ethics Jones Copy (P0083245).PDF

David: Attached is a copy of my letter setting forth the rationale of why McKinley & Associates should not be treated like a law firm. I also added the paragraph at the end reiterating the relationship between the Johnson McKinley engineering practice and the present-day McKinley & Associates. I hope this will satisfy them. Regards.

Charles J. Kaiser, Jr., Esq.
PHILLIPS, GARDILL, KAISER & ALTMEYER, PLLC.
61 Fourteenth Street
Wheeling, WV 26003
T: 304-232-[redacted]
Fax: 304-232-4918 or 304-232-6907

[redacted]@pgka.com

****

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COPY

PHILLIPS, GARDILL, KAISER & ALTMEYER, PLLC
LAWYERS

61 FOURTEENTH STREET
WHEELING, WEST VIRGINIA 26003

JAMES C. GARDILL
CHARLES J. KAISER, JR.
H. BRANN ALTMEYER *
WILLIAM A. KOLIBASH
EDWARD M. GEORGE, III
DENISE KNOUSE-SNYDER
TODD M. KILDOW **
RICHARD N. BEAVER
J. CHRISTOPHER GARDILL
ROBERT D. PLUMBY *
ANDREW R. THALMAN***

* ALSO ADMITTED IN OHIO
** ADMITTED WV PA AND OH
*** ALSO ADMITTED IN PENNSYLVANIA

JOHN B. PHILLIPS
(1906-2000)

OF COUNSEL
ROBERT J. SAMOL ***

TELEPHONE
(304) 232-[redacted]

FAX
(304) 232-4918

April 14, 2011

Heather Jones, Esq., Counsel
Committee on Ethics
U.S. HOUSE OF REPRESENTATIVES
1015 Longworth House Office Bldg.
Washington, DC 20515
Via E-Mail

RE: McKINLEY & ASSOCIATES, INC.

Greetings:

Thank you for your e-mail of April 13, 2011. I have delayed in responding to check the facts cited in this letter. As you are aware I represent McKinley & Associates, Inc. which is a West Virginia corporation that engages in the businesses of professional engineering and architecture through its employed professionals who hold licenses to practice professional engineering and architecture in a number of states including West Virginia.

Article 13 of Chapter 30 of the West Virginia Code sets forth the requirements for engineers to be licensed in the state. West Virginia Code §30-13-3 defines a number of terms that apply to the entire Article. Among those definitions are: Engineer, Professional Engineer, Consulting Engineer, and Practice of Engineering. However, only the definition of a "Consulting Engineer" carries with it the responsibilities of a fiduciary. The definition of a "Consulting Engineer" under the Code is:

> (b) "Consulting engineer" means a professional engineer whose principal occupation is the independent practice of engineering; whose livelihood is obtained by offering engineering services to the public; who serves clients as an independent fiduciary; who is devoid of public, commercial, and product affiliation that might tend to infer a conflict of interest; and who is cognizant of their public and legal responsibilities and is capable of discharging them. (emphasis added).

Under the same code section a "Professional Engineer" is defined as:

> (f) "Professional engineer" means a person who has been duly registered or licensed as a professional engineer by the board. The board may designate a professional engineer, on the basis of education, experience and examination, as

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> being licensed in a specific discipline or branch of engineering signifying the area in which the engineer has demonstrated competence.

Throughout his career Congressman David B. McKinley, P.E. has held himself out and been licensed in the State of West Virginia as a professional engineer, not a consulting engineer.

The West Virginia Code of State Regulations leaves no doubt as to where the primary responsibilities of a licensed professional engineer lies. WV 7CSR1 §12.3 sets forth the Registrant's Obligation to Society and states in subparagraph (a): "Registrants, in the performance of their services for clients, employers, and customers, shall be cognizant that their first and foremost responsibility is to the public welfare." (emphasis added). Thus unlike a lawyer whose primary responsibility is to her client, a registered professional engineer's primary responsibility is to the public welfare.

The provisions of the West Virginia Code that apply to architects do state that all architects must meet the definition of "good moral character" in order to be licensed. The definition of "good moral character" under West Virginia Code §30-12-2(4) states:

> (4) "Good moral character" means such character as will enable a person to discharge the fiduciary duties of an architect to his client and to the public for the protection of health, safety and welfare. Evidence of inability to discharge such duties include the commission of an offense justifying discipline under section eight of this article.

Thus, even though the definition does state that an architect owes fiduciary duties to his client, an architect also owes equal fiduciary duties to the public for the protection of health, safety and welfare. The Rules of Professional Conduct for Architects set forth in the West Virginia Code of State Regulations (WV 2CSR1 §9.3.3) also provides clarity that the public interest is paramount by providing:

> 9.3.3. If in the course of his or her work on a project, a registered architect becomes aware of a decision made by his or her employer or client, against his or her advice, which violates applicable state or municipal building laws and rules or ordinances which will, in the registered architect's judgment, materially and adversely affect the safety to the public of the finished project, the registered architect shall:
>
> > 9.3.3.a. Report the decision to the local building inspector or other public official charged with the enforcement of the applicable state or municipal building laws and rules or ordinances.
> >
> > 9.3.3.b. Refuse to consent to the decision; and

> 9.3.3.c. In circumstances where the registered architect reasonably believes that other similar decisions will be made notwithstanding his or her objections, terminate his or her services with respect to the project. If the registered architect terminates his or her services he or she has no liability to his or her client or employer on account of the termination.

(emphasis added). Failure to follow the Rules of Professional Conduct can be grounds for the loss of the license to practice architecture in the State of West Virginia. WV Code §30-12-8. Congressman McKinley is not a licensed architect; rather McKinley & Associates, Inc. has on its staff licensed architects that must comply with these rules.

West Virginia law requires that business firms that practice professional engineering and architecture designate a licensed professional in each field whose responsibility it is to supervise the professionals employed by the firm to assure that they are following the requirements of West Virginia law and regulations in the performance of their duties. McKinley & Associates, Inc. has designated senior professionals in each area to perform that function. Neither of those supervising professionals is Congressman McKinley. In fact, for the past several years Congressman McKinley's role with the company has not been in the practice of professional engineering but in the management of the approximately 40 employees (licensed and unlicensed) that are employed by the firm.

In conclusion, West Virginia imposes fiduciary responsibilities only upon consulting engineers, not professional engineers. Moreover, the House Rules were intended to apply to areas where a professional had fiduciary responsibilities to his or her client which could necessarily conflict with the responsibilities of a Member of Congress. As has been shown, West Virginia law states clearly that the fiduciary responsibility of a licensed professional engineer or licensed architect is to the public, not the client. Thus the dangers that the House Rules were trying to guard against do not apply in this particular instance.

Before closing, I wanted to reiterate the history of the professional engineering firm within the McKinley family. McKinley & Associates, Inc. is the successor business to the independent practice of professional engineering by Johnson B. McKinley, Congressman David B. McKinley's father, who first opened his office in Wheeling in 1954. Father and son worked together for two years; Congressman McKinley purchased his father's office furniture, acquired his drawings and files, and assumed his clients when his father retired as a professional engineer. Thus it is hard for me to understand the distinction that you are apparently making between an unincorporated family business to practice professional engineering and an incorporated family business using the same family name. Though the present McKinley & Associates, Inc. business is much larger than the single-engineer office that was started in 1954, McKinley & Associates, Inc. is the natural and direct successor and should be recognized as such. The change to corporate form is no different than if a business changes from a partnership to a corporation to a limited liability company; the business is the same, only the legal form has changed.

(P:\043175.1)

In the event you would like copies of any of the code sections or state regulations cited above, I will be happy to send them to you. If you would like to discuss these matters further, please do not hesitate to contact me. Thank you for your cooperation.

Very truly yours,

Charles J. Kaiser, Jr.

CJK/sls

cc: Congressman David B. McKinley

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EXHIBIT 17

Kaiser, Charles J.

n:	Kaiser, Charles J.
t:	Thursday, April 14, 2011 3:04 PM
To:	'Jones, Heather'
Subject:	RE: Rep. McKinley
Attachments:	McKinley House Ethics Jones (P0083243).PDF

Greetings: The "brief" is in the form of a letter to you. If you would like me to change the format or provide you with copies of the code and state regulations cited in the letter, please let me know. If you would like to discuss this further, please do not hesitate to contact me.

From: Jones, Heather [mailto:Heather.Jones@mail.house.gov]
Sent: Wednesday, April 13, 2011 2:16 PM
To: Kaiser, Charles J.
Subject: Rep. McKinley

Mr. Kaiser-
I wanted to remind you that the Committee on Ethics is waiting on your brief regarding whether architects and engineers are fiduciaries under West Virginia law. You may send it to me by email at this address.

Regards,
Heather Jones

Heather Jones
Counsel
Committee on Ethics
U.S. House of Representatives
1015 Longworth House Office Building
Washington, DC 20515
(202) 225-7103

EXHIBIT
17

COPY

PHILLIPS, GARDILL, KAISER & ALTMEYER, PLLC
LAWYERS

61 FOURTEENTH STREET
WHEELING, WEST VIRGINIA 26003

JAMES C. GARDILL
CHARLES J. KAISER, JR.
H. BRANN ALTMEYER *
WILLIAM A. KOLIBASH
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J. CHRISTOPHER GARDILL
ROBERT D. PLUMBY *
ANDREW R. THALMAN***

JOHN B. PHILLIPS
(1964-2000)

OF COUNSEL
ROBERT J. SAMOL ***

TELEPHONE
(304) 232-[redacted]

FAX
(304) 232-4918

* ALSO ADMITTED IN OHIO
** ADMITTED WV PA AND OH
*** ALSO ADMITTED IN PENNSYLVANIA

April 14, 2011

Heather Jones, Esq., Counsel
Committee on Ethics
U.S. HOUSE OF REPRESENTATIVES
1015 Longworth House Office Bldg.
Washington, DC 20515
Via E-Mail

RE: McKINLEY & ASSOCIATES, INC.

Greetings:

Thank you for your e-mail of April 13, 2011. I have delayed in responding to check the facts cited in this letter. As you are aware I represent McKinley & Associates, Inc. which is a West Virginia corporation that engages in the businesses of professional engineering and architecture through its employed professionals who hold licenses to practice professional engineering and architecture in a number of states including West Virginia.

Article 13 of Chapter 30 of the West Virginia Code sets forth the requirements for engineers to be licensed in the state. West Virginia Code §30-13-3 defines a number of terms that apply to the entire Article. Among those definitions are: Engineer, Professional Engineer, Consulting Engineer, and Practice of Engineering. However, only the definition of a "Consulting Engineer" carries with it the responsibilities of a fiduciary. The definition of a "Consulting Engineer" under the Code is:

> (b) "Consulting engineer" means a professional engineer whose principal occupation is the independent practice of engineering; whose livelihood is obtained by offering engineering services to the public; who serves clients as an independent fiduciary; who is devoid of public, commercial, and product affiliation that might tend to infer a conflict of interest; and who is cognizant of their public and legal responsibilities and is capable of discharging them. (emphasis added).

Under the same code section a "Professional Engineer" is defined as:

> (f) "Professional engineer" means a person who has been duly registered or licensed as a professional engineer by the board. The board may designate a professional engineer, on the basis of education, experience and examination, as

[redacted]

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> being licensed in a specific discipline or branch of engineering signifying the area in which the engineer has demonstrated competence.

Throughout his career Congressman David B. McKinley, P.E. has held himself out and been licensed in the State of West Virginia as a professional engineer, not a consulting engineer.

The West Virginia Code of State Regulations leaves no doubt as to where the primary responsibilities of a licensed professional engineer lies. WV 7CSR1 §12.3 sets forth the Registrant's Obligation to Society and states in subparagraph (a): "Registrants, in the performance of their services for clients, employers, and customers, shall be cognizant that their first and foremost responsibility is to the public welfare." (emphasis added). Thus unlike a lawyer whose primary responsibility is to her client, a registered professional engineer's primary responsibility is to the public welfare.

The provisions of the West Virginia Code that apply to architects do state that all architects must meet the definition of "good moral character" in order to be licensed. The definition of "good moral character" under West Virginia Code §30-12-2(4) states:

> (4) "Good moral character" means such character as will enable a person to discharge the fiduciary duties of an architect to his client and to the public for the protection of health, safety and welfare. Evidence of inability to discharge such duties include the commission of an offense justifying discipline under section eight of this article.

Thus, even though the definition does state that an architect owes fiduciary duties to his client, an architect also owes equal fiduciary duties to the public for the protection of health, safety and welfare. The Rules of Professional Conduct for Architects set forth in the West Virginia Code of State Regulations (WV 2CSR1 §9.3.3) also provides clarity that the public interest is paramount by providing:

> 9.3.3. If in the course of his or her work on a project, a registered architect becomes aware of a decision made by his or her employer or client, against his or her advice, which violates applicable state or municipal building laws and rules or ordinances which will, in the registered architect's judgment, materially and adversely affect the safety to the public of the finished project, the registered architect shall:
>
> > 9.3.3.a. Report the decision to the local building inspector or other public official charged with the enforcement of the applicable state or municipal building laws and rules or ordinances.
> >
> > 9.3.3.b. Refuse to consent to the decision; and

> 9.3.3.c. In circumstances where the registered architect reasonably believes that other similar decisions will be made notwithstanding his or her objections, terminate his or her services with respect to the project. If the registered architect terminates his or her services he or she has no liability to his or her client or employer on account of the termination.

(emphasis added). Failure to follow the Rules of Professional Conduct can be grounds for the loss of the license to practice architecture in the State of West Virginia. WV Code §30-12-8. Congressman McKinley is not a licensed architect; rather McKinley & Associates, Inc. has on its staff licensed architects that must comply with these rules.

West Virginia law requires that business firms that practice professional engineering and architecture designate a licensed professional in each field whose responsibility it is to supervise the professionals employed by the firm to assure that they are following the requirements of West Virginia law and regulations in the performance of their duties. McKinley & Associates, Inc. has designated senior professionals in each area to perform that function. Neither of those supervising professionals is Congressman McKinley. In fact, for the past several years Congressman McKinley's role with the company has not been in the practice of professional engineering but in the management of the approximately 40 employees (licensed and unlicensed) that are employed by the firm.

In conclusion, West Virginia imposes fiduciary responsibilities only upon consulting engineers, not professional engineers. Moreover, the House Rules were intended to apply to areas where a professional had fiduciary responsibilities to his or her client which could necessarily conflict with the responsibilities of a Member of Congress. As has been shown, West Virginia law states clearly that the fiduciary responsibility of a licensed professional engineer or licensed architect is to the public, not the client. Thus the dangers that the House Rules were trying to guard against do not apply in this particular instance.

Before closing, I wanted to reiterate the history of the professional engineering firm within the McKinley family. McKinley & Associates, Inc. is the successor business to the independent practice of professional engineering by Johnson B. McKinley, Congressman David B. McKinley's father, who first opened his office in Wheeling in 1954. Father and son worked together for two years; Congressman McKinley purchased his father's office furniture, acquired his drawings and files, and assumed his clients when his father retired as a professional engineer. Thus it is hard for me to understand the distinction that you are apparently making between an unincorporated family business to practice professional engineering and an incorporated family business using the same family name. Though the present McKinley & Associates, Inc. business is much larger than the single-engineer office that was started in 1954, McKinley & Associates, Inc. is the natural and direct successor and should be recognized as such. The change to corporate form is no different than if a business changes from a partnership to a corporation to a limited liability company; the business is the same, only the legal form has changed.

[redacted]

In the event you would like copies of any of the code sections or state regulations cited above, I will be happy to send them to you If you would like to discuss these matters further, please do not hesitate to contact me. Thank you for your cooperation.

Very truly yours,

Charles J. Kaiser, Jr

CJK/sls

cc: Congressman David B. McKinley

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EXHIBIT 18

From:	David B McKinley <[redacted]@mckinleyassoc.com>
Sent:	Monday, June 27, 2011 6:26 PM
To:	'Kaiser, Charles J.'
Subject:	FW: Ethics advisory opinion
Attachments:	ethicscommittee@mail.house.gov_20110627_142125.pdf

This makes no sense. think about it: McKinley Engineering is OK but McKinley & Associates is a problem. My father's company was not McKinley Engineering and we never represented that it was. That name was the one I used as a sole proprietor for the early years of the company. Let's talk.

-----Original Message-----
From: Strickland, Kelle [mailto:Kelle.Strickland@mail.house.gov]
Sent: Monday, June 27, 2011 5:55 PM
To: [redacted]@mckinleyassoc.com
Subject: Ethics advisory opinion

Congressman,

Please see the attached letter, per your conversation with Mr. Bonner.

Also, if you or your counsel have questions regarding the attached, Mr. Bonner advised that our Staff Director and Chief Counsel would be happy to speak with you regarding the details of the letter. Dan Schwager may be reached at 202-225-7103.

Thank you.

Kelle Strickland
Counsel to the Chairman
Committee on Ethics

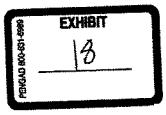

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EXHIBIT 19

Wiley Rein LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

September 14, 2012

Jan Witold Baran
202.719.[redacted]
[redacted]@wileyrein.com

The Honorable Jo Bonner, Chairman
The Honorable Linda T. Sanchez, Ranking Member
Committee on Ethics
United States House of Representatives
1015 Longworth House Office Building
Washington, DC 20515

Re: Response of Rep. David B. McKinley to August 24, 2012 Committee Letter

Dear Chairman Bonner and Ranking Member Sanchez:

By letter of August 24, 2012, you requested an explanation from the Honorable David B. McKinley regarding the status of efforts to rename the West Virginia engineering, architecture, and interior design firm of McKinley & Associates, Inc., in light of the Committee's concerns that continued operation of the firm under that name could violate provisions of the Ethics in Government Act that "prohibit a firm that provides fiduciary services from using the name of a Member, even if the Member is not compensated." We were recently engaged by Rep. McKinley to represent him in connection with his response to the Committee's August 24th request.[1]

It is important to note at the outset that Rep. McKinley and his wife no longer own any stock in McKinley & Associates. The Employee Stock Option Plan ("ESOP") – in which neither Rep. McKinley nor his wife participate – now owns *all* of the shares in McKinley & Associates previously owned by Rep. McKinley. The ESOP now owns 100% of the shares of McKinley & Associates. Further, Rep. McKinley has no other affiliation with McKinley & Associates as an owner, board member, executive, employee, or consultant. Therefore, as described in more detail below, Rep. McKinley has no association or affiliation with McKinley & Associates which could raise concerns – either for him or for McKinley & Associates -- pursuant to

[1] Your August 24th letter requested a response from Rep. McKinley by September 7, 2012. In a September 4, 2012, telephone call with Committee Staff Director and Chief Counsel Daniel A. Schwager we asked on behalf of Rep. McKinley for an additional week to respond. Mr. Schwager informed us by email on September 5, 2012, that you had approved a one week extension for Rep. McKinley's response, to September 14, 2012.

EXHIBIT 19

the "fiduciary" restrictions set forth in the Ethics in Government Act and by House Rule XXV.[2]

As explained further below, a number of factors support your approval of continued use of the name "McKinley & Associates" by Rep. McKinley's former firm. "McKinley" is a well-known family and historical name in West Virginia. The "McKinley" name in engineering and building design was originally established in West Virginia by Rep. McKinley's father, Johnson B. McKinley, and was reinforced by him through his long, public association with McKinley & Associates. Entirely independent of Rep. McKinley's status as a Member of Congress, "McKinley & Associates" has long been – and remains – an established brand name in the provision of the highest-quality engineering, architectural, and interior design services.

As the legislative history of the Ethics in Government Act makes clear, the Act's restrictions (and the parallel restrictions under House Rule XXV) on the use of a "Member's name" are intended to address "cases where outside interests attempt to trade on the prestige of Members of Congress." This concern does not exist with McKinley & Associates. The company trades on the "McKinley" name as an historical name in West Virginia and as a "family name" in engineering and building design. The company trades on – indeed, relies upon – the name "McKinley & Associates" as an established and well-known brand name in its field. Rep. McKinley therefore requests that you approve the company's continued use of the name "McKinley & Associates" for all business purposes.

---

[2] As disclosed in his annual financial disclosure form covering calendar year 2011, Rep. McKinley holds the notes receivable with respect to loan agreements entered into by the ESOP to purchase Rep. McKinley's ownership interest in McKinley & Associates. Rep. McKinley owns the building which houses McKinley & Associates, he leases space in this building from McKinley & Associates for use as an office (not for official purposes) and he pays the firm for use of their telephone and internet/email services. Rep. McKinley's wife, Mary, serves as Secretary of the Board of Directors and as a Vice President of McKinley & Associates; if required to do so by the Committee, Mary McKinley would relinquish these positions at the company. Rep. McKinley's daughter-in-law, Katy McKinley, is an employee of the company and an owner of the company by virtue of her participation in the Employee Stock Ownership Plan. Rep. McKinley's oldest son also is the financial advisor to the ESOP participants and the company's secondary retirement fund.

Background

The McKinley family name; the "McKinley & Associates" brand name

Nine generations of McKinleys are associated with the Wheeling area. The McKinley name in West Virginia dates back to the Revolutionary War Era, when Captain John McKinley is known to have been an early Wheeling landowner in what was then Virginia. Several generations later, Johnson Camden McKinley, Rep. McKinley's grandfather, further established the McKinley name in the state through his pioneering activity as an organizer and developer – a "baron" -- of the northern coal fields in West Virginia; he was recognized as such by induction into the Coal Hall of Fame. He operated the McKinley Coal Company and was honored when the community of McKinleyville in a neighboring county was named after him. The Johnson Camden McKinley House – or "Willow Glen" – in Wheeling, is one of the best-known historic houses in the state and endures as a monument to the significant role Johnson C. McKinley played in the industrial history of West Virginia.

Johnson B. McKinley, Rep. McKinley's father, established the McKinley family name in engineering and construction in the Wheeling area. Johnson B. McKinley served as the City Engineer for Bethlehem, West Virginia, for many years; among many other prominent projects, he was the engineer for a civic center and for a sewage treatment plant. Over his many years of practice, Johnson B. McKinley appears to have operated under a number of business names, including "Johnson B. McKinley Engineering" and, primarily, "Johnson B. McKinley, Consulting Engineer." Although he was not an architect, and therefore did not refer to architectural services in his business name, Johnson B. McKinley designed primarily in the area of municipal sewer and water projects and built many projects under the name "Penn Construction." It is unclear whether Johnson B. McKinley ever incorporated his business operations.

From 1971 to 1973, Rep. McKinley worked with his father in his father's engineering and construction businesses and, together, they continued to develop the reach and reputation of the McKinley name for these skills and services in the tri-state and Wheeling regional area. Rep. McKinley left his father's business after about two years. He founded his own firm, McKinley Engineering Company, in 1981. In 1989, after the firm began to offer architectural services, the company name changed to McKinley & Associates, Inc. Despite any gap in time or

variations in the company name, however, it is important to appreciate the continuity of core professional services and reputation centered on the McKinley name. It is equally important to appreciate the continuity of the public professional collaboration between Johnson B. McKinley and David B. McKinley.

From the time David B. McKinley began his own firm in 1981 – and continuing for some years beyond the renaming of this firm as McKinley & Associates in 1989 -- Johnson B. McKinley played an instrumental and very public role in solidifying and expanding the reputation of that firm, and of the McKinley family name as used by that firm, in engineering and architectural services in West Virginia and beyond. Particularly during those periods when David McKinley was required to be absent from the firm to attend the state legislature, Johnson B. McKinley served as the eyes and ears for the firm that became McKinley & Associates on numerous project sites, and in so doing became a public face of the firm. Although he also maintained his own business, Johnson B. McKinley attended many meetings with clients as the representative of McKinley & Associates; he walked many project sites with owners as the representative of McKinley & Associates.

The continuity and close connection between Johnson B. McKinley and McKinley & Associates continued even after Johnson B. McKinley's death in 1996 at age 76. McKinley & Associates completed all of Johnson B. McKinley's unfinished work. McKinley & Associates acquired all of Johnson B. McKinley's business assets. McKinley & Associates hired a site design specialist to continue providing services that Johnson B. McKinley's expertise had allowed the company to offer and that clients of McKinley & Associates had come to expect.

Based on Johnson B. McKinley's long association with and substantial work for the firm, "McKinley & Associates" was and is inarguably a family name, independent of Rep. McKinley's service as a Member of Congress. Moreover, the established brand name of "McKinley & Associates" -- its recognized reputation for professional excellence in engineering and architecture – further eliminates any concern that the firm could be seen as trading on a Member's "prestige." With three offices in West Virginia and Pennsylvania, McKinley & Associates has completed major projects, not just in every county in West Virginia, but across the country in North Carolina, South Carolina, Ohio, Pennsylvania, New York, Kentucky, Minnesota, Illinois, and Utah. These projects include hospitals, secondary schools and colleges, federal and state government buildings, office and commercial projects, historic preservation sites, and others. The reputation of

McKinley & Associates has been earned – and continues to be confirmed – by the work of its over 40 architects and mechanical, electrical, structural, and civil engineers.[3] The work of these professionals has garnered McKinley & Associates wide recognition and numerous awards, including, naming only a few, the prestigious West Virginia AIA (American Institute of Architects) Honor Award and Merit Award and the Governor's Award for Historic Preservation. Building from the solid foundation of the McKinley family name in engineering, design, and construction, it is on the work and reputation of these professionals – on the McKinley & Associates brand name that they maintained and extended -- that the future success, and the future business, of McKinley & Associates rests.

Sale of Rep. McKinley's interest in McKinley & Associates

Five years ago and prior to any consideration of public service David B. McKinley, PE began the first of two steps in transferring ownership of the company to his employees by initiating an Employee Stock Ownership Plan (ESOP) and selling it 30% of McKinley & Associates. Besides holding the stock of a company, an ESOP is generally considered a form of retirement benefit for employees.

In April of 2011, Rep. McKinley then signed a Memorandum of Understanding with the company ESOP to sell the balance of McKinley & Associates to them. Rep. McKinley understood, in good faith, that the sale of his entire ownership interest in McKinley & Associates would resolve, and was an appropriate response to, any concerns expressed by the Committee as to the company's continued use of the name "McKinley & Associates."

As disclosed on his annual financial disclosure form for calendar year 2011, on December 31, 2011, Rep. McKinley entered into a formal agreement to sell his entire remaining ownership interest in McKinley & Associates – comprising 70% of the company's shares – to the ESOP. This sale was contingent on an independent valuation of the firm. Because of the time needed to complete this valuation, and because of ERISA requirement, the actual sale was not completed until April 30, 2012. On that date McKinley & Associates became 100% ESOP owned. Rep.

[3] Of course, the professional work of David B. McKinley as an engineer has contributed significantly to the "brand name" and reputation of McKinley & Associates. But, as the Committee has been informed previously, for the past several years before entering Congress Rep. McKinley's role with the company has not been in the practice of professional engineering but in the management of the firm's more than 40 professionals and support employees.

McKinley holds the note receivable with respect to the loan undertaken by the ESOP to finance its purchase of his 70% interest in McKinley & Associates (as he also holds the note receivable for the loan undertaken by the ESOP to finance its earlier purchase of its initial 30% share of the company's stock). According to the sale documents, Rep. McKinley does not retain any authority to direct or require the ESOP to change the name of the company.

Restriction on permitting one's name to be used by an entity that provides covered services

The Ethics in Government Act of 1989, at Title 5 U.S.C. app. 4 § 502(a)(2), provides that a Member or covered employee shall not "permit [his or her] name to be used by any . . . firm, partnership, association, corporation, or other entity" which, by reference to § 502(a)(1) of the statute, "provides professional services involving a fiduciary relationship." House Rule XXV. paragraph 2, §§ (a) and (b), which reflect the same restrictions on fiduciary professions and uses of a Member's or covered employee's name as are set forth in the Ethics in Government Act, limit the scope of § 502(a)(1) of the Act to cover any entity that "provides professional services involving a fiduciary relationship *except for the practice of medicine*." (Emphasis added.)

Recognizing that neither Committee action, nor even a House Rule, can trump the statutory requirements of the Ethics in Government Act, the Committee on Ethics has stated: "Notwithstanding the existing statutory prohibition, the Standards Committee has authorized Member-physicians to practice medicine for a limited amount of compensation." (*House Ethics Manual*, page 218.) Indeed, the Committee has permitted member physicians to practice medicine for at least a limited amount of compensation ever since the passage of the Ethics in Government Act, and notwithstanding the fact that the legislative history of the act makes clear that "medicine" – like "architecture"[4] – is one of the "professional activities involv[ing] a 'fiduciary' relationship" the practice of which for compensation was specifically intended to be covered by the Act.[5]

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[4] Unlike architecture, the Committee does not appear to have concluded that engineering is a covered "fiduciary" profession.

[5] House Bipartisan Task Force on Ethics, *Report of the Bipartisan Task Force on Ethics on H.R. 3660*, 101st Cong., 1st Sess. 13-14 (Comm. Print. Comm. on Rules 1989), page 16: "The task force

The same legislative history makes clear that "consulting and advising," without apparent limitation, are intended to be included as "fiduciary" professions covered by the Act and, thus, by the House Rule. Yet -- although neither the language of the Act, the legislative history of the Act, nor the language of the House Rule on fiduciary restrictions appear to contemplate such an exception – the Committee on Ethics advises that a senior staffer, who is otherwise covered by the restrictions, "is not prohibited from accepting compensation for political consulting services that he or she provides to either a candidate (including one's employing Member), a political party, or a Member's leadership PAC." (*House Ethics Manual*, at page 218.)

Our purpose in citing these expansive interpretations and applications by the Committee of the language of House Rule XXV, of the Ethics in Government Act, and of the legislative history of the Act (as contained in the *Report of the Bipartisan Task Force on Ethics*) is not to criticize the Committee's past approach to interpreting and applying the fiduciary restrictions. To the contrary, the purpose in citing these well-known past instances is to demonstrate clear Committee precedent – in fact, a Committee tradition – for reading the language of the fiduciary restrictions, and of the related legislative history, flexibly and pragmatically when there is a reasonable basis for doing so.

Approval of the continued use of the name "McKinley & Associates" by Rep. McKinley's former firm would not require you to reach outside of the language and four corners of the Rule, the statue, or the legislative history, as was arguably done by the Committee in the instances of interpretation and application cited above. Your approval of the continued use of the name "McKinley & Associates" would simply require you to approach the "fiduciary" restrictions – and, in particular, the related legislative history – as written in light of what they may be viewed reasonably and soundly to permit (not in light of what they may be argued to prohibit).

(Continued . . .)
intends the ban to reach, for example, services such as legal, real estate, consulting and advising, insurance, medicine, architecture or financial."

Continued use of the name "McKinley & Associates" is consistent with the restrictions on "fiduciary services"

In its section by section report on the Ethics in Government Act of 1989, and as repeatedly referred to above, the House Bipartisan Task Force on Ethics specifically discussed a "family name" exception to the prohibition on the use of a Member's name by an entity that provides "fiduciary services":

[T]he task force understands that a law firm, real estate agency, or other firm that bears a "family" name, as opposed to the name of the individual Member, officer, or employee, would not have to change its name. Thus, the fact that a Member, officer or employee is presently associated with a law firm founded by, and still bearing the name of his father would not require the firm to drop the "family" name.[6]

In its June 24, 2011, letter to Rep. McKinley the Committee appears to read this last quoted sentence from the *Bipartisan Task Force Report* as describing and defining the only circumstance under which a firm name will be considered a "family name." Admittedly, this also appears to be the overly narrow reading of "family name" taken by the Committee in its *Manual*.[7] But these circumstances -- that is, where the firm in question is legally and factually the same entity as founded by, and still bearing the specific name of, the father or other relative of the Member – can and should be viewed as *only one example* of the kind of family participation in, and association with an entity, that supports a determination that the entity bears a "family name."

That the specific circumstances described in the *Bipartisan Task Force Report* were intended as only one example of when the facts will support the finding of a "family name" is evident from the fact that the key sentence (quoted above) begins with the word "thus," a common meaning of which is "as an example" or "for example."

There may be a number of factual scenarios, therefore, under which the Committee could, and should, determine that an entity bears a "family name." Rather than

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[6] *Id.*
[7] *House Ethics Manual*, at page 221 and page 222, Example 32.

being applied rigidly only where a present firm is legally and factually the identical firm founded by a Member's "father" (the *Bipartisan Task Force Report* does not, after all, identify any other permissible family relationship), interpretation and application of the "family name" exception should serve the actual, underlying purpose of the restrictions on use of a Member's name by a "fiduciary services" firm. As the *Bipartisan Task Force Report* makes clear, this underlying purpose is to address the "potential for abuse . . . in cases where outside interests attempt to trade on the prestige of Members of Congress . . .."[8] Where there is a reasonable basis for the Committee to determine that use in a firm's name of the surname (or "family name") of a Member reflects historical factors or reflects some demonstrable family association with the firm the Committee should determine that the firm name qualifies as a "family name."

As detailed in this letter, there are ample grounds for the Committee to determine that "McKinley & Associates" qualifies as a "family name." Independent of Rep. McKinley – and dating back to his grandfather Johnson Camden McKinley and, before him, to the Revolutionary War – "McKinley" is a recognized and prominent family name in West Virginia history and business. Initially in agriculture and then in the coal fields of West Virginia, the name of McKinley has been associated with business. In the fields of engineering, construction, and design, Rep. McKinley's father, Johnson B. McKinley, first established and, for many years, grew the reputation of the "McKinley" name in and around the Wheeling regional area. Johnson B. McKinley founded the "McKinley" professional family name. Johnson B. McKinley imparted his professional bona fides, and the professional reputation he first founded, to his association with "McKinley Engineering Company" and to "McKinley & Associates" through his important and frequent work over many years as the public eyes, ears, and representative of the firm (under both firm names).

Just as the Committee should not unduly and rigidly limit application of the "family name" exception to the single set of circumstances cited as one example in the *Bipartisan Task Force Report*, the Committee should recognize that – even apart from a firm name being a "family name" – there are other reasonable bases to determine that a firm name is not an "attempt to trade on the prestige" of a Member of Congress and is, therefore, permissible under both statute and House Rule. One such basis should be found where a firm name that includes a Member's surname is

[8] *Bipartisan Task Force Report* at page 14

an established brand name in its professional field. As discussed above, "McKinley & Associates" is an established brand name and industry leader – in Wheeling, in West Virginia, in the tri-state area, and beyond – in engineering, architecture, and interior design. As "McKinley & Associates" has successfully completed numerous high-profile projects under its current name for over 20 years, and as the reputation and brand of the firm under this name has grown, the professional excellence of the "McKinley & Associates" firm has been repeatedly recognized and awarded by peer groups, professional associations and others. "McKinley & Associates" does not trade on the "prestige" of Rep. McKinley as a Member of Congress. Frankly, that kind of "prestige" would be worthless to the firm in the technical, results-oriented industries in which it operates. "McKinley & Associates" trades on its recognized and established name and reputation for technical excellence and practical success.

A final, related point should be noted about the scope of the "potential for abuse" that the drafters of the Ethics in Government Act intended to address in imposing restrictions on the use of a Member's name by a "fiduciary" services firm. Throughout the discussion in the *Bipartisan Task Force Report* on the restrictions on the practice of "fiduciary" professions and the delivery of "fiduciary" services, the emphasis is on the potential for conflict between a Member's official, representative duty to the public in general and the personal, private duty that may be owed by a Member/professional to an individual client. The following passage from the *Report* makes this focus clear:

> When certain private positions and employment create for the Member or public official a fiduciary or a representational responsibility to a private client or a limited number of private parties, then such outside activities create the potential for a serious conflict of interest. The conflict occurs in the clash of those responsibilities and the divergence of public and private interests on a particular governmental matter or in general government policy.[9]

This central passage leads directly into the discussion in the *Report* about "the potential for abuse of *this type of income* in cases where outside interests attempt to trade on the prestige of Members of Congress . . ." (Emphasis added.) Thus, it appears that the concern of the drafters of the Ethics in Government Act about outside entities "trading" on the "prestige of Members" was intended primarily to

[9] *Id.*

address circumstance where such an entity would profit improperly by implying that private clients would have, and would benefit from, an actual fiduciary or representational relationship with a Member of Congress. As a general matter – and absent other factors supporting use of a Member's surname in a firm name – the potential for such abuse may well exist in a law firm or in a consulting or advising firm, particularly in a small firm or practice. But the potential for this kind of abuse by a firm providing architectural services (among other services) would appear to be minimal. In the case of a large, established, industry-leading architectural firm like McKinley & Associates, the potential for such abuse – for "trading" on Rep. McKinley's status as a Member in this misleading way -- is nonexistent.

Conclusion

As the Committee has been informed in previous submissions on behalf of Rep. McKinley, a prohibition on McKinley & Associates use of its existing name would create severe financial hardship for all of the current employee/owners of the firm. For their compensation and for their retirement savings, these employee/owners are dependent on the continued success of McKinley & Associates in a difficult economy. The goodwill and positive professional reputation that the firm has engendered over the years attaches to the brand name McKinley & Associates and would be lost if a name change were required.

But no such name change is required. Based on the information, and for the reasons, set forth above, the name "McKinley & Associates," as used by Rep. David B. McKinley's former firm, is a "family name," an established brand name, and is otherwise consistent with the intent and purpose of the restrictions imposed by statute and House Rule on the provision of professional services involving a fiduciary relationship. On behalf of Rep. McKinley, therefore, we respectfully urge you to approve the firm's continued use of the name "McKinley & Associates."

If you have any questions or wish to discuss this matter, please do not hesitate to contact me, at 202-719-[redacted], or my colleague Robert L. Walker, at 202-719-[redacted]

Sincerely,

Jan Witold Baran
Robert L. Walker
Counsel for Rep. David B. McKinley

EXHIBIT 20

Call w/ Steve P - David McKinley's Counsel
8/12/11 - He called to inform me the Committee made a factual mistake regarding the name of the father's business. The business name was J.B. McKinley Engineering. He asked if that fact might change the Committee's direction to change the firm's name. I told him it was not something I could do & that he should have the Member send a letter to the Committee. I indicated that it was unlikely they would change the opinion absent a significant change in facts.

EXHIBIT
20

EXHIBIT 21

ONE HUNDRED TWELFTH CONGRESS

U.S. House of Representatives

COMMITTEE ON ETHICS

Washington, DC 20515–6328

1015 LONGWORTH HOUSE OFFICE BUILDING
(202) 225–7103

June 24, 2011

The Honorable David B. McKinley
U.S. House of Representatives
313 Cannon House Office Building
Washington, DC 20515

Dear Colleague:

This responds to the letters dated January 3, 2011, and April 14, 2011, which were submitted on your behalf by your counsel, Charles J. Kaiser, Jr., concerning your outside business interests.

FACTUAL BACKGROUND

According to the information provided in Mr. Kaiser's letters, additional information provided to Committee counsel by you and Mr. Kaiser, and publicly-available information, the background on this matter is as follows.

Prior to your election to the House, you worked as a licensed professional engineer at McKinley & Associates, Inc. (the Firm), of which you were also an officer and director. According to its Web site, the Firm opened its doors in 1981 as "a full-service architectural and engineering firm." Your counsel has represented that the Firm "provides professional engineering and architectural services through its employees who are professional engineers and licensed architects under the laws of West Virginia, Ohio, and Pennsylvania." Your letters concede that West Virginia law deems architecture to be a profession that involves fiduciary duties.

The Firm has three offices, located in Wheeling, West Virginia; Charleston, West Virginia; and Washington, Pennsylvania, and employs more than 40 individuals. The Firm provides services in the Tri-state region and other mid-Atlantic states. Its Web site indicates that past clients have included many state- and local-level government entities, as well as federal entities such as the U.S. Postal Service, Department of Defense, NASA, and the Federal Aviation Administration.

In January 2007, the Firm established a partial Employee Stock Ownership Plan (ESOP). You own approximately 70% of the Firm's common stock, with the remaining 30% owned by the Firm's employees under the ESOP.

Your father, Johnson B. McKinley, was also a licensed professional engineer. Johnson McKinley maintained a one-man office, McKinley Engineering, as a consulting engineer in

Wheeling, West Virginia, beginning in 1954 until his retirement in the 1980s. You worked with your father at McKinley Engineering for approximately two years, prior to establishing the Firm in 1981, which became "custodian of all of the drawings, files, and other assets accumulated" by your father during his career as an engineer, and also serves many of the same clients. Your letters stress that the name "McKinley" has been associated with engineering services in the Wheeling area since 1954.

Finally, we understand that you wish to avoid changing the name of the Firm if at all possible within the Rules.

LEGAL AUTHORITY AND ANALYSIS

Federal law and House rules restrict the outside earnings of Members and senior staff of the House of Representatives. These individuals may not receive more than 15 percent of the Executive Level II (House Member) salary in outside earned income in a calendar year.[1] For 2011, this limit is $26,955. Regardless of whether this income level is reached however, certain types of earnings are absolutely prohibited.

Section 502 of the Ethics in Government Act (5 U.S.C. app. 4 § 502(a)) provides that Members and senior staff shall not —

> (1) receive compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship;
>
> (2) permit that Member's, officer's, or employee's name to be used by any such firm, partnership, association, corporation, or other entity;
>
> (3) receive compensation for practicing a profession which involves a fiduciary relationship; or
>
> (4) serve for compensation as an officer or member of the board of an association, corporation, or other entity.

See also House Rule 25, cl. 2. The Act gives this Committee responsibility for interpreting these provisions for the House.

The statute does not define "fiduciary," a term generally denoting an obligation to act in another person's best interests or for that person's benefit, or a relationship of trust in which one relies on the integrity, fidelity, and judgment of another.[2] However, in creating the exception,

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[1] 5 U.S.C. app. 4 § 501(a)(1); House Rule 25, cl. 1(a)(1).

[2] *See Black's Law Dictionary* 658, 1315 (8th ed. 2004); *Bipartisan Task Force Report, Report on H.R. 3660*, 101st Cong., 1st Sess. (Comm. Print, Comm. on Rules 1989), *reprinted in* 135 Cong. Rec. H9253 (daily ed. Nov. 21, 1989) at 16.

the Bipartisan Task Force stated that in order for the underlying purposes to be achieved, "the term fiduciary [should] not be applied in a narrow, technical sense."[3] This report further states:

> The task force intends the ban to reach, for example, services such as legal, real estate, consulting and advising, insurance, medicine, architecture, or financial.[4]

The legislative history of the statute clearly denotes architecture as a field involving a fiduciary relationship. This determination is supported by West Virginia law,[5] and your letters indicate you concur with this assessment.[6] Thus, the Firm is a business that provides fiduciary services, and therefore is subject to the limitations stated in the statute and rule cited above.

These provisions prohibit a firm that provides fiduciary services from using the name of a Member, even if the Member is not compensated. The ban extends, for example, to use of the name of the Member on the letterhead, advertising, or signage of any covered organization. Under this provision, when the name of an incoming Member is used in the name of a law firm, real estate agency, or other organization that provides fiduciary services, the name of that organization must be changed to eliminate the name of the Member. However, the requirement does not apply when the organization's name in fact reflects a "family" name, as opposed to that of the individual Member or staff person. On this point, the Bipartisan Task Force Report states, "the fact that a Member, officer, or employee is presently associated with a law firm founded by, and still bearing the name of, his father would not require the firm to drop the 'family' name."[7]

In the case of the Firm, the Committee accepts your representation that the current Firm can reasonably be seen as a practical continuation of McKinley Engineering, the business originally established in 1954 by your father, Johnson McKinley, for whom it was named. However they are legally and factually distinct entities. **Accordingly, the Committee finds that, while a name change is required under current rules, guidelines and policies, a change of the Firm name to the name of your father's original business, McKinley Engineering, along with a clear association with your father, such as adding to the letterhead the phrase "Part of a Family Tradition since 1954"[8] if appropriate and consistent with relevant state**

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[3] *Bipartisan Task Force Report* at 16, 135 Cong. Rec. at H9257.

[4] *Id.*

[5] West Virginia statute requires architects to practice "good moral character," which means "character as will enable a person to discharge the fiduciary duties of an architect to his client and to the public." *See* W.V. Code § 30-12-2(4); W.V. Code § 30-12-4.

[6] Because both you and the Committee are in agreement on this point, we do not address whether the provision of engineering services also involves fiduciary duties. This is because the rule addresses any of the firm's services, not the Member's actual prior services.

[7] *See 2008 House Ethics Manual* at 221; Bipartisan Task Force Report at 16, 135 Cong. Rec. at H9257.

[8] We note that any reference to Association with your father should not misrepresent the company's actual corporate history or status. However, should some other language be more appropriate or preferred, you should consult with the Committee to determine if the alternate language or proposal would satisfy the need to change the name and satisfy the family name exception.

laws, would be consistent with the family name exception to the Rules and would be permissible for the purposes of House Rules.

Regarding the limitation on outside earnings, these limitations apply only to "income," that is, compensation for services (or "earned income"), and not to money received from ownership or investment of equity income ("unearned income").[9] Because these provisions and House Rules concern the receipt of compensation for services they do not generally restrict the ability of a Member to have an ownership interest in a business or to receive dividends or other income that results from their ownership interest. However, the Committee has taken the position that when a Member has an ownership interest in a "personal service" business – that is, a business in which capital is not a material income-producing factor – the Member's share of the profits from the business will be deemed to be outside *earned* income, unless it can be demonstrated that the income was in fact a return on investment. Even when the Member performs no personal services, absent a strong showing to the contrary, it is presumed that the Member's share of profits from a service business is for attracting or retaining clients and thus constitutes *earned* income.[10]

Your attorney has indicated that you resigned as an officer and director of the Firm prior to taking the oath of office. However, for the sake of completeness, we address the rules related to board service. The ban on paid board service arises from the same set of concerns as the fiduciary relationship prohibitions. The ban on accepting compensation for serving as an officer or board member applies to all entities, including nonprofit and campaign organizations, and governmental entities. As a general matter, Members may serve in such capacities, but they may not be paid any directors' fees or other compensation for that service. Members may accept reimbursements for travel and other expenses in carrying out the duties of a board member and may be covered by an insurance policy as a member of a board, provided that acceptance is permissible under the applicable provision of the gift rule (House Rule 25, cl. 5(a)(3)(G)(i)).[11]

Finally, we note for your information an additional federal statute, 5 U.S.C. § 501, which provides:

> An individual, firm, or corporation practicing before an agency of the United States may not use the name of a Member of either House of Congress or of an individual in the service of the United States in advertising the business.

This statute is enforced by the U.S. Department of Justice, and, thus, the Committee cannot give definitive guidance on its scope or offer you any exception from its requirements. To be clear, this statute may prohibit the Firm, even with a revised name such as the one discussed in this letter, from completing or accepting work from the U.S. government or federal entities or agencies. You should seek guidance from the Department of Justice or private counsel on that issue.

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[9] *See* House Rule 25, cl. 4(d)(1); *2008 House Ethics Manual* at 228.

[10] *See 2008 House Ethics Manual* at 231.

[11] *See id.* at 222.

LIMITATIONS

The response above constitutes an advisory opinion concerning the application of 5 U.S.C. app. 4 §§ 501 *et seq.* and House Rule 25, clause 1. The following limitations apply to this opinion:

- This advisory opinion is issued only to Representative David B. McKinley, the requestor of this opinion. This advisory opinion cannot be relied upon by any other individual or entity.

- This advisory opinion is limited to the provisions of House rule and federal statute specifically noted above. No opinion is expressed or implied herein regarding the application of any other federal, state, or local statute, rule, regulation, ordinance, or other law that may be applicable to the proposed conduct described in this letter, including, without limitation, 5 U.S.C. § 501.

- This advisory opinion will not bind or obligate any entity other than the Committee on Ethics of the United States House of Representatives.

- This advisory opinion is limited in scope to the specific proposed conduct described in this letter, the specific facts represented to the Committee, and the understanding of those facts to the extent indicated in this letter, and does not apply to any other conduct or facts, including those which appear similar in nature or scope to that described in this letter. Should this letter misstate any facts in this matter, the opinion and advice may no longer apply and you should inform the Committee as soon as possible to determine if the advice and opinion in this letter applies to the accurate factual basis.

The Committee will take no adverse action against you in regard to any conduct that you undertake, or have undertaken, in good faith reliance upon this advisory opinion, so long as you have presented a complete and accurate statement of all material facts relied upon herein, and the proposed conduct in practice conforms with the information you provided, as addressed in this opinion.

Changes or other developments in the law (including, but not limited to, the Code of Official Conduct, House rules, Committee guidance, advisory opinions, statutes, regulations, or case law) may affect the analysis or conclusions drawn in this advisory opinion. The Committee reserves the right to reconsider the questions and issues raised in this advisory opinion and to rescind, modify, or terminate this opinion if required by the interests of the House. However, the Committee will rescind an advisory opinion only if relevant and material facts were not completely and accurately disclosed to the Committee at the time the opinion was issued. In the event that this advisory opinion is modified or terminated, the Committee will not take any adverse action against you with respect to any action taken in good faith reliance upon this advisory opinion so long as such conduct or such action was promptly discontinued upon notification of the modification or termination of this advisory opinion.

If you have any further questions, please contact the Committee's Office of Advice and Education at extension 5-7103.

Sincerely,

Jo Bonner
Chairman

Linda T. Sánchez
Ranking Member

JB/LTS:ced

EXHIBIT 22

DAVID B. McKINLEY, P.E.
1st District, West Virginia
412 Cannon House Office Building
Washington, DC 20515
TEL (202) 225-4172
FAX (202) 225-7564
www.mckinley.house.gov

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Co-Chair,
Congressional Youth Challenge Caucus
Co-Chair,
High Performance Buildings Caucus
Co-Chair
Congressional Hearing Health Caucus

August 22, 2016

The Honorable Charles W. Dent, Chairman
The Honorable Loretta T. Sánchez, Ranking Member
Members of the Committee on Ethics
U.S. House of Representatives
1015 Longworth House Office Building
Washington, DC 20515

Re: Response of Representative David B. McKinley to the Committee's proposed report and letter

Dear Members of the Committee on Ethics:

Thank you for this opportunity to respond to the draft report and draft letter of reproval provided to me by the staff of the Committee on Ethics.

Following the clear and repeated advice of my attorney at that time, after I was elected and sworn into my first term in Congress I sold my remaining interest in the McKinley & Associates architecture and engineering firm to that firm's Employee Stock Option Plan to comply with my obligations under House ethics requirements, specifically with the so-called "fiduciary restrictions." I have since come to understand that the advice of my then attorney in explaining and interpreting to me House Committee on Ethics requirements and guidance, and my reliance on that advice, were mistaken. I regret relying on that advice.

I appreciate that, after a long review, the Committee on Ethics in its proposed report has not found that I acted in bad faith in relying on my then attorney's legal advice; that there is no finding by the Committee of any knowing or willful violation by me; and that, in fact, the Committee's own proposed findings indicate that my actions were, at worst, negligent. And yet, based on these findings, the Committee proposes the disproportionate response of issuing a letter of reproval to me.

Even recognizing that a Committee on Ethics reproval is not considered a sanction under the Committee's own procedural rules, I take the strongest exception to this disproportionate and unjustified proposed response. I urge the Committee to handle this matter as an advisory matter, without issuing any public report. But, even if you decide that my good faith reliance on the advice of counsel merits a public report to keep others in the House community from making a

similar mistake, I respectfully ask you to agree that this important educational end can be fully achieved without reproving me through that report and without a finding that my actions reflected on the House. The issuance of a separate letter of reproval in this matter, where any violations by me were unintentional, is clearly not merited and would be contrary to the most recent Committee precedent.

As noted, this matter concerns my compliance with restrictions on affiliating with or receiving compensation from a firm that provides professional services involving a fiduciary relationship. That is, this matter concerns the House "fiduciary restrictions." In its inquiry, the Committee has focused on the continued use of the name McKinley & Associates by the West Virginia architecture and engineering firm I founded in 1981. Prior to entering Congress in 2011, I was a principal, officer, and director of McKinley & Associates, but my wife Mary McKinley and I no longer own any stock in McKinley & Associates; I have no other affiliation with the firm either as an owner, board member, executive, employee, or consultant. Through letters submitted on my behalf by my current counsel, Jan Witold Baran and Robert L. Walker, to the Committee on September 24, 2012 and May 1, 2013, and through a substantial volume of accompanying documents, I have described and discussed at length my efforts to understand and to comply with these "fiduciary restrictions."[1] The two earlier letters are included as Exhibits 1 and 2 to this letter and, although they are lengthy, I urge you to read through them carefully. I believe strongly that your review will convince you that, based on the advice of my attorney at that time, I acted in good faith to comply with the "fiduciary restrictions" and did not intentionally violate those restrictions.

Although I urge my colleagues on the Committee to carefully review all the arguments and information in my earlier letters, I want to emphasize in this letter the following points:

- **Relying on the advice and guidance of my former attorney, after entering Congress I sold my ownership interest in McKinley & Associates with the understanding that this sale would satisfactorily address and eliminate the need for that firm to remove "McKinley" from its name. My good faith reliance on this legal advice and guidance occurred in the context of receiving what I reasonably perceived as self-contradictory and confusing guidance from the then Committee staff. The Committee's proposed report in this matter, and the proposal to issue a reproval based on the findings in that report, unrealistically and unfairly minimizes that context of confusion.**
- **The Committee's proposed report appears to suggest, incorrectly, that I did not notify the Committee of the sale of my interest in McKinley & Associates until sometime after August 24, 2012. In fact, as clearly described in my May 1, 2013 submission to the Committee on Ethics, in June 2011 I told the then Chairman of the Committee that I had sold my interest in the firm. I do not know why the Committee's proposed report ignores this fact, especially when the report cites other parts of this same exchange with the then Chairman as apparent fact. I do know that a determination by the Committee to issue a report or reproval based, even in**

[1] I have also argued – and I maintain – that the facts in this case do not make out a violation because the name "McKinley & Associates" should be found to fall within the "family name" exception to the "fiduciary restrictions."

part, on an erroneous and incomplete understanding of when I informed the Committee of this sale would be unfair.

- **I have cooperated fully with the inquiry the Committee began in this matter in August 2012. I have provided exhaustively detailed factual information and over 550 pages of documents in response to the Committee's requests for information and documents. In doing so, I also continued to advance what I still regard as a reasonable position in this matter: the Committee should determine that McKinley & Associates falls within the "family name" exception to the fiduciary restrictions.**

In the remainder of this letter I address at greater length each of the three points outlined above.[2]

- **Relying on the advice and guidance of my former attorney, after entering Congress I sold my ownership interest in McKinley & Associates with the understanding that this sale would satisfactorily address and eliminate the need for that firm to remove "McKinley" from its name. My good faith reliance on this legal advice and guidance occurred in the context of receiving what I perceived as self-contradictory and confusing guidance from the then Committee staff. The Committee's proposed report in this matter, and the proposal to issue a reproval based on the findings in that report, unrealistically and unfairly minimizes that context of confusion.**

To a non-lawyer layperson like me – and, I imagine, even to some of you on the Committee – the requirements, the "do's and don'ts," of the "fiduciary restrictions" under the Ethics in Government Act and House rules do not seem to be based on common sense and require clear and consistent exposition to understand. As I think the record and documents I provided to the Committee show, in 2010 and 2011 Committee on Ethics staff did not provide consistent guidance on the "fiduciary restrictions" to me.

Yes, as my May 1, 2013 letter to the Committee fully describes and acknowledges, soon after my election to Congress in November 2010 there were members of the Committee staff who were providing the "informal opinion" that the "fiduciary restrictions" would necessitate changing the name of McKinley & Associates (by removing my surname "McKinley") because, as a provider of architectural services, it is apparently considered to be a provider of professional services imposing fiduciary obligations. However, *in clear contrast to and in complete contradiction of this staff advice*, on January 25, 2011 another counsel to the Committee – in fact the Director of

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[2] Apart from the specific points covered in this letter, there numerous other statements and conclusions in the Committee's proposed report and proposed letter with which I disagree, including, but not limited to, the following.

On page 10, the Committee's proposed report states: "Nevertheless, it must be noted that, at that time, both Representative McKinley and his counsel and Committee staff knew that the only procedural solution to the matter was a *formal opinion from the Committee*, not informal advice from its staff." I am not sure what "procedural solution" is intended to mean here, but if this statement is intended to mean that in 2011 I knew that the only solution of the issues arising under the "fiduciary restrictions" was a formal opinion letter from the Committee, this statement is wrong. As I have emphasized throughout this letter and in my other responses to the Committee, at that time I believed – based on my then attorney's firm advice – that, if issues existed under the "fiduciary restrictions," these issues could be resolved by the sale of my interest in McKinley & Associates.

Financial Disclosure at that time – called my attorney at that time, Charles J. Kaiser, to tell him (as Mr. Kaiser emailed to me the following day):

> [The Committee] staff agreed with our assertion that McKinley & Associates does not provide professional services involving a fiduciary relationship. As you will recall, this is the critical element that created the difficulties under the House Ethics Manual. [He] also agreed that McKinley & Associates qualified as a "family business" and so the name would not need to be changed.

For two months, McKinley & Associates and I operated on the understanding – based on this analysis and opinion (albeit informal) by Committee counsel – that McKinley & Associates would not need to change its name. *Then*, yet again in clear contrast and complete contradiction – but this time of the guidance received on January 25 from the Director of Financial Disclosure – *yet another* Committee counsel contacted Mr. Kaiser to tell him the counsel he had spoken with on January 25 was no longer with the Committee and that this new counsel was going to recommend, in sum, that the Committee take the position that McKinley & Associates did provide services involving a fiduciary relationship and that the name "McKinley" would have to be removed from the firm name.

Throughout the process of receiving contradictory, and so to me, unclear guidance from Committee staff, my attorney Mr. Kaiser provided an essentially consistent and clear explanation of the requirements imposed by the "fiduciary restrictions": "If McKinley & Associates is considered to be a firm providing professional services involving a fiduciary relationship, then it appears you are left with two choices: (1) change the name, or (2) completely divest yourself of your interest in the company.. . ."[3] This clearly stated analysis from Mr. Kaiser – either change the company name or divest myself of my interest in the company – established a firm frame of understanding for me through which I viewed my obligations under House Ethics standards with respect to McKinley & Associates. Even the Committee's proposed report appears to take note of the consistency and persistency of Mr. Kaiser's guidance: "[] Mr. Kaiser's internal discussions with Representative McKinley and his team repeatedly referenced the sale [of my interest in McKinley & Associates] as a fully-fleshed alternative pathway to EIGA compliance."[4]

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[3] See the November 24, 2010 email from Mr. Kaiser to me, included as Exhibit 3 to this letter. Please note that, if my discussion and documentation (in this and other responses by me to the Committee) of communications between me and attorney Charles J. Kaiser may be viewed as constituting a waiver by me of attorney-client privilege with respect to communications with Mr. Kaiser, no such waiver is intended to be implied, and none should be inferred, respecting any other communications between me and any other counsel.

[4] See the Committee's proposed report at page 9. As I have previously described to the Committee, and as the Committee discusses in its proposed report, a plan to have the McKinley & Associates ESOP purchase my interest over time was in the works before my election to Congress. But this does not at all contradict the fact that I also understood and believed, based on advice from Mr. Kaiser, that the sale of my interest was, in the Committee's description, "a fully-fleshed alternative pathway to EIGA compliance." At page 7 in its proposed report, the Committee states: "While it is true that Representative McKinley may have mistakenly viewed full divestment as a solution to the ethics issues the Firm presented for him, it is not the only reason for such a sale." For the Committee's purposes in concluding that any violation by me in this matter was unintentional, the only relevant part of this sentence should be the first part: It is true that I "mistakenly viewed full divestment as a solution to the ethics issues" in this matter.

It also appears that McKinley & Associates and its President, Ernie Dellatorre, also understood that sale of my ownership interest in the company would resolve any ethics issues and would permit the company to keep the name

The proposed Committee report unrealistically and unfairly minimizes the context of contradictory guidance on the "fiduciary restrictions" provided by Committee staff to me and my then counsel in 2010 and 2011.[5] Please understand that I am not saying that the Committee's inconsistent guidance caused me to rely on the consistent – but, as I now understand, mistaken – guidance of my attorney at that time. I am, however, asking you – as my colleagues who have come to the House from varied private businesses, occupations, and professions – to put yourselves in my shoes as a novice to the House and to the House ethics process in late 2010 and early 2011. I am asking you to understand from that perspective that it was an understandable – not an unreasonable – impulse to rely on the clear counsel of a trusted attorney to make sense of what I perceived to be self-contradictory guidance from the Committee on the arcane requirements of the "fiduciary restrictions."

Again, I am not trying to say that the Committee or its staff is to blame for what occurred here. I am not saying that, viewed in hindsight, I should have relied on private counsel. But neither should I be "reproved" by the Committee for relying on my own attorney at that time to make sense for me – in a matter of great importance to me and the hardworking employee-owners of McKinley & Associates – of what I reasonably perceived as the confusing counsel being provided by the Committee. The proposed Committee report itself states: "The evidence suggests that Representative McKinley did indeed disclose all pertinent facts to Mr. Kaiser, and Representative McKinley appears to have actually relied on the advice Mr. Kaiser gave him."[6]

"McKinley & Associates." In an April 30, 2013 email to attorney George B. Sanders explaining the company's understanding of the requirements imposed by the "fiduciary restrictions," Mr. Dellatore wrote: "It was our understanding that a name change would be required if DBM [David B. McKinley] maintained any percentage ownership. . . ." This understanding – which appears to have been the same as my understanding of the relevant ethics requirements – was also based on guidance provided to the company by attorney Kaiser, who was advising the company through the process at that time. (This email is cited as document MCK000079 in Exhibit 8 to the Committee's proposed report.)

[5] For example, regarding the January 25, 2011 call from the Committee's the Director of Financial Disclosure to Mr. Kaiser, the Committee's proposed report says:

> Neither the Director of Financial Disclosure nor the Committee has a similar record or recollection of such a conversation. The Committee does not know what Mr. Kaiser told the Director of Financial Disclosure regarding the facts of the matter on this call, who initiated the call and for what purpose. Without this information, it is difficult for the Committee to judge precisely why Mr. Kaiser recalls this single teleconference resulting in advice so vastly different than that provided by the Committee on a consistent basis throughout the remainder of this process.

The purely theoretical approach of this analysis ignores the often messy and inconvenient way in which events occur in the real world. Things happen. And this call from the Committee's then Director of Financial Disclosure happened, even if what he said in the call did not fit in with what some others from the Committee staff had said or would say. Look carefully at the detail of Charles Kaiser's email to me the day after this call occurred recounting with specificity the range of things discussed in the call. [See Exhibit 4 to this letter, previously provided to the Committee in the document production accompanying my letter of May 1, 2013; this email is Exhibit 13 to the Committee's proposed report.] Isn't plain to from your reading that Mr. Kaiser – the very day following his call with the Committee's Director of Financial Disclosure – recalled this "vastly different" advice because Committee counsel actually provided this "vastly different" advice? Against this essentially contemporaneous evidence, the proposed report offers no actual evidence at all in contradiction in contradiction of Mr. Kaiser's email narrative. Whatever the Committee determines to do in this matter, wouldn't it better for the Committee to forthrightly accept and factor into its determination how its guidance and advisory function may have misfired here, so that there is less chance of a similar misfire affecting other Members in the future?

[6] Committee proposed report at page 17.

As I stated at the outset of this letter, I urge the Committee to handle this matter as an advisory matter, without issuing any public report. If you decide, however, that my good faith reliance on the advice of counsel merits a public report to keep others in the House community from making a similar mistake, I ask you to agree that this important educational end can be achieved fully without reproving me and without finding that my actions reflected on the House.

The Committee's proposed report suggests, incorrectly, that I did not notify the Committee of the sale of my interest in McKinley & Associates until sometime after August 24, 2012. In fact, as clearly described in my May 1, 2013 submission to the Committee on Ethics, in June 2011 I told the then Chairman of the Committee that I had sold my interest in the firm. A determination by the Committee to issue a report or reproval based, even in part, on an erroneous and incomplete understanding of when I informed the Committee of this sale would be unfair.

The Committee's proposed report states, at page 12, that a telephone conversation between me and the Committee's Chief Counsel at that time "appears to be the first time in which Representative McKinley notified the Committee of his sale of his interest in" McKinley & Associates. This is contrary to the record before the Committee in this matter. Shortly after June 27, 2011 – within days of receiving the Committee's advisory letter dated June 24, 2011 – I told the then Committee Chairman that I had already sold McKinley & Associates.[7] My May 1, 2013 letter to the Committee, submitted through counsel, describes the following exchange in June 2011 with the then Chairman of the Committee:

> Rep. McKinley recalls that, within a day or two of receiving the Committee's [June 24, 2011] letter on June 27, 2011, he approached Chairman Bonner before the Speaker's podium on the floor of the House. With regard to the Committee's letter, Rep. McKinley recalls saying to Chairman Bonner, "what the [heck] is this," or some other similarly expressive phrase. Rep. McKinley told Chairman Bonner that "McKinley Engineering" was the original name of *his* firm, not the name of his father's firm (as the Committee's letter incorrectly stated). Rep. McKinley recalls Chairman Bonner responding, in substance, that the Committee was not aware of this but had thought that "McKinley Engineering" was the name of his father's firm; Chairman Bonner said that this could make a difference to the Committee's determination. Rep. McKinley then responded

[7] As described in greater detail in my May 1, 2013 letter to the Committee, on April 11, 2011 I entered into a Memorandum of Understanding ("MOU") with the McKinley & Associates Employee Stock Ownership Plan ("ESOP"). Through this MOU, I 1) committed to the sale of all my remaining stock in the company to the ESOP and 2) agreed that I had "no further control over the ownership and operations of McKinley & Associates, Inc." As discussed above, previous to my entering into this MOU my then attorney Charles Kaiser had advised me consistently that there were two compliance options with respect to the House ethics restrictions on providing professional services involving a fiduciary relationship: **either** change the name of the company **or** divest my interest in the company. By entering into the MOU with the McKinley & Associates ESOP on April 11, 2011, I believed that I had taken satisfactory good faith steps to effectuate this second compliance option as described by attorney Kaiser, that is, divestment of my interest in the company. On December 31, 2011, this MOU was followed up by a formal agreement regarding the sale of my ownership interest in McKinley & Associates to the ESOP. This sale was contingent on an independent valuation of the firm; because of the time needed to complete this valuation, and because of ERISA requirement, the actual sale was not completed until April 30, 2012.

> that, in any event, it did not matter anymore because he had already sold his company, by which Rep. McKinley meant the arrangement put in place by the MOU.[8] Chairman Bonner said that he did not know this and that he had hoped it would not come to this.

Why doesn't the fact of my June 2011 exchange on the House floor with the then Chairman of the Committee on Ethics regarding the sale of my interest in McKinley & Associates appear in the Committee's proposed report? Referencing my May 1, 2013 letter to the Committee as the source, the Committee report does cite *other* portions of this *same* House floor exchange with the Committee's former Chairman as apparent fact.[9]

My June 2011 exchange with the then Chairman of the Committee regarding the sale of my interest in McKinley & Associates is another rough fact about the Committee's past process in this matter that should be fully acknowledged and considered by the Committee in this case, not ignored because it does not fit into a predetermined narrative and conclusion. Does this fact mean that I provided procedurally perfect notice to the Committee at that early stage about the sale of McKinley & Associates? No, not at all. As my May 1, 2013 letter to the Committee states with regard to this exchange with the former Committee Chairman, I regret not having responded more formally at the time – including by providing a more formal notification of the sale – to the Committee's June 24, 2011 letter regarding McKinley & Associates. But I did respond to and did inform the then Committee Chairman. To the extent that this fact is ignored, to the extent that the Committee's determination as to whether or not to issue a reproval to me would be based on the erroneous suggestion that I did not inform the Committee of the sale until essentially forced to do so in late August 2012, that determination would be unfair and wrong.

I have cooperated fully with the inquiry the Committee began in this matter in August 2012. I have provided exhaustively detailed factual information and over 550 pages of documents in response to the Committee's requests for information and documents. In doing so, I also continued to advance what I still regard as a reasonable position in this matter: the Committee should determine that McKinley & Associates falls within the "family name" exception to the fiduciary restrictions.

On August 24, 2012, the Committee sent me a letter requesting an explanation of the status of efforts to rename McKinley & Associates. On March 18, 2013, the Committee sent me a detailed written request for documents and explanatory information. Through letters submitted on my behalf by my current counsel, Mr. Baran and Mr. Walker, I responded to these requests at length and in specific detail, including with over 550 pages of responsive documents that accompanied my May 1, 2013 response to the Committee's March 18, 2013 letter. My responses also argued and supported my strong and continuing central view on this matter: the name "McKinley & Associates" for my former architecture and engineering firm is a "family name," therefore meeting an exception to the "fiduciary restrictions." The Committee's proposed report rejects this position, but I respectfully urge the full Committee to reconsider my position. I won't repeat in this letter all the facts and arguments that support finding that "McKinley &

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[8] See footnote 2.

[9] See page 12 of the Committee's proposed report, regarding the Committee's error in assuming that McKinley Engineering was the name of my father's firm: "[Representative McKinley] apparently approached Representative Bonner on the floor of the House and stated, 'what the [heck] is this,' and explained the factual error."

Associates" is a family name. These facts and arguments are set out primarily in my September 14, 2012 letter to the Committee (Exhibit 1 to this letter), and I again ask the Members of the Committee to review that letter in full. The following paragraph from that September 14, 2011 letter, however, summarizes the substantial basis for determining that use of the McKinley & Associates name is not contrary to the restrictions relating to fiduciary professions:

> [A] number of factors support your approval of continued use of the name "McKinley & Associates" by Rep. McKinley's former firm. "McKinley" is a well-known family and historical name in West Virginia. The "McKinley" name in engineering and building design was originally established in West Virginia by Rep. McKinley's father, Johnson B. McKinley, and was reinforced by him through his long, public Association with McKinley & Associates. Entirely independent of Rep. McKinley's status as a Member of Congress, "McKinley & Associates" has long been – and remains – an established brand name in the provision of the highest-quality engineering, architecture, and interior design services.
>
> As the legislative history of the Ethics in Government Act makes clear, the Act's restrictions (and the parallel restrictions under House Rule XXV) on the use of a "Member's name" are intended to address "cases where outside interests attempt to trade on the prestige of Members of Congress." This concern does not exist with McKinley & Associates. The company trades on the "McKinley" name as an historical name in West Virginia and as a "family name" in engineering and building design. The company trades on – indeed, relies upon – the name "McKinley & Associates" as an established and well-known brand name in its field.[10]

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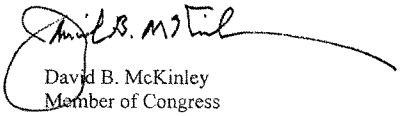
[10] The discussion in the Committee's proposed report regarding the business names used by my father is yet another point at which that report minimizes or ignores hard, contrary evidence. The report provides a list of some names used by my father professionally from about 1954 through 1992. This list was compiled through a review of still extant engineering drawings from my father's records. This list includes such titles as "Engineers," "Consulting Engineer," "Eng'r," and "P.E."; none of the names on this list include the word "engineering." The report, at page 5, concludes that "Johnson McKinley appears to have done business" under the names on this list. I provided this list to the Committee as a document accompanying my May 1, 2013 letter to the Committee.

In my May 1, 2013 letter to the Committee, I also provided the Committee with an online link to a PDF of the minutes of the regular meeting of the Council of Beech Bottom, West Virginia, for November 4, 1986 (http://beechbottomwv.org/pdfs/1986.pdf, at page 257) which publicly record and refer to my father's business as "Johnson B. McKinley *Engineering*." (Emphasis added; although I have previously provided the Committee with a link to these minutes, I include the relevant pages from those minutes with this letter as Exhibit 5.) And yet, in contrast to the Committee's apparent willingness to accept as authoritative a list of names (provided by me) that does *not* include the word "engineering," it seems to dismiss (and, frankly, seems to mischaracterize) the use of the name "Johnson B. McKinley Engineering" by an independent source. About the evidence supporting use of the name "Johnson B. McKinley Engineering," the proposed report, at page 6, states, vaguely and dismissively: "Representative McKinley, through his counsel, has stated that the name 'Johnson B. McKinley Engineering' was also used at some point." In its investigation, did the Committee not go to the link I provided to actually view the relevant document? As of August 19, 2016, the relevant minutes of the Beech Bottom Council were still there. My point here is not that this independent source showing the use of the name "Johnson B. McKinley Engineering" for my father's practice is, by itself, determinative of the question of whether "McKinley & Associates" meets the "family

* * *

Thank you again for the opportunity to respond directly to all of you on the Committee's draft proposed report and draft letter. As I have discussed above, the proposed response of a reproval – in whatever form issued by the Committee – is disproportionate and unjustified in this matter, in which I acted in good faith reliance on the advice of my counsel at the time that I was complying with House requirements. And, certainly, because any violation by me of House standards was unintentional, no separate letter of reproval is merited here.[11]

Sincerely,



David B. McKinley
Member of Congress

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name" exception. My point here is that this source seems to have been unfairly weighed and accounted for in the Committee's review and consideration of the evidence relevant to determination of the "family name" question.

[11] See, for example, the most recent public action taken by the Committee on July 14, 2016 in a matter in which the Committee determined that the Member's violations were not intentional.

EXHIBIT 23

August 24, 2012

The Honorable David B. McKinley
U.S. House of Representatives
313 Cannon House Office Building
Washington, DC 20515

Dear Representative McKinley:

On June 24, 2011, the Committee on Ethics (Committee) issued a letter to you in response to your letters dated January 3, 2011, and April 14, 2011, regarding your engineering firm. As the letter indicated, the Committee determined that pursuant to Section 502 of the Ethics in Government Act (5 U.S.C. app. 4 § 502(a)) and House Rule XXV, clause 2, your engineering firm, McKinley & Associates, Inc. (the Firm), provides fiduciary services. As such, your name could not be used as a part of the Firm's name. The Committee thus instructed you in its letter that a change of the Firm's name was required. The Committee noted that it accepted your indication that the current Firm could reasonably be seen as a practical continuation of a firm started by your father, Johnson McKinley, and found that changing the Firm's name to McKinley Engineering, the name of your father's former firm, along with a clear association to your father, would be permissible for the purposes of House Rules.

To date, it does not appear that you have changed the name of the Firm. Your 2011 Financial Disclosure Statement, that you filed on May 15, 2012, continues to list the Firm as McKinley and Associates. In addition, the Firm's Web site still lists McKinley and Associates as its name and there is no indication that the name of the Firm has or will be changed. Further, according to publicly available information, the Firm appears to still be registered with the West Virginia Secretary of State as McKinley and Associates.

The Committee expects you to change the name of the Firm, as directed. Failure to do so may be viewed as a knowing violation of the Ethics in Government Act and House Rule XXV, clause 2, and may result in further proceedings against you by the Committee. The Committee thus requests a detailed explanation of the status of your efforts to change the name of the Firm, and what that name will be. If the firm intends to use the name McKinley Engineering, please inform the Committee how the firm will indicate the clear association between the name and your father.

We request that you provide a response to this letter by September 7, 2012. To the extent that any part of your response is not a complete written response signed by you, we request that

the response be provided under oath or affirmation. (We have enclosed a declaration for this purpose.)

If you have any further questions regarding this letter, please contact the Committee's Chief Counsel and Staff Director Dan Schwager, the Director of Investigations, Deborah Sue Mayer, or Committee counsel Patrick McMullen, at extension 5-7103.

Sincerely,

Jo Bonner
Chairman

Linda T. Sánchez
Ranking Member

Declaration

I, Representative David B. McKinley, declare (certify, verify, or state) under penalty of perjury that the response and factual assertions contained in the attached letter dated _____, 2012, relating to my response to the August 24, 2012, Committee on Ethics request for information, are true and correct.

Signature: _____

Name: Representative David B. McKinley

Date: _____, 2012

APPENDIX C

Wiley Rein LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000

www.wileyrein.com

Jan Witold Baran
202.719.[redacted]
[redacted]@wileyrein.com

April 19, 2016

The Honorable Charles W. Dent, Chairman
The Honorable Linda T. Sánchez, Ranking Member
Committee on Ethics
U.S. House of Representatives
1015 Longworth House Office Building
Washington, D.C.

Re: *Response to request for additional information*

Dear Chairman Dent and Ranking Member Sánchez:

Through an oral request from Patrick McMullen, Director of Investigations, the Committee has asked for additional information from Rep. David B. McKinley regarding receipt of pay by Rep. McKinley's father, Johnson B. McKinley, for consulting work performed for Rep. McKinley's former firm (the "Firm"). In response to this request, Rep. McKinley has authorized counsel to transmit the following representations by him to the Committee:

> Rep. McKinley recalls several of the projects on which his father was very much involved with the Firm in the 1980s, including: the water line expansion of the Glendale Heights Public Service District; the West Liberty College sewage treatment plant; the Martins Ferry retaining walls; and contract administration of Tire America and of the Ohio Valley Drug Company.
>
> As for compensation, Rep. McKinley recalls his father was paid $10,000 for one of these projects. He specifically recalls this payment because his father had been generous with his professional time but had not billed the Firm for every quarter hour. When the company nonetheless provided appropriate payment of $10,000, Johnson B. McKinley balked at cashing the check for several weeks but eventually deposited the funds, just as he did previous payments. Rep. McKinley recalls that these previous payments were for smaller amounts, in the range of $2,000 to $4,000 each.
>
> Rep. McKinley notes that the payments were made as much as 30 years ago (or more) and that the Firm at the time of those payments was using a different bank, different CPA, and a different

Wiley Rein LLP

comptroller than today; further the Firm was not computerized or automated at the time of these payments (that did not occur until the early 1990s). Rep. McKinley also emphasizes that none of the records of the Firm are now available to him.

Although submitted by counsel on his behalf, the information and representations provided through this letter were thoroughly reviewed by Rep. McKinley, were authorized and confirmed by him as accurate to the best of his knowledge, recollection, and belief at this time, and were approved and authorized by him for submission to the Committee, as was this letter.

We hope the information provided through this letter will enable a prompt resolution of this matter. If the Committee has further questions, however, please do not hesitate to let us know.

Sincerely,

Jan Witold Baran
Counsel for Rep. David B. McKinley

Robert L. Walker
Counsel for Rep. David B. McKinley

DAVID B. McKINLEY, P.E.
1ST DISTRICT, WEST VIRGINIA

412 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
TEL: (202) 225-4172
FAX: (202) 225-7564

www.mckinley.house.gov

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CONGRESSIONAL YOUTH CHALLENGE CAUCUS

CO-CHAIR,
HIGH PERFORMANCE BUILDINGS CAUCUS

CO-CHAIR
CONGRESSIONAL HEARING HEALTH CAUCUS

August 22, 2016

The Honorable Charles W. Dent, Chairman
The Honorable Loretta T. Sánchez, Ranking Member
Members of the Committee on Ethics
U.S. House of Representatives
1015 Longworth House Office Building
Washington, DC 20515

Re: Response of Representative David B. McKinley to the Committee's proposed report and letter

Dear Members of the Committee on Ethics:

Thank you for this opportunity to respond to the draft report and draft letter of reproval provided to me by the staff of the Committee on Ethics.

Following the clear and repeated advice of my attorney at that time, after I was elected and sworn into my first term in Congress I sold my remaining interest in the McKinley & Associates architecture and engineering firm to that firm's Employee Stock Option Plan to comply with my obligations under House ethics requirements, specifically with the so-called "fiduciary restrictions." I have since come to understand that the advice of my then attorney in explaining and interpreting to me House Committee on Ethics requirements and guidance, and my reliance on that advice, were mistaken. I regret relying on that advice.

I appreciate that, after a long review, the Committee on Ethics in its proposed report has not found that I acted in bad faith in relying on my then attorney's legal advice; that there is no finding by the Committee of any knowing or willful violation by me; and that, in fact, the Committee's own proposed findings indicate that my actions were, at worst, negligent. And yet, based on these findings, the Committee proposes the disproportionate response of issuing a letter of reproval to me.

Even recognizing that a Committee on Ethics reproval is not considered a sanction under the Committee's own procedural rules, I take the strongest exception to this disproportionate and unjustified proposed response. I urge the Committee to handle this matter as an advisory matter, without issuing any public report. But, even if you decide that my good faith reliance on the advice of counsel merits a public report to keep others in the House community from making a

similar mistake, I respectfully ask you to agree that this important educational end can be fully achieved without reproving me through that report and without a finding that my actions reflected on the House. The issuance of a separate letter of reproval in this matter, where any violations by me were unintentional, is clearly not merited and would be contrary to the most recent Committee precedent.

As noted, this matter concerns my compliance with restrictions on affiliating with or receiving compensation from a firm that provides professional services involving a fiduciary relationship. That is, this matter concerns the House "fiduciary restrictions." In its inquiry, the Committee has focused on the continued use of the name McKinley & Associates by the West Virginia architecture and engineering firm I founded in 1981. Prior to entering Congress in 2011, I was a principal, officer, and director of McKinley & Associates, but my wife Mary McKinley and I no longer own any stock in McKinley & Associates; I have no other affiliation with the firm either as an owner, board member, executive, employee, or consultant. Through letters submitted on my behalf by my current counsel, Jan Witold Baran and Robert L. Walker, to the Committee on September 24, 2012 and May 1, 2013, and through a substantial volume of accompanying documents, I have described and discussed at length my efforts to understand and to comply with these "fiduciary restrictions."[1] The two earlier letters are included as Exhibits 1 and 2 to this letter and, although they are lengthy, I urge you to read through them carefully. I believe strongly that your review will convince you that, based on the advice of my attorney at that time, I acted in good faith to comply with the "fiduciary restrictions" and did not intentionally violate those restrictions.

Although I urge my colleagues on the Committee to carefully review all the arguments and information in my earlier letters, I want to emphasize in this letter the following points:

- **Relying on the advice and guidance of my former attorney, after entering Congress I sold my ownership interest in McKinley & Associates with the understanding that this sale would satisfactorily address and eliminate the need for that firm to remove "McKinley" from its name. My good faith reliance on this legal advice and guidance occurred in the context of receiving what I reasonably perceived as self-contradictory and confusing guidance from the then Committee staff. The Committee's proposed report in this matter, and the proposal to issue a reproval based on the findings in that report, unrealistically and unfairly minimizes that context of confusion.**
- **The Committee's proposed report appears to suggest, incorrectly, that I did not notify the Committee of the sale of my interest in McKinley & Associates until sometime after August 24, 2012. In fact, as clearly described in my May 1, 2013 submission to the Committee on Ethics, in June 2011 I told the then Chairman of the Committee that I had sold my interest in the firm. I do not know why the Committee's proposed report ignores this fact, especially when the report cites other parts of this same exchange with the then Chairman as apparent fact. I do know that a determination by the Committee to issue a report or reproval based, even in**

[1] I have also argued – and I maintain – that the facts in this case do not make out a violation because the name "McKinley & Associates" should be found to fall within the "family name" exception to the "fiduciary restrictions."

part, on an erroneous and incomplete understanding of when I informed the Committee of this sale would be unfair.

- **I have cooperated fully with the inquiry the Committee began in this matter in August 2012. I have provided exhaustively detailed factual information and over 550 pages of documents in response to the Committee's requests for information and documents. In doing so, I also continued to advance what I still regard as a reasonable position in this matter: the Committee should determine that McKinley & Associates falls within the "family name" exception to the fiduciary restrictions.**

In the remainder of this letter I address at greater length each of the three points outlined above.[2]

- **Relying on the advice and guidance of my former attorney, after entering Congress I sold my ownership interest in McKinley & Associates with the understanding that this sale would satisfactorily address and eliminate the need for that firm to remove "McKinley" from its name. My good faith reliance on this legal advice and guidance occurred in the context of receiving what I perceived as self-contradictory and confusing guidance from the then Committee staff. The Committee's proposed report in this matter, and the proposal to issue a reproval based on the findings in that report, unrealistically and unfairly minimizes that context of confusion.**

To a non-lawyer layperson like me – and, I imagine, even to some of you on the Committee – the requirements, the "do's and don'ts," of the "fiduciary restrictions" under the Ethics in Government Act and House rules do not seem to be based on common sense and require clear and consistent exposition to understand. As I think the record and documents I provided to the Committee show, in 2010 and 2011 Committee on Ethics staff did not provide consistent guidance on the "fiduciary restrictions" to me.

Yes, as my May 1, 2013 letter to the Committee fully describes and acknowledges, soon after my election to Congress in November 2010 there were members of the Committee staff who were providing the "informal opinion" that the "fiduciary restrictions" would necessitate changing the name of McKinley & Associates (by removing my surname "McKinley") because, as a provider of architectural services, it is apparently considered to be a provider of professional services imposing fiduciary obligations. However, *in clear contrast to and in complete contradiction of this staff advice*, on January 25, 2011 another counsel to the Committee – in fact the Director of

[2] Apart from the specific points covered in this letter, there numerous other statements and conclusions in the Committee's proposed report and proposed letter with which I disagree, including, but not limited to, the following.

On page 10, the Committee's proposed report states: "Nevertheless, it must be noted that, at that time, both Representative McKinley and his counsel and Committee staff knew that the only procedural solution to the matter was a *formal opinion from the Committee*, not informal advice from its staff." I am not sure what "procedural solution" is intended to mean here, but if this statement is intended to mean that in 2011 I knew that the only solution of the issues arising under the "fiduciary restrictions" was a formal opinion letter from the Committee, this statement is wrong. As I have emphasized throughout this letter and in my other responses to the Committee, at that time I believed – based on my then attorney's firm advice – that, if issues existed under the "fiduciary restrictions," these issues could be resolved by the sale of my interest in McKinley & Associates.

Financial Disclosure at that time – called my attorney at that time, Charles J. Kaiser, to tell him (as Mr. Kaiser emailed to me the following day):

> [The Committee] staff agreed with our assertion that McKinley & Associates does not provide professional services involving a fiduciary relationship. As you will recall, this is the critical element that created the difficulties under the House Ethics Manual. [He] also agreed that McKinley & Associates qualified as a "family business" and so the name would not need to be changed.

For two months, McKinley & Associates and I operated on the understanding – based on this analysis and opinion (albeit informal) by Committee counsel – that McKinley & Associates would not need to change its name. *Then,* yet again in clear contrast and complete contradiction – but this time of the guidance received on January 25 from the Director of Financial Disclosure – *yet another* Committee counsel contacted Mr. Kaiser to tell him the counsel he had spoken with on January 25 was no longer with the Committee and that this new counsel was going to recommend, in sum, that the Committee take the position that McKinley & Associates did provide services involving a fiduciary relationship and that the name "McKinley" would have to be removed from the firm name.

Throughout the process of receiving contradictory, and so to me, unclear guidance from Committee staff, my attorney Mr. Kaiser provided an essentially consistent and clear explanation of the requirements imposed by the "fiduciary restrictions": "If McKinley & Associates is considered to be a firm providing professional services involving a fiduciary relationship, then it appears you are left with two choices: (1) change the name, or (2) completely divest yourself of your interest in the company.. . ."[3] This clearly stated analysis from Mr. Kaiser – either change the company name or divest myself of my interest in the company – established a firm frame of understanding for me through which I viewed my obligations under House Ethics standards with respect to McKinley & Associates. Even the Committee's proposed report appears to take note of the consistency and persistency of Mr. Kaiser's guidance: "[] Mr. Kaiser's internal discussions with Representative McKinley and his team repeatedly referenced the sale [of my interest in McKinley & Associates] as a fully-fleshed alternative pathway to EIGA compliance."[4]

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[3] See the November 24, 2010 email from Mr. Kaiser to me, included as Exhibit 3 to this letter. Please note that, if my discussion and documentation (in this and other responses by me to the Committee) of communications between me and attorney Charles J. Kaiser may be viewed as constituting a waiver by me of attorney-client privilege with respect to communications with Mr. Kaiser, no such waiver is intended to be implied, and none should be inferred, respecting any other communications between me and any other counsel.

[4] See the Committee's proposed report at page 9. As I have previously described to the Committee, and as the Committee discusses in its proposed report, a plan to have the McKinley & Associates ESOP purchase my interest over time was in the works before my election to Congress. But this does not at all contradict the fact that I also understood and believed, based on advice from Mr. Kaiser, that the sale of my interest was, in the Committee's description, "a fully-fleshed alternative pathway to EIGA compliance." At page 7 in its proposed report, the Committee states: "While it is true that Representative McKinley may have mistakenly viewed full divestment as a solution to the ethics issues the Firm presented for him, it is not the only reason for such a sale." For the Committee's purposes in concluding that any violation by me in this matter was unintentional, the only relevant part of this sentence should be the first part: It is true that I "mistakenly viewed full divestment as a solution to the ethics issues" in this matter.

It also appears that McKinley & Associates and its President, Ernie Dellatorre, also understood that sale of my ownership interest in the company would resolve any ethics issues and would permit the company to keep the name

The proposed Committee report unrealistically and unfairly minimizes the context of contradictory guidance on the "fiduciary restrictions" provided by Committee staff to me and my then counsel in 2010 and 2011.[5] Please understand that I am not saying that the Committee's inconsistent guidance caused me to rely on the consistent – but, as I now understand, mistaken – guidance of my attorney at that time. I am, however, asking you – as my colleagues who have come to the House from varied private businesses, occupations, and professions – to put yourselves in my shoes as a novice to the House and to the House ethics process in late 2010 and early 2011. I am asking you to understand from that perspective that it was an understandable – not an unreasonable – impulse to rely on the clear counsel of a trusted attorney to make sense of what I perceived to be self-contradictory guidance from the Committee on the arcane requirements of the "fiduciary restrictions."

Again, I am not trying to say that the Committee or its staff is to blame for what occurred here. I am not saying that, viewed in hindsight, I should have relied on private counsel. But neither should I be "reproved" by the Committee for relying on my own attorney at that time to make sense for me – in a matter of great importance to me and the hardworking employee-owners of McKinley & Associates – of what I reasonably perceived as the confusing counsel being provided by the Committee. The proposed Committee report itself states: "The evidence suggests that Representative McKinley did indeed disclose all pertinent facts to Mr. Kaiser, and Representative McKinley appears to have actually relied on the advice Mr. Kaiser gave him."[6]

"McKinley & Associates." In an April 30, 2013 email to attorney George B. Sanders explaining the company's understanding of the requirements imposed by the "fiduciary restrictions," Mr. Dellatore wrote: "It was our understanding that a name change would be required if DBM [David B. McKinley] maintained any percentage ownership. . . ." This understanding – which appears to have been the same as my understanding of the relevant ethics requirements – was also based on guidance provided to the company by attorney Kaiser, who was advising the company through the process at that time. (This email is cited as document MCK000079 in Exhibit 8 to the Committee's proposed report.)

[5] For example, regarding the January 25, 2011 call from the Committee's the Director of Financial Disclosure to Mr. Kaiser, the Committee's proposed report says:

> Neither the Director of Financial Disclosure nor the Committee has a similar record or recollection of such a conversation. The Committee does not know what Mr. Kaiser told the Director of Financial Disclosure regarding the facts of the matter on this call, who initiated the call and for what purpose. Without this information, it is difficult for the Committee to judge precisely why Mr. Kaiser recalls this single teleconference resulting in advice so vastly different than that provided by the Committee on a consistent basis throughout the remainder of this process.

The purely theoretical approach of this analysis ignores the often messy and inconvenient way in which events occur in the real world. Things happen. And this call from the Committee's then Director of Financial Disclosure happened, even if what he said in the call did not fit in with what some others from the Committee staff had said or would say. Look carefully at the detail of Charles Kaiser's email to me the day after this call occurred recounting with specificity the range of things discussed in the call. [See Exhibit 4 to this letter, previously provided to the Committee in the document production accompanying my letter of May 1, 2013; this email is Exhibit 13 to the Committee's proposed report.] Isn't plain to from your reading that Mr. Kaiser – the very day following his call with the Committee's Director of Financial Disclosure – recalled this "vastly different" advice because Committee counsel actually provided this "vastly different" advice? Against this essentially contemporaneous evidence, the proposed report offers no actual evidence at all in contradiction in contradiction of Mr. Kaiser's email narrative. Whatever the Committee determines to do in this matter, wouldn't it better for the Committee to forthrightly accept and factor into its determination how its guidance and advisory function may have misfired here, so that there is less chance of a similar misfire affecting other Members in the future?

[6] Committee proposed report at page 17.

As I stated at the outset of this letter, I urge the Committee to handle this matter as an advisory matter, without issuing any public report. If you decide, however, that my good faith reliance on the advice of counsel merits a public report to keep others in the House community from making a similar mistake, I ask you to agree that this important educational end can be achieved fully without reproving me and without finding that my actions reflected on the House.

The Committee's proposed report suggests, incorrectly, that I did not notify the Committee of the sale of my interest in McKinley & Associates until sometime after August 24, 2012. In fact, as clearly described in my May 1, 2013 submission to the Committee on Ethics, in June 2011 I told the then Chairman of the Committee that I had sold my interest in the firm. A determination by the Committee to issue a report or reproval based, even in part, on an erroneous and incomplete understanding of when I informed the Committee of this sale would be unfair.

The Committee's proposed report states, at page 12, that a telephone conversation between me and the Committee's Chief Counsel at that time "appears to be the first time in which Representative McKinley notified the Committee of his sale of his interest in" McKinley & Associates. This is contrary to the record before the Committee in this matter. Shortly after June 27, 2011 – within days of receiving the Committee's advisory letter dated June 24, 2011 – I told the then Committee Chairman that I had already sold McKinley & Associates.[7] My May 1, 2013 letter to the Committee, submitted through counsel, describes the following exchange in June 2011 with the then Chairman of the Committee:

> Rep. McKinley recalls that, within a day or two of receiving the Committee's [June 24, 2011] letter on June 27, 2011, he approached Chairman Bonner before the Speaker's podium on the floor of the House. With regard to the Committee's letter, Rep. McKinley recalls saying to Chairman Bonner, "what the [heck] is this," or some other similarly expressive phrase. Rep. McKinley told Chairman Bonner that "McKinley Engineering" was the original name of *his* firm, not the name of his father's firm (as the Committee's letter incorrectly stated). Rep. McKinley recalls Chairman Bonner responding, in substance, that the Committee was not aware of this but had thought that "McKinley Engineering" was the name of his father's firm; Chairman Bonner said that this could make a difference to the Committee's determination. Rep. McKinley then responded

[7] As described in greater detail in my May 1, 2013 letter to the Committee, on April 11, 2011 I entered into a Memorandum of Understanding ("MOU") with the McKinley & Associates Employee Stock Ownership Plan ("ESOP"). Through this MOU, I 1) committed to the sale of all my remaining stock in the company to the ESOP and 2) agreed that I had "no further control over the ownership and operations of McKinley & Associates, Inc." As discussed above, previous to my entering into this MOU my then attorney Charles Kaiser had advised me consistently that there were two compliance options with respect to the House ethics restrictions on providing professional services involving a fiduciary relationship: **either** change the name of the company **or** divest my interest in the company. By entering into the MOU with the McKinley & Associates ESOP on April 11, 2011, I believed that I had taken satisfactory good faith steps to effectuate this second compliance option as described by attorney Kaiser, that is, divestment of my interest in the company. On December 31, 2011, this MOU was followed up by a formal agreement regarding the sale of my ownership interest in McKinley & Associates to the ESOP. This sale was contingent on an independent valuation of the firm; because of the time needed to complete this valuation, and because of ERISA requirement, the actual sale was not completed until April 30, 2012.

> that, in any event, it did not matter anymore because he had already sold his company, by which Rep. McKinley meant the arrangement put in place by the MOU.[8] Chairman Bonner said that he did not know this and that he had hoped it would not come to this.

Why doesn't the fact of my June 2011 exchange on the House floor with the then Chairman of the Committee on Ethics regarding the sale of my interest in McKinley & Associates appear in the Committee's proposed report? Referencing my May 1, 2013 letter to the Committee as the source, the Committee report does cite *other* portions of this *same* House floor exchange with the Committee's former Chairman as apparent fact.[9]

My June 2011 exchange with the then Chairman of the Committee regarding the sale of my interest in McKinley & Associates is another rough fact about the Committee's past process in this matter that should be fully acknowledged and considered by the Committee in this case, not ignored because it does not fit into a predetermined narrative and conclusion. Does this fact mean that I provided procedurally perfect notice to the Committee at that early stage about the sale of McKinley & Associates? No, not at all. As my May 1, 2013 letter to the Committee states with regard to this exchange with the former Committee Chairman, I regret not having responded more formally at the time – including by providing a more formal notification of the sale – to the Committee's June 24, 2011 letter regarding McKinley & Associates. But I did respond to and did inform the then Committee Chairman. To the extent that this fact is ignored, to the extent that the Committee's determination as to whether or not to issue a reproval to me would be based on the erroneous suggestion that I did not inform the Committee of the sale until essentially forced to do so in late August 2012, that determination would be unfair and wrong.

I have cooperated fully with the inquiry the Committee began in this matter in August 2012. I have provided exhaustively detailed factual information and over 550 pages of documents in response to the Committee's requests for information and documents. In doing so, I also continued to advance what I still regard as a reasonable position in this matter: the Committee should determine that McKinley & Associates falls within the "family name" exception to the fiduciary restrictions.

On August 24, 2012, the Committee sent me a letter requesting an explanation of the status of efforts to rename McKinley & Associates. On March 18, 2013, the Committee sent me a detailed written request for documents and explanatory information. Through letters submitted on my behalf by my current counsel, Mr. Baran and Mr. Walker, I responded to these requests at length and in specific detail, including with over 550 pages of responsive documents that accompanied my May 1, 2013 response to the Committee's March 18, 2013 letter. My responses also argued and supported my strong and continuing central view on this matter: the name "McKinley & Associates" for my former architecture and engineering firm is a "family name," therefore meeting an exception to the "fiduciary restrictions." The Committee's proposed report rejects this position, but I respectfully urge the full Committee to reconsider my position. I won't repeat in this letter all the facts and arguments that support finding that "McKinley &

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[8] See footnote 2.

[9] See page 12 of the Committee's proposed report, regarding the Committee's error in assuming that McKinley Engineering was the name of my father's firm: "[Representative McKinley] apparently approached Representative Bonner on the floor of the House and stated, 'what the [heck] is this,' and explained the factual error."

Associates" is a family name. These facts and arguments are set out primarily in my September 14, 2012 letter to the Committee (Exhibit 1 to this letter), and I again ask the Members of the Committee to review that letter in full. The following paragraph from that September 14, 2011 letter, however, summarizes the substantial basis for determining that use of the McKinley & Associates name is not contrary to the restrictions relating to fiduciary professions:

> [A] number of factors support your approval of continued use of the name "McKinley & Associates" by Rep. McKinley's former firm. "McKinley" is a well-known family and historical name in West Virginia. The "McKinley" name in engineering and building design was originally established in West Virginia by Rep. McKinley's father, Johnson B. McKinley, and was reinforced by him through his long, public Association with McKinley & Associates. Entirely independent of Rep. McKinley's status as a Member of Congress, "McKinley & Associates" has long been – and remains – an established brand name in the provision of the highest-quality engineering, architecture, and interior design services.
>
> As the legislative history of the Ethics in Government Act makes clear, the Act's restrictions (and the parallel restrictions under House Rule XXV) on the use of a "Member's name" are intended to address "cases where outside interests attempt to trade on the prestige of Members of Congress." This concern does not exist with McKinley & Associates. The company trades on the "McKinley" name as an historical name in West Virginia and as a "family name" in engineering and building design. The company trades on – indeed, relies upon – the name "McKinley & Associates" as an established and well-known brand name in its field.[10]

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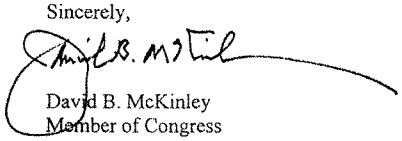
[10] The discussion in the Committee's proposed report regarding the business names used by my father is yet another point at which that report minimizes or ignores hard, contrary evidence. The report provides a list of some names used by my father professionally from about 1954 through 1992. This list was compiled through a review of still extant engineering drawings from my father's records. This list includes such titles as "Engineers," "Consulting Engineer," "Eng'r," and "P.E."; none of the names on this list include the word "engineering." The report, at page 5, concludes that "Johnson McKinley appears to have done business" under the names on this list. I provided this list to the Committee as a document accompanying my May 1, 2013 letter to the Committee.

In my May 1, 2013 letter to the Committee, I also provided the Committee with an online link to a PDF of the minutes of the regular meeting of the Council of Beech Bottom, West Virginia, for November 4, 1986 (http://beechbottomwv.org/pdfs/1986.pdf, at page 257) which publicly record and refer to my father's business as "Johnson B. McKinley *Engineering*." (Emphasis added; although I have previously provided the Committee with a link to these minutes, I include the relevant pages from those minutes with this letter as Exhibit 5.) And yet, in contrast to the Committee's apparent willingness to accept as authoritative a list of names (provided by me) that does *not* include the word "engineering," it seems to dismiss (and, frankly, seems to mischaracterize) the use of the name "Johnson B. McKinley Engineering" by an independent source. About the evidence supporting use of the name "Johnson B. McKinley Engineering," the proposed report, at page 6, states, vaguely and dismissively: "Representative McKinley, through his counsel, has stated that the name 'Johnson B. McKinley Engineering' was also used at some point." In its investigation, did the Committee not go to the link I provided to actually view the relevant document? As of August 19, 2016, the relevant minutes of the Beech Bottom Council were still there. My point here is not that this independent source showing the use of the name "Johnson B. McKinley Engineering" for my father's practice is, by itself, determinative of the question of whether "McKinley & Associates" meets the "family

* * *

Thank you again for the opportunity to respond directly to all of you on the Committee's draft proposed report and draft letter. As I have discussed above, the proposed response of a reproval – in whatever form issued by the Committee – is disproportionate and unjustified in this matter, in which I acted in good faith reliance on the advice of my counsel at the time that I was complying with House requirements. And, certainly, because any violation by me of House standards was unintentional, no separate letter of reproval is merited here.[11]

Sincerely,



David B. McKinley
Member of Congress

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name" exception. My point here is that this source seems to have been unfairly weighed and accounted for in the Committee's review and consideration of the evidence relevant to determination of the "family name" question.

[11] See, for example, the most recent public action taken by the Committee on July 14, 2016 in a matter in which the Committee determined that the Member's violations were not intentional.

Exhibit 1

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

September 14, 2012

Jan Witold Baran
202.719.[redacted]
[redacted]n@wileyrein.com

The Honorable Jo Bonner, Chairman
The Honorable Linda T. Sanchez, Ranking Member
Committee on Ethics
United States House of Representatives
1015 Longworth House Office Building
Washington, DC 20515

Re: Response of Rep. David B. McKinley to August 24, 2012 Committee Letter

Dear Chairman Bonner and Ranking Member Sanchez:

By letter of August 24, 2012, you requested an explanation from the Honorable David B. McKinley regarding the status of efforts to rename the West Virginia engineering, architecture, and interior design firm of McKinley & Associates, Inc., in light of the Committee's concerns that continued operation of the firm under that name could violate provisions of the Ethics in Government Act that "prohibit a firm that provides fiduciary services from using the name of a Member, even if the Member is not compensated." We were recently engaged by Rep. McKinley to represent him in connection with his response to the Committee's August 24th request.[1]

It is important to note at the outset that Rep. McKinley and his wife no longer own any stock in McKinley & Associates. The Employee Stock Option Plan ("ESOP") – in which neither Rep. McKinley nor his wife participate – now owns *all* of the shares in McKinley & Associates previously owned by Rep. McKinley. The ESOP now owns 100% of the shares of McKinley & Associates. Further, Rep. McKinley has no other affiliation with McKinley & Associates as an owner, board member, executive, employee, or consultant. Therefore, as described in more detail below, Rep. McKinley has no association or affiliation with McKinley & Associates which could raise concerns – either for him or for McKinley & Associates -- pursuant to

[1] Your August 24th letter requested a response from Rep. McKinley by September 7, 2012. In a September 4, 2012, telephone call with Committee Staff Director and Chief Counsel Daniel A. Schwager we asked on behalf of Rep. McKinley for an additional week to respond. Mr. Schwager informed us by email on September 5, 2012, that you had approved a one week extension for Rep. McKinley's response, to September 14, 2012.

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the "fiduciary" restrictions set forth in the Ethics in Government Act and by House Rule XXV.[2]

As explained further below, a number of factors support your approval of continued use of the name "McKinley & Associates" by Rep. McKinley's former firm. "McKinley" is a well-known family and historical name in West Virginia. The "McKinley" name in engineering and building design was originally established in West Virginia by Rep. McKinley's father, Johnson B. McKinley, and was reinforced by him through his long, public association with McKinley & Associates. Entirely independent of Rep. McKinley's status as a Member of Congress, "McKinley & Associates" has long been – and remains – an established brand name in the provision of the highest-quality engineering, architectural, and interior design services.

As the legislative history of the Ethics in Government Act makes clear, the Act's restrictions (and the parallel restrictions under House Rule XXV) on the use of a "Member's name" are intended to address "cases where outside interests attempt to trade on the prestige of Members of Congress." This concern does not exist with McKinley & Associates. The company trades on the "McKinley" name as an historical name in West Virginia and as a "family name" in engineering and building design. The company trades on – indeed, relies upon – the name "McKinley & Associates" as an established and well-known brand name in its field. Rep. McKinley therefore requests that you approve the company's continued use of the name "McKinley & Associates" for all business purposes.

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[2] As disclosed in his annual financial disclosure form covering calendar year 2011, Rep. McKinley holds the notes receivable with respect to loan agreements entered into by the ESOP to purchase Rep. McKinley's ownership interest in McKinley & Associates. Rep. McKinley owns the building which houses McKinley & Associates; he leases space in this building from McKinley & Associates for use as an office (not for official purposes) and he pays the firm for use of their telephone and internet/email services. Rep. McKinley's wife, Mary, serves as Secretary of the Board of Directors and as a Vice President of McKinley & Associates; if required to do so by the Committee, Mary McKinley would relinquish these positions at the company. Rep. McKinley's daughter-in-law, Katy McKinley, is an employee of the company and an owner of the company by virtue of her participation in the Employee Stock Ownership Plan. Rep. McKinley's oldest son also is the financial advisor to the ESOP participants and the company's secondary retirement fund.

Background

The McKinley family name; the "McKinley & Associates" brand name

Nine generations of McKinleys are associated with the Wheeling area. The McKinley name in West Virginia dates back to the Revolutionary War Era, when Captain John McKinley is known to have been an early Wheeling landowner in what was then Virginia. Several generations later, Johnson Camden McKinley, Rep. McKinley's grandfather, further established the McKinley name in the state through his pioneering activity as an organizer and developer – a "baron" -- of the northern coal fields in West Virginia; he was recognized as such by induction into the Coal Hall of Fame. He operated the McKinley Coal Company and was honored when the community of McKinleyville in a neighboring county was named after him. The Johnson Camden McKinley House – or "Willow Glen" – in Wheeling, is one of the best-known historic houses in the state and endures as a monument to the significant role Johnson C. McKinley played in the industrial history of West Virginia.

Johnson B. McKinley, Rep. McKinley's father, established the McKinley family name in engineering and construction in the Wheeling area. Johnson B. McKinley served as the City Engineer for Bethlehem, West Virginia, for many years; among many other prominent projects, he was the engineer for a civic center and for a sewage treatment plant. Over his many years of practice, Johnson B. McKinley appears to have operated under a number of business names, including "Johnson B. McKinley Engineering" and, primarily, "Johnson B. McKinley, Consulting Engineer." Although he was not an architect, and therefore did not refer to architectural services in his business name, Johnson B. McKinley designed primarily in the area of municipal sewer and water projects and built many projects under the name "Penn Construction." It is unclear whether Johnson B. McKinley ever incorporated his business operations.

From 1971 to 1973, Rep. McKinley worked with his father in his father's engineering and construction businesses and, together, they continued to develop the reach and reputation of the McKinley name for these skills and services in the tri-state and Wheeling regional area. Rep. McKinley left his father's business after about two years. He founded his own firm, McKinley Engineering Company, in 1981. In 1989, after the firm began to offer architectural services, the company name changed to McKinley & Associates, Inc. Despite any gap in time or

variations in the company name, however, it is important to appreciate the continuity of core professional services and reputation centered on the McKinley name. It is equally important to appreciate the continuity of the public professional collaboration between Johnson B. McKinley and David B. McKinley.

From the time David B. McKinley began his own firm in 1981 – and continuing for some years beyond the renaming of this firm as McKinley & Associates in 1989 -- Johnson B. McKinley played an instrumental and very public role in solidifying and expanding the reputation of that firm, and of the McKinley family name as used by that firm, in engineering and architectural services in West Virginia and beyond. Particularly during those periods when David McKinley was required to be absent from the firm to attend the state legislature, Johnson B. McKinley served as the eyes and ears for the firm that became McKinley & Associates on numerous project sites, and in so doing became a public face of the firm. Although he also maintained his own business, Johnson B. McKinley attended many meetings with clients as the representative of McKinley & Associates; he walked many project sites with owners as the representative of McKinley & Associates.

The continuity and close connection between Johnson B. McKinley and McKinley & Associates continued even after Johnson B. McKinley's death in 1996 at age 76. McKinley & Associates completed all of Johnson B. McKinley's unfinished work. McKinley & Associates acquired all of Johnson B. McKinley's business assets. McKinley & Associates hired a site design specialist to continue providing services that Johnson B. McKinley's expertise had allowed the company to offer and that clients of McKinley & Associates had come to expect.

Based on Johnson B. McKinley's long association with and substantial work for the firm, "McKinley & Associates" was and is inarguably a family name, independent of Rep. McKinley's service as a Member of Congress. Moreover, the established brand name of "McKinley & Associates" -- its recognized reputation for professional excellence in engineering and architecture – further eliminates any concern that the firm could be seen as trading on a Member's "prestige." With three offices in West Virginia and Pennsylvania, McKinley & Associates has completed major projects, not just in every county in West Virginia, but across the country in North Carolina, South Carolina, Ohio, Pennsylvania, New York, Kentucky, Minnesota, Illinois, and Utah. These projects include hospitals, secondary schools and colleges, federal and state government buildings, office and commercial projects, historic preservation sites, and others. The reputation of

McKinley & Associates has been earned – and continues to be confirmed – by the work of its over 40 architects and mechanical, electrical, structural, and civil engineers .[3] The work of these professionals has garnered McKinley & Associates wide recognition and numerous awards, including, naming only a few, the prestigious West Virginia AIA (American Institute of Architects) Honor Award and Merit Award and the Governor's Award for Historic Preservation. Building from the solid foundation of the McKinley family name in engineering, design, and construction, it is on the work and reputation of these professionals – on the McKinley & Associates brand name that they maintained and extended -- that the future success, and the future business, of McKinley & Associates rests.

Sale of Rep. McKinley's interest in McKinley & Associates

Five years ago and prior to any consideration of public service David B. McKinley, PE began the first of two steps in transferring ownership of the company to his employees by initiating an Employee Stock Ownership Plan (ESOP) and selling it 30% of McKinley & Associates. Besides holding the stock of a company, an ESOP is generally considered a form of retirement benefit for employees.

In April of 2011, Rep. McKinley then signed a Memorandum of Understanding with the company ESOP to sell the balance of McKinley & Associates to them. Rep. McKinley understood, in good faith, that the sale of his entire ownership interest in McKinley & Associates would resolve, and was an appropriate response to, any concerns expressed by the Committee as to the company's continued use of the name "McKinley & Associates."

As disclosed on his annual financial disclosure form for calendar year 2011, on December 31, 2011, Rep. McKinley entered into a formal agreement to sell his entire remaining ownership interest in McKinley & Associates – comprising 70% of the company's shares – to the ESOP. This sale was contingent on an independent valuation of the firm. Because of the time needed to complete this valuation, and because of ERISA requirement, the actual sale was not completed until April 30, 2012. On that date McKinley & Associates became 100% ESOP owned. Rep.

[3] Of course, the professional work of David B. McKinley as an engineer has contributed significantly to the "brand name" and reputation of McKinley & Associates. But, as the Committee has been informed previously, for the past several years before entering Congress Rep. McKinley's role with the company has not been in the practice of professional engineering but in the management of the firm's more than 40 professionals and support employees.

McKinley holds the note receivable with respect to the loan undertaken by the ESOP to finance its purchase of this 70% interest in McKinley & Associates (as he also holds the note receivable for the loan undertaken by the ESOP to finance its earlier purchase of its initial 30% share of the company's stock). According to the sale documents, Rep. McKinley does not retain any authority to direct or require the ESOP to change the name of the company.

Restriction on permitting one's name to be used by an entity that provides covered services

The Ethics in Government Act of 1989, at Title 5 U.S.C. app. 4 § 502(a)(2), provides that a Member or covered employee shall not "permit [his or her] name to be used by any . . . firm, partnership, association, corporation, or other entity" which, by reference to § 502(a)(1) of the statute, "provides professional services involving a fiduciary relationship." House Rule XXV, paragraph 2, §§ (a) and (b), which reflect the same restrictions on fiduciary professions and uses of a Member's or covered employee's name as are set forth in the Ethics in Government Act, limit the scope of § 502(a)(1) of the Act to cover any entity that "provides professional services involving a fiduciary relationship *except for the practice of medicine*." (Emphasis added.)

Recognizing that neither Committee action, nor even a House Rule, can trump the statutory requirements of the Ethics in Government Act, the Committee on Ethics has stated: "Notwithstanding the existing statutory prohibition, the Standards Committee has authorized Member-physicians to practice medicine for a limited amount of compensation." (*House Ethics Manual*, page 218.) Indeed, the Committee has permitted member-physicians to practice medicine for at least a limited amount of compensation ever since the passage of the Ethics in Government Act, and notwithstanding the fact that the legislative history of the act makes clear that "medicine" – like "architecture"[4] – is one of the "professional activities involv[ing] a 'fiduciary' relationship" the practice of which for compensation was specifically intended to be covered by the Act.[5]

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[4] Unlike architecture, the Committee does not appear to have concluded that engineering is a covered "fiduciary" profession.

[5] House Bipartisan Task Force on Ethics, *Report of the Bipartisan Task Force on Ethics on H.R. 3660*, 101st Cong., 1st Sess. 13-14 (Comm. Print, Comm. on Rules 1989), page 16: "The task force

The same legislative history makes clear that "consulting and advising," without apparent limitation, are intended to be included as "fiduciary" professions covered by the Act and, thus, by the House Rule. Yet -- although neither the language of the Act, the legislative history of the Act, nor the language of the House Rule on fiduciary restrictions appear to contemplate such an exception – the Committee on Ethics advises that a senior staffer, who is otherwise covered by the restrictions, "is not prohibited from accepting compensation for political consulting services that he or she provides to either a candidate (including one's employing Member), a political party, or a Member's leadership PAC." (*House Ethics Manual*, at page 218.)

Our purpose in citing these expansive interpretations and applications by the Committee of the language of House Rule XXV, of the Ethics in Government Act, and of the legislative history of the Act (as contained in the *Report of the Bipartisan Task Force on Ethics*) is not to criticize the Committee's past approach to interpreting and applying the fiduciary restrictions. To the contrary, the purpose in citing these well-known past instances is to demonstrate clear Committee precedent – in fact, a Committee tradition – for reading the language of the fiduciary restrictions, and of the related legislative history, flexibly and pragmatically when there is a reasonable basis for doing so.

Approval of the continued use of the name "McKinley & Associates" by Rep. McKinley's former firm would not require you to reach outside of the language and four corners of the Rule, the statue, or the legislative history, as was arguably done by the Committee in the instances of interpretation and application cited above. Your approval of the continued use of the name "McKinley & Associates" would simply require you to approach the "fiduciary" restrictions -- and, in particular, the related legislative history – as written in light of what they may be viewed reasonably and soundly to permit (not in light of what they may be argued to prohibit).

(Continued . . .)
intends the ban to reach, for example, services such as legal, real estate, consulting and advising, insurance, medicine, architecture or financial."

Continued use of the name "McKinley & Associates" is consistent with the restrictions on "fiduciary services"

In its section by section report on the Ethics in Government Act of 1989, and as repeatedly referred to above, the House Bipartisan Task Force on Ethics specifically discussed a "family name" exception to the prohibition on the use of a Member's name by an entity that provides "fiduciary services":

[T]he task force understands that a law firm, real estate agency, or other firm that bears a "family" name, as opposed to the name of the individual Member, officer, or employee, would not have to change its name. Thus, the fact that a Member, officer or employee is presently associated with a law firm founded by, and still bearing the name of his father would not require the firm to drop the "family" name.[6]

In its June 24, 2011, letter to Rep. McKinley the Committee appears to read this last quoted sentence from the *Bipartisan Task Force Report* as describing and defining the only circumstance under which a firm name will be considered a "family name." Admittedly, this also appears to be the overly narrow reading of "family name" taken by the Committee in its *Manual*.[7] But these circumstances -- that is, where the firm in question is legally and factually the same entity as founded by, and still bearing the specific name of, the father or other relative of the Member -- can and should be viewed as *only one example* of the kind of family participation in, and association with an entity, that supports a determination that the entity bears a "family name."

That the specific circumstances described in the *Bipartisan Task Force Report* were intended as only one example of when the facts will support the finding of a "family name" is evident from the fact that the key sentence (quoted above) begins with the word "thus," a common meaning of which is "as an example" or "for example."

There may be a number of factual scenarios, therefore, under which the Committee could, and should, determine that an entity bears a "family name." Rather than

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[6] *Id.*
[7] *House Ethics Manual*, at page 221 and page 222, Example 32.

being applied rigidly only where a present firm is legally and factually the identical firm founded by a Member's "father" (the *Bipartisan Task Force Report* does not, after all, identify any other permissible family relationship), interpretation and application of the "family name" exception should serve the actual, underlying purpose of the restrictions on use of a Member's name by a "fiduciary services" firm. As the *Bipartisan Task Force Report* makes clear, this underlying purpose is to address the "potential for abuse . . . in cases where outside interests attempt to trade on the prestige of Members of Congress . . .."[8] Where there is a reasonable basis for the Committee to determine that use in a firm's name of the surname (or "family name") of a Member reflects historical factors or reflects some demonstrable family association with the firm the Committee should determine that the firm name qualifies as a "family name."

As detailed in this letter, there are ample grounds for the Committee to determine that "McKinley & Associates" qualifies as a "family name." Independent of Rep. McKinley – and dating back to his grandfather Johnson Camden McKinley and, before him, to the Revolutionary War – "McKinley" is a recognized and prominent family name in West Virginia history and business. Initially in agriculture and then in the coal fields of West Virginia, the name of McKinley has been associated with business. In the fields of engineering, construction, and design, Rep. McKinley's father, Johnson B. McKinley, first established and, for many years, grew the reputation of the "McKinley" name in and around the Wheeling regional area. Johnson B. McKinley founded the "McKinley" professional family name. Johnson B. McKinley imparted his professional bona fides, and the professional reputation he first founded, to his association with "McKinley Engineering Company" and to "McKinley & Associates" through his important and frequent work over many years as the public eyes, ears, and representative of the firm (under both firm names).

Just as the Committee should not unduly and rigidly limit application of the "family name" exception to the single set of circumstances cited as one example in the *Bipartisan Task Force Report*, the Committee should recognize that – even apart from a firm name being a "family name" – there are other reasonable bases to determine that a firm name is not an "attempt to trade on the prestige" of a Member of Congress and is, therefore, permissible under both statute and House Rule. One such basis should be found where a firm name that includes a Member's surname is

[8] *Bipartisan Task Force Report* at page 14.

an established brand name in its professional field. As discussed above, "McKinley & Associates" is an established brand name and industry leader – in Wheeling, in West Virginia, in the tri-state area, and beyond – in engineering, architecture, and interior design. As "McKinley & Associates" has successfully completed numerous high-profile projects under its current name for over 20 years, and as the reputation and brand of the firm under this name has grown, the professional excellence of the "McKinley & Associates" firm has been repeatedly recognized and awarded by peer groups, professional associations and others. "McKinley & Associates" does not trade on the "prestige" of Rep. McKinley as a Member of Congress. Frankly, that kind of "prestige" would be worthless to the firm in the technical, results-oriented industries in which it operates. "McKinley & Associates" trades on its recognized and established name and reputation for technical excellence and practical success.

A final, related point should be noted about the scope of the "potential for abuse" that the drafters of the Ethics in Government Act intended to address in imposing restrictions on the use of a Member's name by a "fiduciary" services firm. Throughout the discussion in the *Bipartisan Task Force Report* on the restrictions on the practice of "fiduciary" professions and the delivery of "fiduciary" services, the emphasis is on the potential for conflict between a Member's official, representative duty to the public in general and the personal, private duty that may be owed by a Member/professional to an individual client. The following passage from the *Report* makes this focus clear:

> When certain private positions and employment create for the Member or public official a fiduciary or a representational responsibility to a private client or a limited number of private parties, then such outside activities create the potential for a serious conflict of interest. The conflict occurs in the clash of those responsibilities and the divergence of public and private interests on a particular governmental matter or in general government policy.[9]

This central passage leads directly into the discussion in the *Report* about "the potential for abuse of *this type of income* in cases where outside interests attempt to trade on the prestige of Members of Congress . . .." (Emphasis added.) Thus, it appears that the concern of the drafters of the Ethics in Government Act about outside entities "trading" on the "prestige of Members" was intended primarily to

[9] *Id.*

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address circumstance where such an entity would profit improperly by implying that private clients would have, and would benefit from, an actual fiduciary or representational relationship with a Member of Congress. As a general matter – and absent other factors supporting use of a Member's surname in a firm name – the potential for such abuse may well exist in a law firm or in a consulting or advising firm, particularly in a small firm or practice. But the potential for this kind of abuse by a firm providing architectural services (among other services) would appear to be minimal. In the case of a large, established, industry-leading architectural firm like McKinley & Associates, the potential for such abuse – for "trading" on Rep. McKinley's status as a Member in this misleading way -- is nonexistent.

Conclusion

As the Committee has been informed in previous submissions on behalf of Rep. McKinley, a prohibition on McKinley & Associates use of its existing name would create severe financial hardship for all of the current employee/owners of the firm. For their compensation and for their retirement savings, these employee/owners are dependent on the continued success of McKinley & Associates in a difficult economy. The goodwill and positive professional reputation that the firm has engendered over the years attaches to the brand name McKinley & Associates and would be lost if a name change were required.

But no such name change is required. Based on the information, and for the reasons, set forth above, the name "McKinley & Associates," as used by Rep. David B. McKinley's former firm, is a "family name," an established brand name, and is otherwise consistent with the intent and purpose of the restrictions imposed by statute and House Rule on the provision of professional services involving a fiduciary relationship. On behalf of Rep. McKinley, therefore, we respectfully urge you to approve the firm's continued use of the name "McKinley & Associates."

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If you have any questions or wish to discuss this matter, please do not hesitate to contact me, at 202-719-[redacted] or my colleague Robert L. Walker, at 202-719-[redacted]

Sincerely,

Jan Witold Baran
Robert L. Walker
Counsel for Rep. David B. McKinley

13498665.1

Exhibit 2

Wiley Rein LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

May 1, 2013

Jan Witold Baran
202.719.[redacted]
[redacted]@wileyrein.com

The Honorable K. Michael Conaway, Chairman
The Honorable Linda T. Sanchez, Ranking Member
Committee on Ethics
U. S. House of Representatives
1015 Longworth House Office Building
Washington, DC 20515

Re: *Committee Request for Information, March 18, 2013*

Dear Chairman Conaway and Ranking Member Sanchez:

Congressman David B. McKinley, through counsel, respectfully submits to the Committee on Ethics his responses to the requests for information set forth by the Committee in its March 18, 2013 letter. Documentary materials responsive to the Committee's requests are included on an accompanying disk at Bates Numbers DBM00000001 through DBM00000554.

Rep. McKinley did not knowingly or intentionally violate any law, standard of conduct, or Committee directive with respect to use of the name McKinley & Associates by his now former firm. Indeed, as the Committee will see from the responses and materials p rovided, based on his understanding of the relevant standards and legal compliance options as explained to him by attorney Charles J. Kaiser, Rep. McKinley believed that he had resolved ethics concerns with respect to the name of McKinley & Associates when he entered into a Memorandum of Understanding ("MOU") with the company's Employee Stock Ownership Plan ("ESOP") on April 11, 2011. Through this MOU, Rep. McKinley 1) committed to the sale of all his remaining stock in the company to the ESOP and 2) agreed that he had "no further control over the ownership and operations of McKinley & Associates, Inc." Previously, attorney Kaiser had advised then Congressman-elect McKinley consistently that there were two compliance options with respect to the House ethics restrictions on providing professional services involving a fiduciary relationship: **either** change the name of the company **or** divest his interest in the company.

By entering into the MOU with the McKinley & Associates ESOP on April 11, 2011, then Congressman-elect McKinley believed that he had taken satisfactory good faith steps to effectuate this second compliance option as described by attorney Kaiser, that is, divestment of his interest in the company. As to what representatives of McKinley & Associates knew of Committee guidance at that time, prior to signing and entering into the MOU on behalf of the McKinley &

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Associates ESOP on April 11, 2011, ESOP Trustee Ernest Dellatorre (also a member of the company's management team) had been informed of recent guidance from Committee staff counsel that she was going to recommend that the Committee determine that the name "McKinley" would have to be removed from the company's name; other representatives of McKinley & Associates also knew of this guidance at that time. (In January 2011, McKinley & Associates personnel had also been apprised of Committee Counsel Stan Simpson's guidance that McKinley & Associates would not need to change its name because the company qualified as a "family business.")

Notwithstanding his good faith belief that he had resolved ethics concerns over the use of the name McKinley & Associates by his former company by entering into the MOU with the ESOP in April 2011, Rep. McKinley regrets that he did not respond more formally at the time to the Committee's letter to him dated June 24, 2011 (but received June 27, 2011), in which the Committee informed him that "a name change [of the company] is required under current rules . . . ." In considering the question of Rep. McKinley's responsiveness, the Committee should keep a number of important factors in mind.

First, as summarized above and explained in more detail below, as of June 24, 2011, Rep. McKinley believed that he had taken appropriate and satisfactory ethics compliance steps with respect to McKinley & Associates when he entered into the MOU with the ESOP more than two months earlier.

Second, within a few days of receiving the letter from the Committee on June 27, 2011, Rep. McKinley told then Ethics Committee Chairman Jo Bonner on the House floor that he had already sold the company to which Chairman Bonner replied, in substance, that he wished it had not come to that. Through this exchange with the Chairman, Rep. McKinley believed that he had effectively provided notice to the Committee of his action and of the status of the company.

Third, by the time he received the Committee's letter on June 27, 2011, Rep. McKinley had not been treated well by the Committee process. In January 2011, a Committee counsel informed his attorney that he agreed that "McKinley & Associates qualified as a 'family business' and so the name would not need to be changed." More than two months later, another Committee counsel informed the attorney that, in a potential total reversal of the Committee's apparent position, she

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was going to recommend that the Committee determine that the name "McKinley" would have to be removed from the company's name. The Committee did not provide its formal written guidance on this matter to Rep. McKinley – via the June 24, 2011, Committee letter – until almost six full months after Rep. McKinley's attorney submitted his letter requesting written Committee guidance.

For these and other reasons discussed below, the Committee's process regarding and handling of this matter was seriously flawed. Rep. McKinley was concerned and upset by this process. However, Rep. McKinley believes that he may have allowed these understandable concerns to affect his responsiveness to the Committee and, if he did, he regrets having done so. He believes he should have responded in a more formal manner to the Committee's June 24, 2011, letter to inform the Committee of the good faith compliance steps he had already taken.

This letter incorporates all arguments supporting the continued use of the name "McKinley & Associates" by Rep. McKinley's former firm that were previously made to the Committee through undersigned counsels' September 14, 2012, letter submitted on behalf of Rep. McKinley. (Bates Numbers DMB00000527-38.) Although the Committee's March 18, 2013, letter seeks information and documents as part of an investigation, Rep. McKinley urges the Committee not to lose sight of the important advisory question underlying this whole matter, that is, whether "McKinley & Associates" is a "family name" under a long-recognized exception to the restrictions on providing fiduciary services imposed by the Ethics in Government Act. The Committee's implicit determination in June 2011 that "McKinley & Associates" is not a "family name" was not required by the facts, by the relevant laws and standards, by legislative history, or by policy. Indeed, all of these factors – the facts, laws and standards, legislative history, policy – provide substantial and sound support for a different, *de novo* determination by the Committee, a determination that "McKinley & Associates" is a "family name" or that its use by the company is otherwise permissible under the relevant fiduciary profession restrictions.

We urge the Committee to review Rep. McKinley's September 14, 2012, letter in its entirety. However, the following quoted paragraphs from that letter provide a summary of the substantial basis for determining that use of the McKinley & Associates name is not contrary to the restrictions relating to fiduciary professions:

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> [A] number of factors support your approval of continued use of the name "McKinley & Associates" by Rep. McKinley's former firm. "McKinley" is a well-known family and historical name in West Virginia. The "McKinley" name in engineering and building design was originally established in West Virginia by Rep. McKinley's father, Johnson B. McKinley, and was reinforced by him through his long, public Association with McKinley & Associates. Entirely independent of Rep. McKinley's status as a Member of Congress, "McKinley & Associates" has long been – and remains – an established brand name in the provision of the highest-quality engineering, architecture, and interior design services.
>
> As the legislative history of the Ethics in Government Act makes clear, the Act's restrictions (and the parallel restrictions under House Rule XXV) on the use of a "Member's name" are intended to address "cases where outside interests attempt to trade on the prestige of Members of Congress." This concern does not exist with McKinley & Associates. The company trades on the "McKinley" name as an historical name in West Virginia and as a "family name" in engineering and building design. The company trades on – indeed, relies upon – the name "McKinley & Associates" as an established and well-known brand name in its field.

As explained above and supported in detail below, at the time Rep. McKinley received the Committee's June 24, 2011, letter, he believed that he had already taken sufficient good faith steps to resolve any ethics concerns arising in connection with McKinley & Associates such that the company's continued use of that name was permissible. Rep. McKinley did not act with any bad intent in this matter, including in not responding more formally to the Committee's June 24, 2011, letter. However, regardless of any position the Committee may take with respect to Rep. McKinley's responsiveness to its June 24 letter, the Committee may and should reconsider its previous determination with respect to use of the name McKinley & Associates by Rep. McKinley's former company. The Committee may now make a more fully informed determination. The Committee should determine that continued use of the name "McKinley & Associates" by the company is not contrary to law, rule, or regulation and is, therefore, permissible.

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Although submitted by counsel on his behalf, the responses and materials provided with this letter were thoroughly reviewed by Rep. McKinley, were authorized and confirmed by him as accurate to the best of his knowledge, recollection, and belief at this time, and were approved and authorized by him for submission to the Committee, as was this letter. It should be noted that the Committee's request for details on conversations and interactions covers a period of two and half years; the request for information regarding Rep. McKinley's father goes back decades. Understandably, there may have been communications and there may be information responsive to the Committee's request which the Congressman does not recall at this time. With respect specifically to his wife and other members of his family, including his four adult children, Rep. McKinley believes he had numerous communications or discussions with them on matters relevant to the Committee's request which he does not now specifically recall. He also believes that he likely complained to other individuals, including other Members, about some of the matters covered in this letter, but he does not recall specific conversations.

Note that, to the extent that discussion and documentation in the following responses of communications between Rep. McKinley and attorney Charles J. Kaiser may be viewed as constituting a waiver by the Congressman of attorney-client privilege with respect to communications with Mr. Kaiser, with respect to any other communications between Rep. McKinley and any other counsel, no such waiver is intended to be implied, and none should be inferred.

With respect to the log of privileged or protected communications requested in Committee Request 1, please note that, as previously discussed with and agreed to by Committee Counsel, communications with undersigned counsel – who were initially retained by the Congressman to assist in responding to the Committee's August 24, 2012, letter – and communications in connection with obtaining information in response to the Committee's March 18, 2012, letter, are attorney-client privileged and/or work product protected and are not separately entered or noted on a log. A privilege log is provided herewith at Exhibit A with respect to withheld communications involving other counsel.

Thank you for your careful consideration of the information and documents provided by Rep. McKinley in response to the Committee's requests.

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Response to Committee Requests 1 and 4

In Request 1 of its March 18, 2013, letter to Rep. McKinley, the Committee asked the Congressman to provide it with "any and all details of meetings, conversations, or other interactions . . . after your election to the U.S. House of Representatives regarding the use of your name by the Firm." In Request 4, the Committee asked the Congressman to "state the steps you took, if any, in response to the Committee's letter dated June 24, 2011" and asked related questions. Committee Requests 1 and 4 are both addressed in the discussion below.

Rep. McKinley first became aware of possible concerns regarding the continued use of his name by the firm McKinley & Associates in communications with Ms. Carol E. Dixon, Counsel to the Committee, on November 5, 2010. In an email of that date to the Congressman (Bates Number DMB00000003), Ms. Dixon referenced a related call earlier that same day and stated: "The informal opinion of the Committee staff is that these [fiduciary] restrictions would necessitate changing the name of your firm, since it is one that provides fiduciary services and currently utilizes your name."

Rep. McKinley's understandably strong response to this "informal opinion" on the use of his name by the firm can be seen by his November 6, 2010, email to Martin Baker, a direct mail consultant to his campaign: "How absurd is that advice. They expect me to change the name of my company . . . I have not read the manual as yet, but her 'informal opinion' is disturbing." (Bates Numbers DMB00000004-05.) Rep. McKinley explained what he viewed as "absurd" at this time when he wrote in this email: "hiding behind a name change makes it OK to do business with the Federal government. Unbelievable." Note that the Tim Garon "cc'd" on this email was the Political Director of the National Republican Congressional Committee ("NRCC") at the time.

On the morning of November 9, 2010, Andy Sere – then Regional Press Secretary for the NRCC and soon thereafter to become Rep. McKinley's first congressional chief of staff – reached out to the Congressman by email to say that Tim Garon had mentioned the Committee "lawyer's opinion on your company's name" and to ask if there had "been any further developments." Mr. Sere stated that he was going to make a few calls to see "how this issue has been handled in the past with other members in similar situations." Later that day, Mr. Sere emailed Rep. McKinley to

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let him know that he had spoken with two people on the issue: John Tosch, apparently a corporate attorney for Rep. Vern Buchanan; and Todd Ungerecht, who had been counsel to Rep. Doc Hastings during his tenure as Chairman of the Ethics Committee. (Bates Numbers DMB00000020-22.)

On November 10, 2013, Andy Sere followed up with an email to Rep. McKinley into which he appears to have "cut and pasted" the content of an email from "a GOP lawyer who used to work on the ethics committee, to whom I previously referred." (Bates Number DMB00000023.) It appears that this "GOP lawyer" may have been Todd Ungerecht, but Rep. McKinley does not know if it was he. In this email, the "GOP lawyer" discussed whether "engineering consulting" is covered by the restrictions on "fiduciary professions" and provided his thoughts on how the Congressman's divestment of his interest in the firm could affect any necessity to change the name of the firm, depending on to whom he divested his interest.

Rep. McKinley recalls that orientation activities for his class of new Members began on about November 14, 2010. During this orientation period, Rep. McKinley recalls speaking about his business holdings with a young woman from the Ethics Committee staff after the ethics presentation. The Committee staffer stated that it was possible that Rep. McKinley would have to sell his company and might have to change the name of the company as well. Rep. McKinley asked the staffer what he was supposed to do if he was a one-term congressman and had no business to return to. Rep. McKinley recalls that the staffer responded by asking, either naively or cavalierly, "Wouldn't you just start a new business?" Rep. McKinley told the staffer that the next time she heard from him it would be through his attorney. The Congressman recalls that Mary McKinley, his wife, was part of this discussion. (Materials that appear to have been provided to Congressman-elect McKinley at, or in connection with, orientation are included at Bates Numbers DMB00000006-19.)

Sometime during the new Member orientation period in 2010, Rep. McKinley spoke in person with Rep. Jo Bonner, then Ranking Member and soon to become Chairman of the Ethics Committee, about the informal opinion of Committee staff that he might have to change the name of McKinley & Associates and/or sell his interest in the company. Rep. McKinley recalls Rep. Bonner saying there was a possibility of his receiving a waiver with respect to matters concerning McKinley & Associates, including with respect to the name of the company. Rep. McKinley

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also recalls Rep. Bonner advising him to get in touch with Kelle Strickland, his Counsel for Ethics Committee matters.

On their drive back to West Virginia after orientation, Rep. McKinley and his wife talked about the opinions provided by Ethics Committee staff regarding McKinley & Associates. Sometime after he arrived back in West Virginia, Rep. McKinley contacted attorney Charles J. Kaiser.[1] On November 17, 2010, attorney Kaiser wrote to Rep. McKinley at McKinley & Associates. This letter was headed "Business Restructuring" and in it Mr. Kaiser provided a brief overview of "a series of Rules that apply to professional businesses." (Bates Numbers DMB00000025-26.) From the documents collected and provided with this response, it appears that Rep. McKinley and Mr. Kaiser spoke about the House ethics issues on November 22, 2010, although Rep. McKinley does not recall if that was the date on which he first spoke to Mr. Kaiser about these matters. (Bates Numbers DMB00000027-28.) Rep. McKinley recalls that Mr. Kaiser was surprised by the ethics restrictions as applied to McKinley & Associates.

On November 23, 2010, Rep. McKinley followed up with an email to Mr. Kaiser, forwarding Andy Sere's November 10 email (referenced above) and summarizing points and questions covered in their discussion the previous day, including: "Keeping the name McKinley as the corporate identity is a huge and over-riding priority"; "Would simply selling to the ESOP make this [moot]?"; and "What is the waiver that has been discussed by Bonner?" (Bates Numbers DMB00000027-28.) Later on November 23, Rep. McKinley forwarded to Mr. Kaiser the November 9 emails from Andy Sere, discussed above. (Bates Numbers DMB00000029-30.)

On Wednesday, November 24, 2010 – the day before Thanksgiving – at 5:04 PM, Mr. Kaiser sent a highly significant email to Rep. McKinley in which, as the attorney advising Rep. McKinley on complying with House ethics requirements, Mr. Kaiser framed for Rep. McKinley the issues and the options for action

[1] With respect to the legal and ethics issues raised by Mr. McKinley's election to Congress, Mr. McKinley understands that, through early to mid-April 2011, Mr. Kaiser was providing legal advice and counsel to both Mr. McKinley and McKinley & Associates (which, until April 11, 2011 – as explained below – was both 70% owned by and controlled by Mr. McKinley). McKinley & Associates paid for these legal services.

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available to him. With regard to the "company name change," Mr. Kaiser wrote and advised Rep. McKinley as follows:

> The question as to the change of name boils down to whether McKinley & Associates is considered to be a firm "providing professional services involving a fiduciary relationship." An example of this definition in the Rules is a company providing architectural services, but we can certainly ask for a ruling and argue that it does not apply to you because you are not an architect. If the ruling comes back favorable, you can keep your interest in the company, but not work or receive earned income from it. **If McKinley & Associates is considered to be a firm providing professional services involving a fiduciary relationship, then it appears that you are left with two choices: (1) change the name, or (2) completely divest yourself of your interest in the company (this appears to include Mary as well).** Please understand that your situation is different than family businesses that do not provide professional services (i.e. car dealerships), though I think the logic got lost when this Rule/law was formulated. In addition, it is important for you to understand that this is not simply a House Rule, but a federal statute.

(Bates Numbers DMB00000033-34.) (Emphasis added.)

This clearly stated analysis from Mr. Kaiser – **either** change the company name **or** divest yourself of your interest in the company – established a firm framework of understanding for Rep. McKinley through which he viewed his obligations under House ethics standards with respect to McKinley & Associates. This framework, to a very significant and persistent extent, guided his subsequent actions regarding his interest in McKinley & Associates, regarding the use of that name by the company, and regarding his understanding of, and steps taken in response to, Ethics Committee communications on these issues in 2010 and 2011.

The extent to which Mr. Kaiser's email of November 24, 2010, both galvanized Rep. McKinley's understanding of the options for compliance available to him and prompted him to preliminary action to effectuate one of these options can be seen in two emails from November 29, 2010. In the first email – sent by Rep. McKinley

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to his cousin Jon in response to a congratulatory message – Rep. McKinley talked about orientation, his House office assignment and swearing in, and then added: "In the meantime I apparently have to wrap up ownership of my A/E practice to comply with the Federal ethics rules." (Bates Number DMB00000044.)

In the second email of November 29, Lynn Adams, Office Manager for McKinley & Associates and a member of the company management team, forwarded to Rep. McKinley the agenda for the upcoming company management meeting. Item 2 on this agenda is "ESOP buyout," that is, discussion of having the McKinley & Associates ESOP – which already owned 30% of the company's stock – purchase the remaining 70% of shares owned by Rep. McKinley. (Bates Number DMB00000057.) As this second email indicates, in November 2010, Rep. McKinley spoke to personnel of McKinley & Associates – including Lynn Adams, Ernie Dellatorre and, likely, others – about company-related issues arising from House ethics standards, but he does not recall specific conversations.

Also on the morning of November 29, 2010, Mr. McKinley had an exchange of emails with Andy Sere and Mr. Kaiser in the morning in which Rep. McKinley forwarded Mr. Kaiser's November 24 email to Mr. Sere and asked Mr. Kaiser to "coordinate" with Mr. Sere, who by that time had become Rep. McKinley's Chief of Staff. On November 29, by email, Mr. Sere also asked Rep. McKinley if he had "talked to Jo Bonner's staffer" and recalled that "NRCC Counsel Jessica Furst" had given Rep. McKinley a "name and contact info" for this purpose. (As discussed below, Rep. McKinley met and spoke with Ms. Furst about ethics-related issues during the orientation period in Washington, D.C.) Mr. Sere stated to Rep. McKinley in this same email: "It does seem like we'll have to ask for a ruling." And, by email later that morning, Mr. Sere told Rep. McKinley: "Just talked with CJ [Kaiser]. We discussed possible next steps . . . will advise later today. (Bates Numbers DMB00000035-43, 45-51.)

It appears that Mr. Sere and Mr. Kaiser then talked on the phone on the morning of November 29, 2010. Based on a summary email about that call from Mr. Kaiser to Mr. Sere, copied to Rep. McKinley, Mr. Kaiser provided Mr. Sere with essentially the same analysis and the same two compliance options he presented to Rep. McKinley in the November 24, 2010, email discussed above: **"If McKinley & Associates is considered to be a firm providing professional services involving a fiduciary relationship, it appears that there are two choices: (1) change the**

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name; or (2) completely divest DBMcK's interest in the company (this appears to include David's wife as well)." (Bates Number DMB00000052.) (Emphasis added.) Mr. Sere followed up later that day with two more emails, sent to Mr. Kaiser and Rep. McKinley, relating to his apparent notification to NRCC "in-house counsel [Jessica Furst] of the issue." Mr. Sere also refers to a proposed discussion on the issue with NRCC "outside counsel," but it appears that this discussion did not occur that day and Rep. McKinley does not specifically recall if it did occur at some later time. (Bates Numbers DMB00000053-56.) In closing out this particular email exchange on the morning of November 30, 2010, Rep. McKinley, in an email to Mr. Sere and Mr. Kaiser, turned the focus of his attorney's steps to "[Mr.] Bonner's staff," noting: "Bonner had confidently suggested that something could be worked out and not to worry; he then turned me over to Kelle, his committee counsel. I am anxious to hear what Bonner's people have to add to this discussion." (Bates Numbers DMB00000058-59.)

As the emails included at Bates Numbers DMB00000061-63 show, Mr. Kaiser spoke with both Jessica Furst and Kelle Strickland on November 30, 2010. Before reviewing more information about these discussions, however, it is worth noting the strength and urgency of Rep. McKinley's concern at this time about the future of the company to which he had devoted 30 years of his life. In an email to Mr. Sere and Mr. Kaiser sent at 11:46 AM on November 30, 2010, Rep. McKinley wrote: "Think about it: if a member-elect were 40 years old and had started his own firm 15 years previously, forcing him to divest himself of the company ownership and changing the name leaves him with what to return to if he were defeated two years later? Bonner said there is a solution; what is it." (Bates Number DMB00000060.)

According to the December 1, 2010, email from Mr. Kaiser to Rep. McKinley (Bates Number DMB00000068), when Mr. Kaiser spoke to Ms. Furst on November 30, after she "reviewed all of the email traffic," Ms. Furst "confirmed [his] concerns," presumably about the stark choice facing Rep. McKinley: either change the name of the company or divest his interest in it. In this same email, Mr. Kaiser notes that he also spoke to Kelle Strickland on November 30, telling Rep. McKinley, "I explained the issues and the background and told her that I would place all of this in a letter to her so that she could advise the best way to proceed."

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Mr. Kaiser attached the letter to Ms. Strickland to his email to Rep. McKinley, which is discussed below. (Bates Numbers DMB00000069-70.)

In concluding his December 1 email to Rep. McKinley, Mr. Kaiser makes a point about the restrictions on the practice of the designated "fiduciary professions" that explains and underscores the frustration of many non-lawyer Members and Senators covered by these restrictions: "Adding architects and engineers to a legal prohibition that was clearly intended to apply to lawyers and business advisers makes no logical sense – if a lobbyist is intending to curry favor with a Congressman he can do it just as easily by purchasing a car from the car dealership as he can by hiring the architect to design his house." As an historical observation, Mr. Kaiser's statement is pretty close to the mark. There is certainly support for the conclusion that the drafters of the "fiduciary profession" restrictions – many of whom were lawyers – did not want to single out the legal profession as being singularly susceptible to creating the potential for a financial conflict, so the restrictions were made to apply to a category created and defined more broadly, the "professions that provide services involving a fiduciary relationship." But, importantly and as Mr. Kaiser further notes in this email: "Nonetheless, the law is the law; and we must find a way to comply with it." That is what Rep. McKinley tried to do, and believed he did, following his understanding of the law as it had been explained to him.

In his November 30, 2010, letter to Kelle Strickland (Bates Numbers DMB00000069-70), Mr. Kaiser sought guidance "in order to advise Congressman-elect McKinley regarding his options concerning the business [McKinley & Associates] and his relationship with it while he remains a Member of Congress." As the following quoted paragraph shows, Mr. Kaiser's letter to Ms. Strickland was informed by the same two-option understanding and framework he set out for Rep. McKinley in the November 24 email quoted above –that is, Rep. McKinley could either change the company name or divest his interest in the company – although in the letter to Ms. Strickland Mr. Kaiser also explored the possibility of a "waiver" exempting McKinley & Associates from the fiduciary profession restrictions:

> Paramount among our concerns is the future use of the name: McKinley & Associates, Inc. Over more than twenty years in the region considerable goodwill and name-recognition has accrued to

> this name. Moreover, Congressman-elect McKinley's deceased father, though not associated with the current firm, was also a licensed professional engineer and had a long career in the area. Much of the company's goodwill that has accrued as a result of the name would be lost if the name must be changed Accordingly, we would like to explore the possibility of retaining the name McKinley & Associates, Inc. if Congressman-elect McKinley would sever his other relationships with the business by for example: (a) selling his stock to the ESOP in return for a note payable over a period of years; (b) alternately giving or selling his stock to his wife or children; (c) resigning as an officer and director; and (d) having the company designate other professionals as its supervising architect and supervising professional engineer. If you believe that McKinley & Associates, Inc. can escape being designated as engaging in a "profession that involves a fiduciary relationship" by requesting a waiver or clarification of the definition, please advise as to the best way to go about that process. Obviously, if we could simply keep the status quo so far as the name and stock ownership of the business is concerned that would be most desirable to Congressman-elect McKinley, even if he must take a sabbatical so far as his employment and other responsibilities toward the firm while a Member.

With regard to Mr. Kaiser's statement in this November 30, 2010, letter that Rep. McKinley's father – Johnson B. McKinley – was "not associated with the current firm," this statement was not accurate. Although the elder McKinley does not appear to have been an on-the-payroll employee of McKinley & Associates, he was "associated" with the firm as a consultant and otherwise, as we have described for the Committee previously in our September14, 2012, letter (Bates Numbers DMB00000527-38) and as we also describe in our response below to Committee Request 2.

While awaiting a response to the letter to Ms. Strickland – and in conformity with the guidance and framework of understanding provided by Mr. Kaiser – Rep. McKinley continued to take steps preparatory to selling McKinley & Associates, as a legal alternative to changing the company name. Two email exchanges between Lynn Adams, of McKinley & Associates, and George B. Sanders, Jr., attorney for

the McKinley & Associates ESOP, show Rep. McKinley's increasing focus on selling his remaining 70% interest in the company to the ESOP (or 60% to the company and 10% to another individual) as soon as possible. In a December 2, 2010, exchange of emails with the subject heading "Urgent Question" (Bates Number DMB00000071-73) Ms. Adams wrote to Mr. Sanders, with a copy to Rep. McKinley: "Mr. McKinley would like to know what stock valuation date would be used if he were to sell his remaining 70% of McKinley & Associates, Inc. to the ESOP on 1/5/11 . . . He needs this information to make an informed decision concerning the Company prior to taking office in the U.S. House in early January due to House ethics rules." In his response, Mr. Sanders noted: "If David is going to do this, we need to start ASAP. I am not sure we could get it done by 1/5/2011 but would surely come close."

By December 10, 2010, a plan for Rep. McKinley to resolve potential ethics issues by selling his remaining interest in the company was closer to execution, as Ms. Adams' email to Mr. Sanders, copied to Rep. McKinley, shows: "It appears as though we may be moving toward the sale of the remaining McKinley stock, or at least 60% of it [10% would go to another individual], to the ESOP . . . [U]nderstanding that this transaction and valuation will take time, our local attorney [apparently Mr. Kaiser] has indicated that **as long as we can initiate the sale by January 5, 2011, we would be demonstrating good-faith and could complete the sale later in the year.**" (Bates Numbers DMB00000090.) (Emphasis added.) Attorney Sanders' December 12, 2010, response to Ms. Adams, also copied to Mr. McKinley, may be read as confirming the "local attorney's" point (cited by Ms. Adams in her email) that, even if Rep. McKinley's sale of the company were not completed until later in the year, initiation of the sale by January 5, 2011, would show Rep. McKinley's good faith in the effort to comply with congressional ethics requirements. (Bates Numbers DMB00000093-94.)

A number of other email exchanges during this same period relate to efforts by Rep. McKinley to resolve ethics issues arising in connection with McKinley & Associates before he took office in January 2011. As reflected in an email from Ms. Adams to Rep. McKinley, dated December 3, 2010 (Bates Number DMB00000076), it appears that at a McKinley & Associates management meeting held on December 2, 2010, there was discussion of the possibility of splitting the company to create an engineering company that *could* retain the name McKinley & Associates and an architectural firm with a different name. Ms. Adams asked Mr.

Kaiser for his opinion on this possibility and inquired about "the prohibitions from putting the company into Mary's name" in a December 7, 2010 email. (Bates Numbers DMB00000077-78.) In a December 10 email to Ms. Adams, copied to Rep. McKinley, Mr. Kaiser discussed the "problem with Mary McKinley being a significant owner of McKinley & Associates." (Bates Number DMB00000092.) In a December 14, 2010, email to Mr. Kaiser, copied to Rep. McKinley, Ms. Adams asked for guidance with respect to whether other steps – closing Rep. McKinley's corporate card, discontinuing use of Mary McKinley's personal card for company purchases, and designating new officers – might be needed to dissociate Rep. McKinley and his wife from McKinley & Associates before he took office. (Bates Numbers DMB00000096-102.)

While Rep. McKinley, attorney Kaiser, and personnel at McKinley & Associates were taking the steps described above for Rep. McKinley and his wife to sell their interests in McKinley & Associates, if necessary, to comply with House ethics standards, Mr. Kaiser heard back from Ms. Strickland in response to his November 30, 2010, letter to her. Mr. Kaiser informed Rep. McKinley, in a December 7, 2010, email that Ms. Strickland had consulted with Carol Dixon and "[t]hey are both of the opinion that while McKinley & Associates, Inc. is providing professional services involving a fiduciary relationship that the company may be able to avoid changing the name under the 'family name exception' based upon the similar name of Johnson B. McKinley, Consulting Engineer. She suggested that we request written advice from the Committee and lodge this letter prior to David being sworn in on January 5, 2011." Mr. Kaiser advised, however, that despite the informal Committee staff guidance that the company "may be able to avoid changing the name," the transfer of the company would likely have to proceed: "Because the 'family name' exception does not eliminate the other two prohibitions (i.e. compensation and management affiliation), I believe that David will have to deal with the management structure and ownership of McKinley & Associates in any event. This will have to be accomplished prior to January 5 and should be done in time so that we can explain the reorganization to the Committee in the letter requesting the opinion on the name." (Bates Number DMB00000079.)

After Ms. Strickland advised Mr. Kaiser to seek written advice from the Committee, Rep. McKinley and Mr. Kaiser communicated on a number of occasions on drafts of the letter and on questions related to the request for Committee guidance on complying with the restrictions on a Member's providing

professional service involving a fiduciary profession. (Bates Numbers DMB00000095, DMB00000103-63.) Lynn Adams, a member of the management team at McKinley & Associates, participated in or was copied on many of these email communications. As these email communications show, during the process of drafting a letter to the Committee the possibility of Rep. McKinley putting his interest in McKinley & Associates in a blind trust was added to the compliance options to be put before the Committee.

On January 3, 2011, at 3:53 PM, Mr. Kaiser emailed a signed letter to the Ethics Committee seeking an advisory opinion on matters relating to Rep. McKinley's interest in McKinley & Associates and on permitting McKinley & Associates "to retain its existing name under the well-recognized family name exception." (Bates Numbers DMB00000164-78). (Note that, although Mr. Kaiser emailed this signed letter to Kelle Strickland and Daniel Taylor at the Committee on January 3, the copy of the letter in the Committee's files, provided to Rep. McKinley in connection with the Committee's current request for information, bears a date of January 14, 2011.) Mr. Kaiser informed the Committee in this letter that "[p]rior to being sworn in as a Member of the House of Representatives, David B. McKinley will resign as an officer and director of McKinley & Associates, Inc. and place his stock in a blind trust that will be held for as long as he remains a member of the House of Representatives or otherwise holds an elected federal office."

Rep. McKinley recalls that sometime between his election to Congress and his being sworn in on January 5, 2011, he spoke with former Ohio Congressman Charlie Wilson about the informal guidance he had received from Ethics Committee staff with regard to his relationship with McKinley & Associates. Mr. Wilson – who had two businesses bearing the Wilson name in Ohio during his congressional tenure – told Rep. McKinley he did not think McKinley & Associates would have to change its name. Rep. McKinley also recalls speaking with Rep. Westmoreland at the Members' Retreat in January 2011, about these matters; Rep. McKinley recalls that at some point Rep. Westmoreland recommended that Rep. McKinley might want to confer with attorney Randy Evans.

A January 12, 2011, email indicates that Rep. McKinley had a brief contact with attorney Harry Buch regarding the letter pending before the Ethics Committee. (See entry on privilege log at Exhibit A.) Mr. Buch, in addition to being the

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proposed trustee listed on the materials submitted to the Committee with Mr. Kaiser's January 3, 2011, letter, was also an attorney for Rep. McKinley.

On January 25, 2011, attorney Kaiser received a crucial telephone call from Stan Simpson, Counsel at the Ethics Committee. As Mr. Kaiser informed Rep. McKinley the next day, in an email copied to Ms. Adams of McKinley & Associates management, Mr. Simpson notified Mr. Kaiser in this call **"[t]hat the staff agreed with our assertion that McKinley & Associates does not provide professional services involving a fiduciary relationship . . . Mr. Simpson also agreed that McKinley & Associates qualified as a 'family business' and so the name would not need to be changed.** He stated that as a result of the first point, there is no need for blind trust to hold your stock in McKinley & Associates." (Bates Numbers DMB00000185-86.) (Emphasis added.) Mr. Simpson's guidance to Mr. Kaiser, although oral and informal, could not have been clearer or more absolute: the name of McKinley & Associates would not need to be changed.

On January 26, 2011, Mr. Kaiser forwarded to Mary McKinley his January 25, 2011, email summarizing his call with Committee Counsel Simpson. It appears that on January 26, Mrs. McKinley and Mr. Kaiser also spoke by phone about Mr. Simpson's guidance. (See Bates Numbers DMB00000187-89 for this email and for what appears to be a page of notes by Mrs. McKinley on a January 26 call with Mr. Kaiser.)

Despite the clarity and specificity of Ethics Committee Counsel Stan Simpson's advice to Mr. Kaiser that McKinley & Associates did not provide professional services involving a fiduciary relationship and that the name McKinley & Associates would not need to be changed, more than two full months later – on March 31, 2011 – Mr. Kaiser received a call from another Committee Counsel, Heather Jones, completely contradicting Mr. Simpson's advice. Mr. Kaiser immediately informed Lynn Adams of the call. Then, in an "urgent" March 31, 2011, email to Mr. McKinley (Bates Number DMB00000216) – and copied to Ernie Dellatorre and Tim Mizer, both of McKinley & Associate management – Ms. Adams summarized the new Ethics Committee guidance from Ms. Jones: "She says that Stan Simpson, who provided the Ethics' position to him on you and the company is no longer with them and that **she is going to recommend that the House Committee take a stand that you do have a fiduciary relationship and**

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also that the McKinley name must be removed from the company." (Emphasis added.)

It is well known, based on media reports, that, during this period of time in early 2011, the Ethics Committee was undergoing considerable organizational turmoil, with some Members and staff apparently under suspicion by other Members and staff. To some extent this confusion within the Committee staff appears to be reflected in Chairman Bonner's reaction when Rep. McKinley spoke with him about Ms. Jones' call. In an April 2, 1011, email to Mr. Kaiser (Bates Number DMB00000207-08), Rep. McKinley summarized his call with the Ethics Committee Chair:

> Lynn [Adams, of the McKinley & Associates management team] has informed me that a different determination may be being considered. Consequently I have already spoken with Congressman Jo Bonner on Friday. He recommended that I get back to him next week because his staff was already gone for the day. He claimed he remembered some of our previous discussions but showed no awareness of an earlier recommendation by his staff. Nevertheless but [sic] he was not particularly pleased that another decision may be forthcoming and one that reversing [sic] an earlier and more encouraging solution.

Whatever was going on internally within the Committee, it is difficult to understand how the Committee could permit two of its staff counsel to provide entirely contradictory advice to a Member on a matter of such vital personal importance to him and of such financial importance not only to the Member, but also to his family, to his company, and to the many people employed by that company and dependent on it for their livelihood. This was not an abstract legal problem for Rep. McKinley or for the management and employees of McKinley & Associates. So it cannot be difficult for the current leadership and Members of the Committee to appreciate how the Committee's apparent 180 degree turnabout in its advice surprised, shocked, and bewildered Rep. McKinley.

In response to the Committee's reversal of opinion on the issues of whether McKinley & Associates provides services involving a fiduciary relationship and whether the company could retain its name, Rep. McKinley and members of

McKinley & Associates management team determined to proceed with the plan for Rep. McKinley to transfer his remaining ownership interest in the company to the McKinley & Associates ESOP. This plan had been abandoned when Committee Counsel Stan Simpson advised on January 25 that the company would not have to change its name. Rep. McKinley cannot recall whether the idea to proceed with this transfer was his or whether it originated with Ernie Dellatorre or someone else at McKinley & Associates; after Ms. Jones's call to Mr. Kaiser on March 31, 2011, Rep. McKinley did discuss this matter with Mr. Dellatorre and others at McKinley & Associates, but he does not recall the details of any specific discussion.

On April 11, 2011, Mr. McKinley and Mr. Dellatorre, as ESOP Trustee, entered into and signed a Memorandum of Understanding ("MOU") on the "ESOP Purchase of Remaining McKinley & Associates Shares." (Bates Number DMB00000217.) Rep. McKinley believes that Mr. Dellatorre drafted this MOU. The MOU provided as follows:

> As a result of your resignation as President of McKinley & Associates and our conversation last week regarding the potential for a perceived conflict with your ownership of the company during your term in Congress, this letter will serve as our memorandum of Understanding that the ESOP will purchase your remaining shares in McKinley & Associates. Once the share value is determined and the transferring document is approved, your remaining shares will be purchased by the ESOP. Payment for the shares will be similar to the funding you provided for the purchase of the original ESOP Shares.
>
> Details on the stock valuation, the financing for the ESOP purchase, and the final transaction date will be detailed in a subsequent document to be developed by counsel for both of our signatures.
>
> **It is our mutual understanding that by agreeing to this Memorandum of Understanding that you will have no further control over the ownership and operations of McKinley & Associates, Inc.**

(Emphasis added.)

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The Committee should recall that, at the time he signed and entered into this MOU with Rep. McKinley, Mr. Dellatorre knew of the Committee's likely reversal of its position on whether the company could maintain the name McKinley & Associates. Mr. Dellatorre had been copied on Lynn Adams March 31, 2011, email in which she stated that Committee Counsel Heather Jones was "going to recommend that the House Committee take a stand that you do have a fiduciary relationship and also that the McKinley name must be removed from the company."

Rep. McKinley entered into the MOU with Mr. Dellatorre and the ESOP on April 11, 2011, with the good faith understanding that – by committing to complete the transfer of his interest when a share value could be determined and by also committing specifically that, as of the date of the MOU, he had "no further control over the ownership and operations of McKinley & Associates, Inc." – he would be in compliance with the advice and framework for understanding previously provided to him by attorney Kaiser. Rep. McKinley believes he did not confer with Mr. Kaiser on the MOU, however. Rep. McKinley recalls that Mr. Kaiser took a "just change the name" stance in response to hearing from Heather Jones on March 31, 2011, that she was going to recommend that the company be required to change its name. Rep. McKinley understood Mr. Kaiser's stance as advocating what Mr. Kaiser saw – as a practical matter – as easiest option to put into effect. Rep. McKinley viewed Mr. Kaiser's practical stance, however, as being entirely consistent with Mr. Kaiser's guidance with respect to the two legal options for compliance – either change the company name or divest his interest – that were available to Rep. McKinley.

On April 14, 2011, Mr. Kaiser emailed a signed letter to Ms. Jones at the Committee explaining why the Committee would be in error if it found that McKinley & Associates was a firm providing professional services involving a fiduciary relationship. (Bates Numbers DMB00000222-26.) Mr. Kaiser sent his letter to Ms. Jones on April 14 following an April 13, 2011, email from Ms. Jones to him "reminding" him "that the Committee on Ethics is waiting on your brief regarding whether architects and engineers are fiduciaries under West Virginia law." (Bates Numbers DMB00000476-80.) Mr. Kaiser's argument in this April 14, 2011, letter is summed up in the following paragraph:

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> West Virginia imposes fiduciary responsibilities only upon consulting engineers, not professional engineers. Moreover, the House Rules were intended to apply to areas where a professional had fiduciary responsibilities to his or her client which could necessarily conflict with the responsibilities of a Member of Congress. As has been shown, West Virginia law states clearly that the fiduciary responsibility of as licensed professional engineer or licensed architect is to the **public, not the client**. Thus the dangers that the House Rules were trying to guard against do not apply in this particular instance.

(Emphasis added.)

In this April 14, 2011, letter to Ms. Jones, Mr. Kaiser also reiterated "the history of the professional engineering firm within the McKinley family." By reiterating this history, Mr. Kaiser demonstrated that the name McKinley & Associates is a "family name," subject as such to a recognized Committee exception to the prohibition on a Member "permitting" his name to be used by an entity that provides professional services involving a fiduciary relationship.

By email on April 14, 2011, at 4:52 PM (Bates Numbers DMB00000222-26), Mr. Kaiser forwarded to Rep. McKinley and to Ms. Adams, at McKinley & Associates, a copy of this signed letter to Ms. Jones at the Ethics Committee. In this email, Mr. Kaiser notes that he "added the paragraph at the end reiterating the relationship between the Johnson McKinley engineering practice and the present-day McKinley & Associates." However, Rep. McKinley does not recall discussing drafts of the letter to Ms. Jones with Mr. Kaiser.

On May 2, 2011, apparently at the request of Andy Sere, Ms. Jackie Barber, then Deputy General Counsel at the NRCC, emailed Mr. Sere about laws and standards applicable to participation in a contract with the federal government by a Member or by a corporation with a relationship with a Member. (Bates Number DMB00000233.)

More than two months later, On June 23, 2011, Mr. Kaiser heard again from Ms Jones at the Committee. Mr. Kaiser described this call in a June 24, 2011, email to Rep. McKinley, copied to Ms. Adams at McKinley & Associates (and included at Bates Number DMB00000235): "While she did not give me any indication as to

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the Committee's decision on this matter, she wanted confirmation from me that you had resigned your position as an officer and director of McKinley & Associates. I told her that your resignation letters were signed and delivered prior to your being sworn into office as a Member of Congress."

On June 27, 2011 – almost *six months* after his counsel submitted a letter to the Committee on January 3, 2011, seeking a formal Committee advisory opinion – Rep. McKinley received word in a phone call from Chairman Bonner that a letter would be forthcoming. In an email that same day at 5:29 PM to Mr. Kaiser, Rep. McKinley summarized the key point of the call with Chairman Bonner: "He says we must change the name of the company to McKinley Engineering." (Bates Number DMB00000237.) Kelle Strickland forwarded the actual letter – dated June 24, 2011 – to Rep. McKinley by email at 5:55 PM on June 27, 2011. (Bates Numbers DMB00000245-51.) As to why, in his June 27 call with Chairman Bonner, Rep. McKinley "countered with the option of selling the company to [his] wife or son" – notwithstanding the fact that the MOU was in place with the McKinley & Associates ESOP regarding transfer of shares and relinquishment of "control over the ownership and operations of the company" – Rep. McKinley believes he mentioned that option to see if the Committee would receive it favorably and in case the MOU could somehow be withdrawn in favor of that option. Rep. McKinley understood at the time, however, that he did not have control over the ownership and operations of McKinley & Associates, or the ESOP, and that the ESOP would have to agree to any modification of the terms of the MOU.

In reviewing the letter, Rep. McKinley quickly focused on a fundamental factual flaw in the Committee's analysis regarding what would qualify as a "family name" for the company, as he pointed out in a June 27, 2011, email to Mr. Kaiser: "This makes no sense. [T]hink about it: McKinley Engineering is OK but McKinley & Associates is a problem. My father's company was not McKinley Engineering and we never represented that it was. That name was the one I used as a sole proprietor for the early years of the company. Let's talk." (Bates Numbers DMB00000238-44.)[2]

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[2] The Committee's letter dated June 24, 2011, letter does state that Rep. McKinley's father, Johnson McKinley, "maintained a one-man office, McKinley Engineering, as a consulting engineer in Wheeling, West Virginia, beginning in 1954 until his retirement in the 1980s." It is not clear

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Rep. McKinley recalls that, within a day or two of receiving the Committee's letter on June 27, 2011, he approached Chairman Bonner before the Speaker's podium on the floor of the House. With regard to the Committee's letter, Rep. McKinley recalls saying to Chairman Bonner, "what the [heck] is this," or some other similarly expressive phrase. Rep. McKinley told Chairman Bonner that "McKinley Engineering" was the original name of *his* firm, not the name of his father's firm (as the Committee's letter incorrectly stated). Rep. McKinley recalls Chairman Bonner responding, in substance, that the Committee was not aware of this but had thought that "McKinley Engineering" was the name of his father's firm; Chairman Bonner said that this could make a difference to the Committee's determination. Rep. McKinley then responded that, in any event, it did not matter anymore because he had already sold his company, by which Rep. McKinley meant the arrangement put in place by the MOU. Chairman Bonner said that he did not know this and that he had hoped it would not come to this.

Shortly after receipt, Rep. McKinley shared the Committee's letter dated June 24, 2011, with members of management at McKinley & Associates.

With respect to steps taken in response to the Committee's latter dated June 24, 2011, Rep. McKinley reasonably believed that no such steps were necessary because – first through the MOU and then, at the end of 2011 and as discussed below, through the final redemption of his remaining shares by McKinley & Associates – he believed he had complied with the guidance from Mr. Kaiser that any ethics concerns that would arise for him in connection with the name "McKinley & Associates" would be resolved by either changing the company name or divesting his interest in the company. Rep. McKinley believed that the

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(Continued . . .)
where the Committee got the information – or the incorrect idea – that Rep. McKinley's father called his practice "McKinley Engineering." It does not appear to be in any written submissions that had been made to the Committee by counsel for the Congressman. Given Rep. McKinley's recollection and understanding that his father did *not* call his own practice "McKinley Engineering" and given that "McKinley Engineering" was the original name of McKinley & Associates, there appears to be just as much basis for the Committee to determine that "McKinley & Associates" is a family name as there is for the Committee to determine that "McKinley Engineering" is a family name. Therefore – and for the other reasons in fact, law, and policy set forth in the instant response letter and in the September 14, 2012, letter to the Committee from the undersigned counsel for Rep. McKinley – the Committee should reconsider its guidance on this point and determine that "McKinley & Associates" itself is a "family name."

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MOU represented a satisfactory good faith effort to resolve the matter by complying with this second option. Rep. McKinley also believed that by the terms of the MOU – through which, as of April 11, 2011, he had given control over the ownership and operations of McKinley & Associates to the ESOP – he no longer had the power or authority to direct or control a change in the name of McKinley & Associates. Further, Rep. McKinley considered that, through his brief conversation with Chairman Bonner on the House floor soon after receiving the Committee's letter dated June 24, 2011 – in which he told the Chairman that he had sold the company – he had effectively notified the Committee about the action he had taken.

Nonetheless, Rep. McKinley regrets not having responded to the Committee's letter more formally at that time. Rep. McKinley was concerned and upset at the way the Committee had treated him. As described above, Rep. McKinley's concerns with the Committee's process in this matter included: being asked by Committee counsel why, if he had to sell McKinley & Associates, he could not just start another company when he left Congress; being advised by Committee counsel in January that the company *would not* have to change its name, hearing nothing from the Committee for two months, and, then being advised by a different Committee counsel that the company *would* have to change its name; hearing nothing from the Committee on this for more than another two months; having to wait a total of almost six months for a written response to his January 3, 2011, written request for formal written guidance on a matter of great personal and financial importance to him and to the management and employees of McKinley & Associates; learning that the Committee, in determining a "family name" for the business, relied upon a name for his father's business that did not exist and that, in any case, did not convey the actual business of McKinley & Associates. These are serious concerns that should not be minimized. However, Rep. McKinley believes that he may have allowed these concerns about the Committee's handling of this matter to affect his responsiveness to the Committee and, if he did, he regrets having done so; he believes he should have responded in a more formal manner to the Committee's letter dated June 24, 2011.

Documents indicate that, in late August 2011, Rep. McKinley had preliminary discussions with attorney Stefan Passantino in connection with this matter. Rep. McKinley did not sign an engagement letter with Mr. Passantino, but the Congressman considers these discussions to be covered by attorney-client

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privilege. Documents related to these discussions have been entered on the privilege log accompanying these responses at Exhibit A.

On October 11, 2011, Congressman and Mrs. McKinley had dinner with former Congressman Tom Reynolds and his associate Sally. It appears that "ethics matters" were discussed at the dinner, including discussion relating to what the Congressman, in an email to Mr. Reynolds the next day, refers to as his "'fifth' child," i.e., McKinley & Associates. (Bates Number DMB00000252.) On October 13, 2011, Mr. Reynolds responded by email to Rep. McKinley, saying that he had spoken with an attorney and asking the Congressman to call him. Mr. Reynolds followed up with Rep. McKinley again by email on November 4, 2011, on their "previous discussion about your business ownership and the house ethics committee"; in this same email Mr. Reynolds forward the contact information for attorney Rob Kelner. (Bates Number DMB00000257.) It appears that Rep. McKinley did not follow up on this recommendation.

Sometime in the late fall of 2011, Rep. McKinley, perhaps because of discussions with Ernie Dellatorre or others at McKinley & Associates, turned his attention to consummating the sale of his remaining shares in McKinley & Associates to the ESOP, as contemplated by the MOU he signed and entered into on April 11, 2011. There are a substantial number of documents related to this transaction, included with these responses at Bates Numbers DMB00000260-458. Rep. McKinley also had a number of discussions with individuals, including attorneys Ben Sanders and Charles Kaiser, persons at McKinley & Associates, and possibly others, about this transaction. An email from Mr. Sanders, distributed on December 31, 2011, to Ernie Dellatorre, Gregg Dorfner, and Tim Mizer at McKinley & Associates, discussed the transaction, its timing, and its effect. (Bates Number DMB00000369-70.) In this email, also sent to Rep. McKinley, Mr. Sanders explained that, "[b]ecause of the press of other business, particularly David's duties as a newly elected member of the House of Representatives, a closing of that sale [committed to through the MOU] has not occurred." Mr. Sanders noted that, "although the [MOU] in [Rep. McKinley's] mind means for all intents and purposes he no longer has an ownership interest in the Company, the [MOU] is apparently insufficient evidence of that fact from the point of view of House ethics rules." Mr. Sanders further noted that, as of that date – i.e., December 31, 2011 – "requirements imposed on the ESOP by ERISA" made it impossible to finalize the transaction with the ESOP by the end of 2011. Therefore, because Rep. McKinley

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wanted "to start 2012 without an ownership interest in the company," as of December 31, 2011, the corporation McKinley & Associates redeemed all of Rep. McKinley's remaining shares in the company "on the condition that the Company [would] assume [Rep. McKinley's obligation under the [MOU] to sell the shares to the ESOP as soon in 2012 as time [would] permit." So, as of December 31, 2011, the transfer of all of Rep. McKinley's remaining shares in McKinley & Associates, committed to in good faith in the April 2011 MOU, was finalized, albeit temporarily to the company rather than the ESOP. The company's sale of the shares to the ESOP was completed on April 22, 2012.

Because he reasonably believed that none were necessary, Rep. McKinley took no further steps in connection with this matter until he received the Committee's letter to him of August 24, 2012. In connection with that letter, Rep. McKinley had some preliminary contacts with Mr. Kaiser, but shortly after receiving the letter Rep. McKinley retained undersigned counsel. As previously noted, Rep. McKinley's communication with undersigned counsel in connection with that letter and with the Committee's letter of March 18, 2013, are covered by attorney-client privilege and are not separately noted or entered on the privilege log. Further, any communications by Rep. McKinley with others and any communication by others in connection with compliance with the Committee's request for documents and information as set forth in its March 18, 2013, letter are covered by attorney-client privilege and/or work product protection and are also not separately noted or entered on the privilege log.

Response to Committee Request 2

Committee Request 2 requests information and documents concerning the association of Johnson B. McKinley, Rep. McKinley's father, with McKinley & Associates.

Rep. McKinley believes that, to the extent that his father was paid by his firm, it was as a consultant. Johnson B. McKinley was not a paid employee, officer, director, owner, or contractor in connection with McKinley & Associates. With respect to Johnson B. McKinley's role as consultant to McKinley & Associates, or its predecessor firm McKinley Engineering Company,[3] Rep. McKinley provides

[3] As discussed above, although in its June 11, 2011, letter to Rep. McKinley the Committee required a change of the name of the company McKinley & Associates "to the name of your father's

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two documents from September 1981 responsive to the Committee's request. The first is a September 1981 report on "Structural Steel Evaluation" undertaken by McKinley Engineering Company for Koppers Company, Inc. in Follansbee, West Virginia. (Bates Numbers DMB00000539-53.) As clearly stated at the beginning of the document, the report sets forth the results of the work of "J.B. McKinley, Engineer, Wheeling, West Virginia, at the request of Thurman Wilson, Koppers Co." "J.B. McKinley, Engineer" was Rep. McKinley's father. Similarly, a September 15, 1981, letter (Bates Number DMB00000554) from McKinley Engineering Company to the Mayor of Martins Ferry, Ohio, states: "A site inspection . . . was made by J.B. McKinley, Engineer, to determine the stability of an alley, sewer repairs, and construction methods."

At Bates Number DMB00000521, the Committee will find a narrative drafted by Rep. McKinley relating to his father and his professional association with his father. Rep. McKinley drafted this narrative after receiving the Committee's letter of August 24, 2012. Mary McKinley's comments on this draft narrative may be seen in an email from her to Rep. McKinley at Bates Numbers DMB00000460-61.

Apart from the information described above or provided in Rep. McKinley's September 14, 2012, letter to the Committee, Rep. McKinley does not have any other information or documents responsive to Committee Request 2. McKinley & Associates may have additional information or documents responsive to this request, but Rep. McKinley does not know if they do or, if so, what information or documents they may have.

(Continued . . .)
original business, McKinley Engineering," to the best of his knowledge his father never used or operated under the name McKinley Engineering and he does not know where the Committee got this information or why it came to this conclusion. Research done by McKinley & Associates employee David Carenbauer in connection with the Committee's August 24, 2012, letter to Rep. McKinley listed a number of names used by Johnson B. McKinley between 1954 and 1992 for his business, but McKinley Engineering is not one of these names. (Bates Number DMB00000524.) A piece of letterhead from Johnson B. McKinley from 1985 shows his use of the business name "Johnson B. McKinley, Consulting Engineer." (Bates Number DMB00000526.) Minutes of the regular meeting of the Council of Beech Bottom, West Virginia, for November 4, 1986 – available online in PDF form at http://beechbottomwv.org/pdfs/1986.pdf, at page 257 – refer to a "Johnson B. McKinley Engineering."

Rep. McKinley believes that, with respect to understanding and appreciating his father's connection with McKinley Engineering and McKinley & Associates, it is important for the Committee to focus on more than just pay records, financial transactions, or contracts alone. First, if some of the records sought by the Committee existed at one time, these records may have been created as much as 30 years ago, or more; for the Committee to base any determination on the absence of such records under these circumstances would be unsound. Second, Johnson B. McKinley's interest and activities in assisting his son's business did not depend on compensation, so to focus exclusively on records of financial compensation in this context is to focus too narrowly. Johnson B. McKinley was Rep. McKinley's father. There were family ties at work. Therefore, it is important for the Committee in this regard to review carefully the information on Johnson B. McKinley and his association with Rep. McKinley's business that is set out at pages 3 and 4 of Rep. McKinley's September 14, 2012, letter. (Bates Numbers DMB00000527-38.)

Response to Committee Request 3

Committee Request 3 asks for information and documents in connection with McKinley & Associates' contracts with or practices before the federal government.

As to any such current contracts, to Rep. McKinley's understanding the company still has an "open-ended" contract with the U.S. Postal Service, under which the company may do work upon request. Rep. McKinley does not know specifics as to the current status of this contract or as to the work, if any, currently being done by McKinley & Associates in connection with the contract. With respect to such specifics as the Committee is requesting in Request 3 on any current or previous contracts with the federal government, Rep. McKinley believes that such information is within the custody and control of McKinley & Associates; therefore, Rep. McKinley respectfully advises that the company would be the source of such information for the Committee.

Although not strictly responsive to this request, an additional point should be made here with respect to use of the name "McKinley & Associates" by Rep. McKinley's former firm. Under relevant procurement codes and regulations, and under other standards applicable to architects and engineers, no matter what name the Committee may determine that McKinley & Associates should operate under,

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when the company bids for work with a government client that government client will necessarily see abundant documentation (relating to past projects by and qualifications of the firm) that the firm is the former "McKinley & Associates." In this way, short of closing down the company there appears to be no way to keep use of the "McKinley & Associates" name out of the government contracting process.

Responses to Committee Requests 5, 6, 7, and 8

Through the discussion and responses in this letter, and through the documents accompanying this letter, Rep. McKinley has attempted to comply with Committee Request 5 and 6 with respect to providing documents and, as solicited by the Committee in Request 8, has provided other information and documents that he hopes will assist the Committee.

With respect to Committee Request 7, regarding efforts taken to identify documents responsive to the Committee's request, reasonable and appropriate steps were taken identify such documents, including:

- Identifying and collecting hard copy documents in Rep. McKinley's possession.
- Distributing a document preservation and identification notice to official and campaign staff and collecting identified materials.
- Copying and searching Rep. McKinley's House email account. (Rep. McKinley understands, however, that the House has a 14 day retention policy for email.)
- Imaging and searching the hard drives of Rep. McKinley House desktop and laptop computers. (It appears that Rep. McKinley saved items locally and did not save items to the House network.)
- Imaging and searching text messages from Rep. McKinley's iPhone.
- Imaging and searching Mary McKinley's AOL email account.

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- Imaging and searching the computer used by Rep. McKinley in his non-official office at the Maxwell Center in Wheeling, West Virginia.

Although he is not able to identify specific items, Rep. McKinley believes there are likely to be documents responsive to the Committee's requests in the possession, custody, and control of McKinley & Associates and/or individual personnel at the company.

If the Committee has any questions about the responses or documents provided with this letter by Rep. McKinley, or wishes to discuss any aspect of this matter, please do not hesitate to contact Jan Witold Baran, at 202.719[redacted], or Robert L. Walker, at 202.719[redacted].

Sincerely,

Jan Witold Baran
Counsel for Rep. David B. McKinley

Robert L. Walker
Counsel for Rep. David B. McKinley

Attachments

cc: The Honorable David B. McKinley

Exhibit A

In Response to the U.S. House Committee on Ethics' March 18, 2013 Request

Document Production Privilege Log of David B. McKinley

5/1/2013

Doc. No.	Author	Recipient	Date & Time	Title	Type	Privilege/Protection	Subject Matter	Privilege or Protection Claim
1	David B. McKinley	Harry Buch	1/12/2011; 8:27 AM	(No Subject)	Email	Attorney-Client Privilege	Legal guidance on ethics compliance	Communication in connection with seeking advice of counsel.
2	Andy Sere	David B. McKinley	9/1/2011; 11:44 AM	Fwd: McKinley & Associates	Email	Attorney-Client Privilege	Legal guidance on ethics compliance	Communication reflecting advice of counsel.
2	Stefan Passantino	Andy Sere, Randy Evans	8/31/2011; 4:20 PM	McKinley & Associates	Email	Attorney-Client Privilege	Legal guidance on ethics compliance	Communication reflecting advice of counsel.

Exhibit 3

From: Kaiser, Charles J. [redacted]@pgka.com>
Sent: Wednesday, November 24, 2010 5:04 PM
To: David B McKinley
Subject: RE: Company name change...

David: I will be out of town on Friday, but I think that it might be a good idea to pick a time early next week to talk about the options. There are no prohibitions in West Virginia to continuing to use the name McKinley & Associates even though you are not an owner or an officer or director. You will have to notify both the Board of Architecture and the PE Board who the "Supervising Architect" and the "Supervising Professional Engineer" is with respect to the company once that is decided. You will not be able to stay on the Board or be an officer, but you can be paid the value of the stock if it is sold to the ESOP (i.e. you can be paid for your capital interest) or for income that you are entitled to receive as a result of completed work. Caution will be required with respect to how this is calculated. The question as to the change of name boils down to whether McKinley & Associates is considered to be a firm "providing professional services involving a fiduciary relationship". An example of this definition in the Rules is a company providing architectural services, but we can certainly ask for a ruling and argue that it does not apply to you because you are not an architect. If the ruling comes back favorable, you can keep your interest in the company, but not work or receive earned income from it. If McKinley & Associates is considered to be a firm providing professional services involving a fiduciary relationship, then it appears that you are left with two choices: (1) change the name, or (2) completely divest yourself of your interest in the company (this appears to include Mary as well). Please understand that your situation is different than family businesses that do not provide professional services (i.e. car dealerships), though I think the logic got lost when this Rule/law was being formulated. In addition, it is important for you to understand that this is not simply a House Rule, but a federal statute. Let me know the best time to talk Monday (or Sunday if that works better). Have a Happy Thansgiving. CJK

From: David B McKinley [mailto:d[redacted]y@mckinleyassoc.com]
Sent: Tuesday, November 23, 2010 3:50 PM
To: Kaiser, Charles J.
Subject: FW: Company name change...

More thoughts.

From: Andy Sere [mailto:[redacted]@NRCC.org]
Sent: Tuesday, November 09, 2010 5:53 PM
To: dmckinley@[redacted]
Subject: RE: Company name change...

David:

Just a quick update.

Rep. Vern Buchanan's (R-Fla.) 2006 campaign manager gave me the contact info for John Tosch, Buchanan's corporate attorney who handled all Vern's transition stuff. Will be interesting to see what he has to say when he gets back to me, since they obviously found some way around this (Buchanan's car dealerships are still called "Buchanan Automotive").

Also talked to Todd Ungerecht, who used to work for the Ethics Committee and now works for Rep. Doc Hastings (R-Wash.) on the Natural Resources Committee. He told me that there may be ways around this (one question he had was, to whom do you plan to divest the business - is

David H involved?), and he's going to take a look at the situation and provide some thoughts soon.

At the end of the day this will obviously be handled by attorneys, but until they get involved I'll keep trying to find out more background and will keep you posted.

Andy

Andy Seré
Regional Press Secretary
National Republican Congressional Committee
(202) 479-[redacted] - ofc
(713) 806-[redacted] - cell
[redacted]@nrcc.org

-----Original Message-----
From: Andy Sere
Sent: Tuesday, November 09, 2010 10:28 AM
To: 'dmckinley@mckinleyassoc.com'
Subject: Company name change...

David:

Tim mentioned to me this issue you're having with a lawyer's opinion on your company's name in light of your election to Congress.

Have there been any further developments on this?

I am going to make a few calls this afternoon to see what I can find out about how this issue has been handled in the past with other members in similar situations. Will let you know if I learn anything.

Andy

Exhibit 4

From: Kaiser, Charles J. <[redacted]@pgka.com>
Sent: Wednesday, January 26, 2011 10:05 AM
To: David B McKinley
Cc: Lynn Adams
Subject: House Committee on Standards

David: I received a call from Mr. Simpson who is a staff member of the House Committee on Standards late yesterday afternoon. He advised me that the staff agreed with our assertion that McKinley & Associates does not provide professional services involving a fiduciary relationship. As you will recall this is the critical element that created the difficulties under the House Ethics Manual. Mr. Simpson also agreed that McKinley & Associates qualified as a "family business" and so the name would not need to be changed. He stated that as a result of the first point, there is no need for a blind trust to hold your stock in McKinley & Associates. There continues to be a strict prohibition on the part of Congressman McKinley using his elected office to solicit or to direct business to McKinley & Associates. Thus, for example, you could not specify earmarks or other federal funding for projects where McKinley & Associates is the project engineer and you could not contact any federal agencies on behalf of McKinley & Associates. However, you could be compensated by McKinley & Associates up to the earned income limits ($25,000 +/-) for employment with McKinley & Associates. And there are no limits in your receipt of unearned income (i.e. dividends) from your stock ownership of McKinley & Associates. Because of the conflict of interest rules (i.e. using a congressional office to solicit personal business), Mr. Simpson and I believe that it would still be advantageous for you to avoid service as an officer or director of McKinley & Associates and to create a simple voting trust for your stock. In other words, the stock would still be in your name but someone else will vote the stock. Because we do not have to follow the Blind Trust Rules, the trustee of the voting trust can be family members or a combination of related parties (i.e. the trustees could be the officers of McKinley & Associates and David H.). Give me a call when you can talk further about this so that I can get back to Mr. Simpson and eliminate the Blind Trust. Best Regards.

Charles J. Kaiser, Jr., Esq.
PHILLIPS, GARDILL, KAISER & ALTMEYER, PLLC.
61 Fourteenth Street
Wheeling, WV 26003
T: 304-232-[redacted]
Fax: 304-232-4918 or 304-232-6907

[redacted]@pgka.com

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Maintain as Confidential

Exhibit 5

WATER DEP'T.: No report, except that they got their new gas cards and the Village and Water Dep't. are now separate.
GARBAGE AND TREES: Some tree limbs were left on the road after the Tri-State truck accident, Mr. Watson asks if we should have them picked up. Mr. Augustine suggests that it is their problem.
Mr. Hall had the trees topped and trimmed by Mrs. Wilson's at a cost of $100.00.

MAYOR'S REPORT:
Halloween will be held on Wed. Oct. 29th. An attempt to discuss the possibility of holding a teen dance or not (on behalf of the Ladies Auxillary) was made. Mr. Augustine informed us that this is not Council's business, that it was the Village and Fire Dep't. problem and the matter was dropped.
It seems we have an interested party for Marshall of Beech Bottom. This will be checked into further and will then be discussed further.
About Tri-Co Cable, their contract renews automatically unless we inform them in writing 90 days before the contract comes due. On delinquincies, upon checking it was found that it will cost us about $75.00 to try the three cases that are most pressing at this time. If we win thay will ahve to pay the court costs, but if they have no assets, we can't collect anyway. After a short discussion it was decided that we have to at least try, and show these people that we have to be taken seriously. A motion was made by Mr. Augustine to proceed on these three cases and was seconded by Mr. Watson. The motion passed.
The PSD received approval of the EPA Grant for the sewage project. The rest must come from the CDBG. Some trees are in bad condition by the rest home and need attention.

TREASURERS REPORT: Was read and approved as read.

GENERAL FUND:		
9-1-86	Balance	$ 940.72
9-25-86	Tot. Receipts	$2,640.88
9-30-86	Tot. Disbursements	$2,129.00
9-30-86	Balance	$1,452.60
COAL SEVERANCE		
9-1-86	Balance	$ 240.37
9-9-86	Disburs. to P.O.	$ 22.00
9-30-86	No receipts	
9-30-86	Balance	$ 218.37
revenue sharing		
9-1-86	Bal. both acc.	$4,737.50
	Interest rec.	$ 48.78
9-30-86	no disb.-balance	$4,786.28
9-30-86	bal in checking	$ 635.17
9-30-86	bal in inv. fund	$4,151.11

With all business discussed a motion was made by Mr. Auguating to adjourn the meeting and was seconded by Mr. Niven. Adjourned at 8:40 pm.

Greg Hall
MAYOR

Sharon L. Watson
Recorder

November 4, 1986

The regular meating of the Council of Beech Bottom was called to order at 7:05 pm by Mayor Hall. Council members present were Mr. Augustine, Mr. Watson, Mrs. Yahrling, and Mrs. Rush.

The Pledge of Allegiance was recited by all present. The minutes of the previous meeting were read and approved as read.

Visitors present were Mr. Mark Baldwin of the BHJ, Mr. Loew, and Mr. Miller.

Mr. Baldwin was recognized. He stated we have made our second drawdown on the CDBG funds. A total of $53,532.62 went to Tri-State Asphalt, $3,000.00 went to Johnson B. McKinley Engineering, and $682.25 will go to the BHJ once the checks are signed, and mailed. A final audit must still be done on the account, but no date has been set for certain. Mr. Cipriani's bill was paid out of the balance in the checking account. Mr. Baldwin said there is still a possibility of two to three thousand dollars still remaining from the grant monies. Once all the figures are in, he will let us know.

Mr. Loew was then recognized. He said he wanted to thank the Village for the nice job on the streets. He reported he has been getting some complaints from the Moore family about the new street light he put up for his parking area. They have made threats of bringing a law suit against the Village if the light is not taken down. They also were supposed to be at this meeting, but have not appeared as of yet. After some discussion it was decided that this should be tabled until the next meeting.

COMMITTEE REPORTS:
STREETS: The paving is completed. the edges of the streets were tapered out at the alley openings, driveways and parking lots. The alleys were cut and slagged. There is a broken storm sewer drain on second street. Mr. McCutchan is too busy to make the repairs. Mr. Augustine will take care of it in the future. The leaves will be picked up on Saturday. More maintanence was done to the snow plow. Mr. Augustine asked the Mayor do designate someone to run the snow plow this winter.

HALL: Paul Phillips called Carole about renting the Hall for 6 weeks for Union Meetings. He will need it every Monday, November through the middle of December. A discussion was held on whether to charge him $15.00 a week plus a$10.00 deposit each week or to just charge him $15.00 a week. It was decided to charge him $15.00 a week plus the $10.00 deposit.

GARBAGE: There has been complaints about broken garbage bags and broken glass jars on Hill Street. Mr. Sugustine also stated thaere is a lot of garbage being dumped in the hollow area. The Mayor will contact Mr. Niven about having a baracade of some sort put up to help prevent this.

Mr. Watson also reports that the PSD will interview three engineering firms interested in doing the Village sewage project.

MAYOR"S REPORT: Mr. Hall talked to the Magistrate about our delinquent accounts to our water dep't. and garbage. To cases were placed with the Magistrate. Mr. Temple's wife called the Mayor about getting permission to pay on their account in the amount of $10.00 per month. Mrs. Rush read the letter she received from Mr. Campbell, Esq. The bills are to be paid in full plus $25.00 court costs. The roof drains from the Post Office were improperly installed. They should drain out at the curb instead of over the sidewalk. this was an oversight by the owner and contractors. The Postmaster is aware of the situation and agrees that it needs corrected. The owner is also aware and said however that since the Village took it upon theirselves to start the project of the lower drain that they should finish it, and the Postmaster is trying to have the roof drain corrected.

TREASURERS REPORT: Was read and approved as read.

General fund:

10-1-86	Balance	$1,452.60
10-28-86	Total Receipts	$2,124.12
10-28-86	Tot. Disbursements	$1,485.87
10-31-86	Balance	$2,090.85

COAL SEVERANCE

10-1-86	Balance	$ 218.37

No transactions in Oct..

REVENUE SHARING

10-1-86	Bal. both acc's.	$4,786.28