ADOPTED BY THE COMMITTEE ON ETHICS ON SEPTEMBER 27, 2016

114TH CONGRESS, 2ND SESSION
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ETHICS

IN THE MATTER OF ALLEGATIONS RELATING TO REPRESENTATIVE DAVID MCKINLEY

SEPTEMBER 28, 2016

Mr. DENT from the Committee on Ethics submitted the following

REPORT

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ONE HUNDRED FOURTEENTH CONGRESS

U.S. House of Representatives

COMMITTEE ON ETHICS

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September 28, 2016

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

Dear Ms. Haas:

Pursuant to clauses 3(a)(2) and 3(b) of Rule XI of the Rules of the House of Representatives, we herewith transmit the attached report, "In the Matter of Allegations Relating to Representative David McKinley."

Sincerely,

Charles W. Dent
Chairman

Linda T. Sánchez
Ranking Member

C O N T E N T S

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R E P O R T

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

I. INTRODUCTION

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

As a part of its advisory function, the Committee routinely provides new Members with confidential guidance on how to comply with the fiduciary restrictions. EIGA expressly grants the Committee sole authority to administer these restrictions for Members of the House.[3] Thus,

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[1] 5 U.S.C. app. § 502(a).
[2] House Rule XXV, cl. 2.
[3] 5 U.S.C. app. § 503(1)(A).

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

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

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

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

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

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

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

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

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

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

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

[7] 5 U.S.C. app. § 502(a). This Section of EIGA has been incorporated into the House Rules at House Rule XXV, cl. 2.
[8] *See Black's Law Dictionary* 658, 1315 (8th ed. 2004).
[9] 5 U.S.C. app. § 503(1)(A).
[10] *See House Ethics Manual* (2008) at 215 (hereinafter *Ethics Manual*) (*citing* House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101st Cong., 1st Sess. (1989)).
[11] *Id.*
[12] House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101st Cong., 1st Sess. at 16 (1989) (emphasis added).

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

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

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

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

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

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

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

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[13] *Ethics Manual* at 216.
[14] *Id*. at 222 (emphasis added).
[15] *See* House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101st Cong., 1st Sess. at 16 (1989) ("the fact that a Member, officer, or employee is presently associated with a law firm founded by, and still bearing the name of, his father would not require the firm to drop the 'family' name.").

III. BACKGROUND

A. HISTORY OF MCKINLEY & ASSOCIATES[16]

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

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

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

In January 2007, the Firm established a partial ESOP. In an appearance before the Committee, Representative McKinley stated that he formed the ESOP after "my attorney and my financial advisor advised me that as we get older . . . we need to think about ownership transition

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

[17] Representative McKinley Appearance.

[18] Exhibit 1.

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

. . . . because I am not going to practice forever."[20] Representative McKinley explained that he did not want to sell the firm to a larger company, because he believed "they would have picked out the best people, and then everyone else would have been gone."[21] "So, what we did in respect for our employees, out of the three offices, we set up an ESOP."[22] The ESOP purchased 30 percent of the company at that time and "they had the right to purchase the remaining 70 percent."[23]

Upon his election to Congress, Representative McKinley still owned approximately 70 percent of the Firm's common stock, with the remaining 30 percent owned by the Firm's employees under the ESOP. Currently, the ESOP owns 100 percent of the Firm's equity, which it purchased via a loan for which Representative McKinley currently holds the note. (On his Financial Disclosure Statement for 2015, Representative McKinley reported two entries for "McKinley & Associates ESOP Notes Receivable," one worth between $1,000,001 and $5,000,000 and one worth between $100,001 and $250,000.[24] Representative McKinley told the Committee there is "somewhere around $3 million probably left, 3.5 maybe" on the notes.[25]) Representative McKinley also owns the building in which the Firm leases its office space; the Firm leases space back to Representative McKinley for a personal office unrelated to his official duties. Representative McKinley's wife serves as Secretary of the Firm's Board and is a Vice President of the Firm. His daughter-in-law is an employee of the Firm and partial owner of the ESOP, and his oldest son is the ESOP's financial advisor.

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

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

[20] Representative McKinley Appearance.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Representative McKinley Financial Disclosure Statement (2015).
[25] Representative McKinley Appearance.
[26] Exhibit 2. Note that "Eng'r" is a common abbreviation for "Engineer." The abbreviation for "Engineering" is "Eng'g." *See, e.g.*, *The Bluebook: A Uniform System of Citation* (20th Ed.), at Table 6.

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

Representative McKinley worked with his father for approximately two years prior to establishing the Firm in 1981, which ultimately became "custodian of all of the drawings, files, and other assets accumulated" by Representative McKinley's father during his career as an engineer, and also currently serves many of the same clients that his father did.[27] Representative McKinley's letters stress that the name "McKinley" has been associated with engineering services in the Wheeling area since approximately 1950. Representative McKinley, through counsel, has also asserted that the Firm also made several payments to Johnson McKinley, acting as a consultant to the Firm, in the 1980s.[28] However, Johnson McKinley was never on the payroll of the Firm, and maintained his own business when his son started the Firm in 1981.

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

Representative McKinley has told the Committee that on the night of his election to the House, November 2, 2010, one of his corporate consultants "surprisingly asked me, he said, are you sure you are going to be able to continue your relationship with your company?" To answer this question, Representative McKinley turned to Committee staff several days later. On November 5, 2010, following a call with Representative McKinley, Committee staff provided informal guidance via email, which stated staff's opinion that the Firm would need to change its name, based on the legal regime discussed at Section II.[29] While Representative McKinley, in his appearance before the Committee, characterized this informal advice as a "maybe," his reaction at the time made clear that he understood that the guidance was quite clear. As he wrote to associates, "How absurd is that advice. They expect me to change the name of my company!!! . . . I told her that her advice was BS."[30] Later, when an unnamed Committee staff member told Representative McKinley during new Member orientation, on or about November 14, 2010, that he may have to change the firm's name, he replied that the next time they heard from him it would be through his attorney.[31] At this time, Representative McKinley also personally met with the then-Chairman of the Committee, Representative Jo Bonner, and expressed his concerns. Representative Bonner apparently mentioned the possibility of a waiver

[27] Exhibit 3.
[28] This assertion is based solely on Representative McKinley's recollections. Representative McKinley's counsel noted that Representative McKinley does not have access to any payment records from this period, which was over 30 years ago. *See* Letter from J. Baran and R. Walker to Chairman Dent and Ranking Member Sánchez, Apr. 19, 2016, at 1-2.
[29] Exhibit 4 ("The informal opinion of the Committee staff is that these [fiduciary services] restrictions would necessitate changing the name of your firm.")
[30] *See id*.
[31] *See* Exhibit 6 at 7.

– although, because there is no record of the meeting, it is unclear what he meant by that – and suggested that Representative McKinley speak to the then-counsel to the Committee Chairman.

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

This email from the NRCC official was the first of many discussions between Representative McKinley and his advisors about selling his stake in the Firm to obviate some or all of the ethical questions surrounding it. Importantly, as discussed more fully below, Representative McKinley did not inform Committee staff of those discussions until after he had received the Committee's formal opinion that he was required to change the Firm's name, and after he had already agreed to sell the Firm, with the name intact. Further, based on the Committee's investigation, the matter of Representative McKinley selling his stake in the Firm is only partially related to his election to the House or the requirements of EIGA. While it is true that Representative McKinley may have mistakenly viewed full divestment as a solution to the ethical issues the Firm presented for him, it is not the only reason for such a sale. According to statements by the Firm's attorney and its current president, Representative McKinley and others at the Firm had long intended to convert the Firm to a fully-employee-owned business, irrespective of Representative McKinley's political ambitions.[33] Moreover, at least this initial email from the NRCC official recognized that selling the Firm was not likely to remove the requirement to change its name.

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

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

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

A week later, on December 7, 2010, then-Counsel to the Chairman and Committee staff responded to Mr. Kaiser's letter via telephone; Mr. Kaiser memorialized his recollection of that conversation in an email to Representative McKinley, the NRCC official, and an employee of the Firm.[38] Mr. Kaiser explained that the staffers had provided their opinion that the Firm would have to change its name unless it qualified for the "family name exception."[39] He noted that staff suggested that Representative McKinley request a written advisory opinion, but that "[b]ecause the Committee will have a number of similar written advice requests from new Members, it may well take some time to work through all of the opinions and the name can remain the same until the opinion is rendered."[40] Finally, Mr. Kaiser's own words demonstrate that he recognized, at this early juncture, that the question of the name of the Firm was distinct from questions of Representative McKinley's compensation or position on the board of the Firm: "[b]ecause *the 'family name exception' does not eliminate the other two prohibitions* (*i.e.* compensation and management affiliation), I believe that [Representative McKinley] will have to deal with the management structure and ownership of McKinley & Associates, Inc. in any event."[41]

C. REPRESENTATIVE MCKINLEY'S FORMAL ADVISORY OPINION

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

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

[36] Exhibit 10.
[37] Exhibit 1.
[38] Exhibit 11.
[39] *Id.*
[40] *Id.*
[41] *Id.* (emphasis added).

> custodian of all the drawings, files, and other assets accumulated by Johnson B. McKinley over his career as a licensed professional engineer.[42]

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

Additionally, Representative McKinley's request did not refer to any sale of Representative McKinley's interest in the Firm. Rather, the request stated that Representative McKinley would continue to hold his equity "in a blind trust that will be held for so long as he remains a Member of the House of Representatives or otherwise holds an elected federal office."[43] Representative McKinley conceded that the trust arrangement would not, in fact, be blind: "Congressman McKinley will of course know that the trust holds his stock, unless and until sold; however, Congressman McKinley will receive no compensation from McKinley & Associates, Inc. and will not be entitled to exercise voting rights."[44]

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

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

[42] Exhibit 3(emphasis added).
[43] *Id.*
[44] *Id.*
[45] Exhibit 12.
[46] Exhibit 13.

was clear that only the Committee could provide a final and formal opinion on Representative McKinley's written request for guidance.

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

Meanwhile, Representative McKinley's plan to sell his equity in the Firm continued, independently from his interactions with the Committee.[48] On April 11, 2011, Representative McKinley and the ESOP entered into a Memorandum of Understanding (MOU) committing to a sale of Representative McKinley's stake upon a valuation of the Firm's equity.[49] At this time, both Representative McKinley and executives at the Firm understood staff's preliminary guidance that the Firm would need to change its name. Neither the Firm nor Representative McKinley contacted the Committee to notify them of the MOU, the change in plans with respect to the blind trust, or any other aspect of the sale. Nor is there any indication that Representative McKinley told then-Chairman Bonner, when they spoke immediately after Committee staff's March 31, 2011 call with Mr. Kaiser, that Representative McKinley was proceeding with plans to sell the Firm, with the name intact.

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

On June 24, 2011, the Chairman and Ranking Member of the Committee issued an advisory opinion on these questions to Representative McKinley.[54] It is clear from the letter that

[47] Exhibit 14.
[48] Representative McKinley, in a submission to the Committee, argues that, in fact, his plan to sell his stake to the ESOP had been "abandoned" based on the Director of Financial Disclosure's informal, staff-level advice in January 2011. *See* Exhibit 6 at 19. But there is no other evidence that the sale went on hold, or, even if it did, when precisely the process stopped and then started again. For example, Representative McKinley's original request for advice contemplated not a sale of his stake, but the transfer of that equity into a blind trust, and at no point did he correct the record to state that he intended to sell the firm. Moreover, Representative McKinley never explained to the Committee that, because of its informal, staff-level guidance, he was withdrawing any part of his request for formal advice.
[49] Exhibit 15.
[50] Exhibit 17.
[51] Exhibit 16.
[52] *Id.*
[53] *Id.*
[54] *See* Exhibit 21.

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

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

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

As noted above, the conclusion that McKinley Engineering was a name that fit within the family name exception was based on a factual error – the Committee's belief that Representative McKinley's reference to that name as a "predecessor" meant that Johnson McKinley had used that name for his practice. He had not. In an email to his advisers, Representative McKinley noted the Committee's mistake: "This makes no sense. [T]hink about it: McKinley Engineering is OK but McKinley & Associates is a problem. My father's company was not McKinley Engineering and we never represented that it was. That name was the one I used as a sole proprietor for the early years of the company."[56] However, the factual error in the advisory opinion appears to be based largely on the vague and confusing syntax of Representative McKinley's counsel's introduction to the history of the Firm, which described McKinley

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

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

Engineering as a "predecessor" of the Firm and discussed his father's involvement in it in the same breath, without distinguishing between the two. Additionally, when staff contacted Representative McKinley's counsel prior to the issuance of the letter, in order to explain its content, Representative McKinley's counsel did not correct the factual error at that time.

Representative McKinley consulted for a brief period with attorney Stefan Passantino, who contacted Committee staff on August 12, 2011.[57] Mr. Passantino explained that Johnson McKinley had not practiced at "McKinley Engineering," but rather at "J.B. McKinley Engineering."[58] A Committee attorney explained that she was unable to change the factual record upon which the advisory opinion was based, but that Representative McKinley could write to the Committee to explain the misunderstanding.[59] Committee staff further explained that the opinion would not likely be changed absent a significant change in facts.[60] Representative McKinley never did write in to the Committee to correct the record, although he apparently approached Representative Bonner on the floor of the House and stated, "what the [heck] is this," and explained the factual error.[61] According to Representative McKinley, during that conversation, which was several days after the Committee issued its formal advisory opinion, Representative McKinley stated that the Committee's misunderstanding regarding the origins of the Firm's name did not matter anymore "because he had already sold the company."[62]

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

D. FURTHER COMMITTEE ACTION AND INQUIRY

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

> The Committee expects you to change the name of the Firm, as directed. Failure to do so may be viewed as a knowing violation of the Ethics in Government Act and House Rule XXV, clause 2, and

[57] *See* Exhibit 20.
[58] This contention is consistent with representations by Representative McKinley's current counsel, but is not supported by a review of corporate records that McKinley & Associates itself performed. *See* Exhibit 2.
[59] Exhibit 20.
[60] *Id.*
[61] Exhibit 6 at 23.
[62] *Id.*; Exhibit 22 at 6.
[63] Exhibit 19 at 5.

> may result in further proceedings against you by the Committee. The Committee thus requests a detailed explanation of the status of your efforts to change the name of the Firm, and what that name will be. If the Firm intends to use the name McKinley Engineering, please inform the Committee how the Firm will indicate the clear association between the name and your father.[64]

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

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

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

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

[64] Exhibit 23 (Letter from Chairman Bonner and Ranking Member Sanchéz to Representative McKinley, Aug. 24, 2012, at 1).
[65] *Id*. at 4.

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

The Committee sent separate requests for information to Representative McKinley and the Firm on March 18, 2013. Representative McKinley responded on May 1, 2013, providing a 30-page letter and 554 pages of documents. In his response, Representative McKinley repeated his assertion that he acted in good faith and on the advice of counsel in selling the Firm. He argued that the months-long history of his interactions with the Committee and its staff left him with the impression that he had resolved ethics concerns regarding the Firm. He also argued that, while Johnson B. McKinley never worked as an on-the-payroll employee of the Firm, he assisted his son on two projects in 1981, and that "Johnson B. McKinley's interest and activities in assisting his son's business did not depend on compensation, so to focus exclusively on records of financial compensation in this context is to focus too narrowly."[67]

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

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

Representative McKinley has been on notice of the Committee's intent to resolve this matter since July 2015. But Representative McKinley did not personally review the proposed resolution until November 2015, and did not offer a substantive written response to the Committee's proposed resolution of the matter until February 2016. In June 2016, the Committee invited Representative McKinley to appear before the Committee in July 2016 to be heard in person. Representative McKinley informed the Committee that he did not believe that

[66] *Id.*
[67] Exhibit 6 at 28.

was sufficient time for him to prepare and asked if he could appear in September 2016, instead. The Committee granted that request, subject to a clear written caution that if he chose that course the blackout rule would not apply to any final resolution of the matter. Representative McKinley chose to delay his appearance until September 2016. Although he appeared before the Committee prior to the start of the blackout period, the Committee's deliberations continued into the blackout period, and the Committee concluded its deliberations and voted to approve the final resolution within the blackout period.

IV. FINDINGS

A. EIGA SECTION 502 AND HOUSE RULE XXV

Representative McKinley and his counsel have argued that the Committee's initial advisory opinion contained factual errors and legal infirmities, and should be revised to permit the Firm to continue to operate as "McKinley & Associates." His arguments boil down to three points: (1) that the Committee made a factual error when it stated that "McKinley Engineering" was a family name, given that Johnson McKinley never used that name in his practice; (2) that the "McKinley" in "McKinley & Associates" should be read to include Johnson McKinley, because of the McKinley reputation in the West Virginia engineering and design community, and because of Johnson McKinley's role in assisting his son's practice; and (3) that the statute and House Rules should be read to permit the use of the name in this case, where the danger of a conflict of interest is low. The Committee has reviewed his arguments, and judged them either incorrect in their own right, or insufficient to affect the outcome.

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

[68] Representative McKinley Appearance (emphasis added).

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

Johnson McKinley's reputation, no matter how sterling, cannot retroactively stand in for the "McKinley" for whom the Firm is actually named. Johnson McKinley was never on the Firm's payroll. He kept his own practice when his son started the Firm in the 1980s. He did not appear on the Firm's letterhead and, to the best of anyone's recollection, never served as anything more than an outside advisor or consultant. The Firm does not use a family name. It uses Representative McKinley's name. EIGA prohibited that use the moment he became a Member of Congress.

Third, Representative McKinley argues that, because the Committee has expansively interpreted or applied Section 502 in other areas – specifically, medicine – the Committee should engage in a flexible reading of the statute in this case, to reach the conclusion that the Firm's use of "McKinley & Associates" does not pose a risk for "trading on the prestige of [a] Member[]."[69] Representative McKinley believes such a risk is low because the McKinley name is associated not only with him but with his father and ancestors, and also because architectural services do not pose the same hazards in this regard as certain other fiduciary industries such as law or lobbying.[70] This argument – which amounts to a request for a waiver – fails for at least three reasons. First, the arguments about the "McKinley brand" simply restate the arguments discussed above, and fail for the same reason. Second, while it may be true that an architect may not be as susceptible to the problems Section 502 was intended to address as some other professionals, the risk still exists that a Member will have some level of divided loyalty. Further, it is not inconceivable that an architecture firm could trade on the prestige of a Member of Congress – governments, after all, do build buildings from time to time. Finally, with respect to

[69] Exhibit 19 at 10-11.

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

the Committee's guidance on the practice of medicine, the Committee has created a limited exception to the *compensation ban*, insofar as Members who are doctors accept fees for medical services that do not exceed the "actual and necessary expenses incurred" by the Member in connection with the practice.[71] The Committee created this waiver because doctors must continue to practice to keep their licenses intact in some situations, and to maintain insurance coverage. Notably, though, the waiver *does not extend to the ban on using the Member's name*, and the Committee has historically advised Members who are doctors that their practices must remove mention of their name upon their election.

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

B. HOUSE RULE XXIII, CLAUSES 1 AND 2

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

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

If Representative McKinley had relied instead on the advice provided by the Committee there would be little question of the protection such reliance would have afforded him. Such protection is, as mentioned above, written into the Committee Rules and EIGA.[73] Indeed, the Committee takes very seriously its obligation to provide sound and dispassionate advice to the Members of this House. Nothing in this Report should be read to discourage Members from coming to the Committee with their questions about the ethical ramifications of their conduct, and the Committee has historically helped a great many Members achieve the goals of their work while keeping within the boundaries of the rules and the law.[74] The disclosure in this Report of Representative McKinley's appeals to that process is not in any way a repudiation of the

[71] *Ethics Manual* at 387.
[72] *See* Committee Rule 3(k) ("The Committee may take no adverse action in regard to any conduct that has been undertaken in reliance on a written opinion if the conduct conforms to the specific facts addressed in the opinion").
[73] Committee Rule 3(k); 5 U.S.C. app. § 503(1)(A).
[74] Comm. on Ethics, *In the Matter of Allegations Related to Representative Tom Petri*, H. Rept. 113-666, 113th Cong. 2d Sess. at 9 (2014) (hereinafter *Petri*).

Committee's longstanding commitment to providing Members with confidential counsel[75] and safe harbor for acting in good faith in response to the Committee's advice.[76] On the contrary, the only way the Committee can retain credibility in performing these services for Members is to publicly address those rare situations in which Members disregard the Committee's advice or fail to disclose full and accurate facts during the advisory process. Such is the case here.

However, relying on the advice of one's private counsel, while it does not confer the same sort of safe harbor as reliance on the Committee, can potentially mitigate the seriousness of a violation, insofar as it makes it less likely that a Member acted in bad faith. Members of Congress are entitled, as all Americans are, to consult with an attorney to inform their decision-making about a variety of situations. In other contexts, courts have held that where someone "(1) fully disclosed all material facts to his attorney before seeking advice, and (2) actually relied on his counsel's advice in the good faith belief that his conduct was legal," such reliance on the advice of counsel might show an absence of wrongful intent or bad faith.[77] The evidence suggests that Representative McKinley did indeed disclose all pertinent facts to Mr. Kaiser, and Representative McKinley appears to have actually relied on the advice Mr. Kaiser gave him. However, neither Representative McKinley nor Mr. Kaiser ever disclosed a key fact *to the Committee* when seeking the Committee's guidance on the Firm's name: the fact that if Representative McKinley did not get the answer he wanted from the Committee, he intended to sell the firm, with his name attached, to the ESOP.

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

[75] *See* Committee Rule 7.
[76] *See* Committee Rules 3(k), (l); *Petri* at 6-9.
[77] *See, e.g.,* See *United States v. Rice*, 449 F. 3d 887, 897 (8th Cir. 2006); *see also United States v. West*, 392 F. 3d 450, 447 (D.C. Cir. 2004) ("A defendant may avail himself of an advice of counsel defense only where he makes a complete disclosure to counsel, seeks advice as to the legality of the contemplated action, is advised that the action is legal, and relies on that advice in good faith.")
[78] *See* Exhibit 22.
[79] *See, e.g.*, Comm. on Ethics, *In the Matter of Representative Don Young*, H. Rept. 113-487, 113th Cong. 2d Sess (2014); Comm. on Ethics, *In the Matter of Allegations Relating to Representative Shelley Berkley*, H. Rept. 112-716, 112th Cong. 2d. Sess. (2012).
[80] The actions of Representative McKinley's attorney suggest that even he may not have believed that selling the Firm would resolve the legal prohibition against continuing to provide fiduciary services while using the Member's name. On April 14, 2011, just three days after Representative McKinley agreed to sell the Firm, Mr. Kaiser sent a letter to Committee staff with additional arguments for the claim that engineering and architecture are not fiduciary services. If Mr. Kaiser believed that selling the Firm resolved these issues – and actually made it impossible for Representative McKinley to change the Firm's name – the natural reaction would have been to inform the

that he could not sell the Firm with his name attached. Representative McKinley's failure to ask this question is inexplicable in light of the advice he had previously solicited and received from a former Committee counsel – who was the counsel to two former Committee Chairmen – that he would likely have to change the Firm's name to sell it.

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

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

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Committee of the sale and withdraw the request for a formal Advisory Opinion. Instead, Mr. Kaiser continued to argue that Representative McKinley was not required to change the Firm's name.

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

[82] *See id*.

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

[84] 5 U.S.C. app. § 502(a).

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

would have informed him, had he only asked.[86] In these circumstances, Committee precedent holds that a public reproval is appropriate.[87]

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

C. EIGA SECTION 501

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

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

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

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

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

V. CONCLUSION

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

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

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

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

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

[89] 5 U.S.C. app. §503(1)(A).