

APPENDIX C



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April 19, 2016

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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



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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,

A handwritten signature in blue ink, appearing to read "Jan Baran".

Jan Witold Baran
Counsel for Rep. David B. McKinley

A handwritten signature in blue ink, appearing to read "Robert L. Walker".

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

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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 reproof 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 reproof 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 reproof based, even in**

¹I 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 reproof 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

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 reproof 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 reproof 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 &

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

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

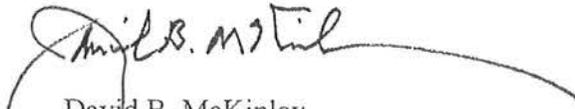
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Thank you again for the opportunity to respond directly to all of you on the Committee's draft proposed report and draft letter. As I have discussed above, the proposed response of a reproof – in whatever form issued by the Committee – is disproportionate 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 reproof is merited here.¹¹

Sincerely,



David B. McKinley
Member of Congress

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



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September 14, 2012

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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.



The Honorable Jo Bonner, Chairman
The Honorable Linda T. Sanchez, Ranking Member
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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.

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.



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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



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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



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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.



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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

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



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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 statute, 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.”



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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

⁶ *Id.*

⁷ *House Ethics Manual*, at page 221 and page 222, Example 32.



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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.



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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-██████ or my colleague Robert L. Walker, at 202-719-██████

Sincerely,

A handwritten signature in cursive script, appearing to read "Jan Baran".

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

Exhibit 2



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COMMITTEE ON ETHICS

May 1, 2013

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The Honorable K. Michael Conaway, Chairman
The Honorable Linda T. Sanchez, Ranking Member
Committee on Ethics
U. S. House of Representatives
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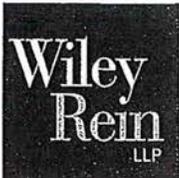
Re: *Committee Request for Information, March 18, 2013*

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 provided, 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 DMB0000020-22.)

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 DMB0000023.) 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 DMB0000006-19.)

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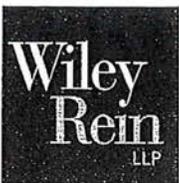
also recalls Rep. Bonner advising him to get in touch with Kelle Strickland, his Counsel for Ethics Committee matters.

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

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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 September 14, 2012, letter (Bates Numbers DMB00000527-38) and as we also describe in our response below to Committee Request 2.

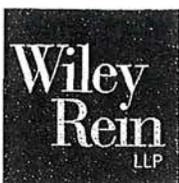
While awaiting a response to the letter to Ms. Strickland – and in conformity with the guidance and framework of understanding provided by Mr. Kaiser – Rep. McKinley continued to take steps preparatory to selling McKinley & Associates, as a legal alternative to changing the company name. Two email exchanges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

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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.



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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

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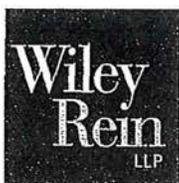
also that the McKinley name must be removed from the company.” (Emphasis added.)

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, 2011, 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



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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 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.

(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

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 letter 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

(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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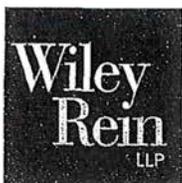
two documents from September 1981 responsive to the Committee's request. The first is a September 1981 report on "Structural Steel Evaluation" undertaken by McKinley Engineering Company for Koppers Company, Inc. in Follansbee, West Virginia. (Bates Numbers DMB00000539-53.) As clearly stated at the beginning 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."



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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 Thanksgiving. 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

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

No virus found in this message.
Checked by AVG - www.avg.com
Version: 10.0.1153 / Virus Database: 424/3246 - Release Date: 11/09/10

No virus found in this message.
Checked by AVG - www.avg.com
Version: 10.0.1170 / Virus Database: 426/3285 - Release Date: 11/28/10

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.

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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 delinquencies, 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 they will have 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 COBG. 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.

Sharon S. Watson
Recorder

Greg Hall
MAYOR

November 4, 1986

The regular meeting 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 maintenance 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	Tctal 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	Bril. both acc's.	\$4,786.28
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