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January 22, 2014

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

*Re: Response to OCE Report and Findings*

Dear Chairman Conaway and Ranking Member Sánchez:

On behalf of our client, The Honorable Markwayne Mullin, we thank you for the opportunity to respond to the Report and Findings of the Office of Congressional Ethics ("OCE") regarding entirely meritless allegations that Representative Mullin may have violated House standards of conduct in connection with income received from and activity engaged in for his family businesses. Through this response submitted on his behalf, Rep. Mullin emphasizes the following:

- This is an advisory matter. The OCE should never have processed it as an investigative matter. The OCE referral, therefore, should be dismissed promptly
- With respect to his family business interests and activities, Rep. Mullin has at all times endeavored to act consistently with the guidance he sought and received from the Committee.
- All income received by Rep. Mullin from his family businesses in 2013 was through distributions from those businesses. None of this income was earned income or income in connection with services to those businesses, but the OCE grossly exaggerates the amount which could even arguably be viewed as earned or as personally received in connection with services.
- If the Committee were to view any of the income to Rep. Mullin as in connection with services to his family businesses, the services were to manage and protect a Member's equity in a family trade or business that both House Rule 25, clause 4(d)(1)(D), and related Committee guidance specifically exclude from the definition of earned income.



January 22, 2014

Page 2

- This exclusion applies equally to any amount which could even arguably be viewed as compensation to Rep. Mullin for his participation in radio and television advertisements for his family businesses.
- If some portion of the distributions received by Rep. Mullin from his family businesses were viewed as compensation for – and as earned income from – his participation in advertisements for these businesses in 2013, there is no reasonable basis to conclude that the amount to be allocated for such compensation either exceeded or reached the outside earned income cap of \$26,955 for 2013.

**This is an advisory matter, not an investigative matter; the OCE referral should be dismissed promptly.**

This matter should never have come before the Committee in an investigative posture. Consistent with the effective manner and framework through which Rep. Mullin and the Committee have addressed such questions since his election to the House in November 2012, any remaining questions regarding Rep. Mullin's income from his family businesses<sup>1</sup> should continue to be addressed by the Committee through its advisory process.

As the Committee is aware – and as Rep. Mullin explained in his November 8, 2013, letter to the OCE – on November 26, 2012, Rep. Mullin met with Committee Counsel Tom Rust (now Interim Chief Counsel and Staff Director) and Committee Counsel Heather Jones regarding his family business interests. The meeting apparently included discussion of such matters as ownership structure, forms of income, and participation in advertising. Since this November 2012 meeting Rep. Mullin has at all times endeavored to act consistently with the guidance from the Ethics Committee. As just one example, the ownership and management of Mullin

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<sup>1</sup> The Mullin family businesses are: Mullin Plumbing, Inc.; Mullin Plumbing West Division, Inc.; Mullin Plumbing New Construction, Inc.; Mullin Services, Inc.; and Mullin Environmental, Inc. These Mullin family businesses have all grown from a plumbing business founded by Rep. Mullin's father. The Mullin family businesses operate primarily in Oklahoma and, together, employ over 120 people. Each Mullin family business is organized and operates as a Subchapter S corporation. With the current exception of Mullin Plumbing West Division, Inc., each Mullin family business is solely owned by Rep. Mullin and his wife, Christie Renee Mullin; as of January 1, 2013, Mullin Plumbing West Divisions has been owned solely by Christie Renee Mullin.



January 22, 2014

Page 3

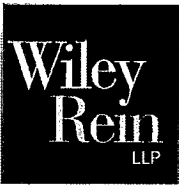
Plumbing West was restructured based on potential concerns raised by Ethics Committee staff regarding this entity's participation as a subcontractor on a federal contract (see footnote 5 below regarding issues in connection with this guidance). Overall, the Mullin family business entities spent thousands of dollars and substantial business hours to implement and conform to guidance from the Committee. Clearly, Rep. Mullin was willing to comply fully with Ethics Committee guidance and to pay the costs – in time and money – to do so. Significantly, however, Rep. Mullin does not recall Ethics Committee staff raising any concerns to him, or to others on his behalf, with respect to any outside earned income issues that would or could arise from proposed continuing activities by him – including advertising – in connection with his family businesses.

As Rep. Mullin wrote to the OCE, in trying to manage and protect his family he has “been caught in the middle between the Ethics Committee acting in an advisory capacity and the OCE acting in an investigative capacity.” As Rep. Mullin further wrote to the OCE, “if the procedural rules of the Committee and of the OCE allowed them to communicate with each other – even informally – about this matter,” it would have been resolved and would have gone away simply and quickly. Now that this matter is before the Committee, Rep. Mullin urges the Committee to handle it through the appropriate advisory process and dismiss the OCE referral promptly and decisively.

As further reason to dismiss the OCE referral regarding Rep. Mullin promptly, the OCE – in its investigation, in its Report, and in its so-called Findings of “Fact” – got so much wrong, factually, legally, and analytically.

**The OCE analysis grossly exaggerates the amount of income personally received by Rep. Mullin from the family businesses; the bulk of the amount found by OCE were payments by the businesses to meet their tax obligations and other business expenses.**

Factually, the OCE's findings are grossly incorrect respecting the amount of income received personally by Rep. Mullin from the Mullin family businesses in 2013. The OCE states at page 14 of its Findings that “Representative Mullin received over \$600,000 of income from the plumbing companies in 2013.” This inaccurate account of income personally received by Rep. Mullin from the family businesses in 2013 appears to be the principal basis for OCE's misplaced concerns and



January 22, 2014

Page 4

erroneous conclusions regarding whether Rep. Mullin received earned income in 2013 in excess of permissible limits.

What the OCE fails to explain in its Findings – and what the OCE apparently failed to explore with the appropriate witnesses during its investigation – is that, except for \$95,000, none of the “over \$600,000” discussed by the OCE in its Report and Findings was income personally received by Rep. Mullin. The OCE’s mistaken accounting regarding income may have arisen from a failure to understand or appreciate how Subchapter S corporations are owned and operated. To simplify a great deal, in Subchapter S corporations – such as each of the Mullin family businesses under consideration here – payment of the corporation’s tax obligations and other business expenses “flow through” the individual owners/shareholders of the corporation. Thus, with respect to the Mullin family business corporations, of the “over \$600,000” attributed as income to Rep. Mullin in 2013 by the OCE, the following amounts actually satisfied tax and other obligations of the business corporations:

\$387,425.00 – tax payments to the IRS and to the Oklahoma Tax Commission

\$69,983.44 – payments to Rep. Mullin’s father for purchase of the business

\$87,702.00 – for purchase of rental properties

For tax and accounting purposes, these payments were treated as distributions to Rep. Mullin. Nonetheless, they were business payments and expenditures of the corporations. In fact, all checks for payments and expenditures included in the above-cited totals went directly from the paying corporations to the payees and not to Rep. Mullin. Certainly, therefore, none of these payments or expenditures constituted “earned income” to Rep. Mullin as that term is used by the Committee.<sup>2</sup>

Likewise, neither the total of \$40,000 in monthly distributions from Mullin Plumbing West through August 2013 nor the total of \$55,000 in monthly distributions from Mullin Plumbing through August 2013 constituted “earned

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<sup>2</sup> “‘Earned’ income is income that constitutes compensation for services.” *House Ethics Manual*, page 212. For 2013, Members were subject to a cap on outside “earned income” of \$26,955.



January 22, 2014

Page 5

income” to Rep. Mullin subject to the \$26,955 cap.<sup>3</sup> First, these amounts were distributions, not compensation, salary, or earned income; these amounts were

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<sup>3</sup> Although none of the distributions or payments under discussion in this response (and focused on by the OCE in its Report or Findings) constituted “earned income” to Rep. Mullin, it is worth noting that, in this matter – which involves family owned businesses only – the rationales historically articulated by the Committee as giving purpose to the earned income limitations simply do not apply. The Committee has stated: “The fundamental purpose of the restrictions and limit [on earned income] is to ensure that Members and staff do not use the influence or prestige of their position with the House for personal gain, and to preclude conflicts of interest.” (*House Ethics Manual*, page 212.) In further explanation of the purposes intended to be served by the restrictions on outside earned income, the Committee quotes the following passages from the legislative history behind the imposition in 1977 of an annual limitation on outside earned income:

Earned income creates a variety of more serious potential conflicts of interest than does investment income, ranging from overt attempts to curry favor by private groups to subtle distortions in the judgment of Members on particular issues. . . . The Member who has stock holdings can transfer his holdings at any time to another company, and, thus, is not as subject to the same degree of potential conflict as a Member who’s . . . salary [from a private company] could be cut off arbitrarily.

Outside earned income also presents a “time conflict” between the Member’s private interest and the public interest. Supplementing salary with outside earned income can detract from a Member’s full time and attention to his official duties and creates subtle distortions in judgment as to how Members should use their time. . . .

Moreover, many citizens perceive outside earned income as providing Members with an opportunity to “cash in” on their positions of influence. Even if there is no actual impropriety, such sources of income give the appearance of impropriety and, in so doing, further undermine public confidence and trust in government officials

(*House Ethics Manual*, pages 212-213, citing Commission on Administrative Review, *Financial Ethics*, H. Doc. 95-73, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 10 (1977).

With respect to the activities of Rep. Mullin in connection with his family businesses, and with respect to any income received by him from those business, there has been no allegation or suggestion – from the OCE, or from any other source – either (1) that such activities or income create a danger of a conflict of interest (i.e., there is no concern here about an outside group currying favor with the Member or subtly distorting his judgement), (2) that such activities create any degree of “time conflict” with the Member’s public and official duties, or (3) that the Member has been, or has been perceived to be, “cashing in” on his official position. Therefore, even if there had been outside income earned by Rep. Mullin in excess of the \$26,955 limit in 2013, it would not have been in violation of any of the purposes or policies underlying those income limits. This is yet another reason why the OCE’s treatment of this as an investigative matter is a purely formal and abstract exercise and why, therefore, the OCE referral should be dismissed promptly.

January 22, 2014

Page 6

profits on Markwayne Mullin's and Christie Mullin's ownership of these two successful businesses. Second, even if any portion of these amounts were treated as compensation or salary for "services" by Rep. Mullin to Mullin Plumbing or Mullin Plumbing West, House Rule 25, clause 4(d)(1)(D) excludes from the definition of "outside earned income" amounts received from a family-controlled trade or business. Third, any and all activities or services rendered by Rep. Mullin in connection with these family businesses in 2013 – including any activities in connection with advertising – were the kind of "services to manage or protect [his] equity in a family trade or business" that the Committee, in explaining the exclusion for amounts received from a family trade or business, has clearly and specifically stated may be performed by a Member "without having to allocate these personal services toward the 15-percent limitation" on outside earned income (i.e., \$26,955 in 2013).<sup>4</sup>

**The total of \$95,000 in monthly payments from Mullin Plumbing and Mullin Plumbing West were distributions reflecting reasonable returns on equity.**

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<sup>4</sup> See generally *House Ethics Manual*, at pages 229-230 for the Committee's discussion of the exclusion from the definition of outside earned of amounts received from a family trade or business. In its Report and Findings the OCE confuses the analysis of this matter by citing not only to this relevant Committee guidance on the specific and distinct situation where income is received from a family trade or business, but by citing also to the Committee's discussions of "Personal Services Businesses" and "Close Corporations, Partnerships, and Unincorporated Businesses." (See, e.g., OCE Findings at page 7.) However, whatever the Committee's published guidance may say about income in these more general contexts of "Personal Service Businesses" and "Close Corporations" is irrelevant to Rep. Mullin's matter because this matter is covered *only* by the specific and distinct rule, guidance, and discussion applicable to income from a family trade or business. In matters of statutory interpretation, application, and enforcement – including interpretation, application, and enforcement of the House ethics rules – the specific trumps the general. This principle of application and interpretation is illustrated here by the fact that the Committee's guidance on "Personal Services Businesses" generally states: "Even when the Member performs no personal services, it is presumed, lacking a strong showing to the contrary, that the Member's share of profits from a service business is for attracting or retaining clients and thus is considered earned income." The OCE's misguided analysis of this matter relies heavily on this presumption. Yet this presumption is clearly inapplicable in the family trade or business context given that, in its more specific guidance relating to family trades and businesses – including, as in this matter, a "trade or business in which both personal services and capital are income producing factors" (*House Ethics Manual*, page 229) – the Committee states that a Member may "render personal services . . . without having to allocate those services toward the [earned income] limitation."



January 22, 2014

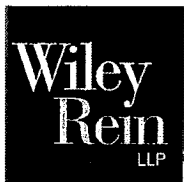
Page 7

The total of \$40,000 received from Mullin Plumbing West and of \$55,000 from Mullin Plumbing through August 2013 were distributions reflecting return on equity; these amounts were not earned income. As a general matter, owners of Subchapter S corporations have great latitude in determining when to take a distribution from the corporation and in what amount. Given the overall value of Mullin Plumbing and Mullin Plumbing West – the disclosed value for each of these entities on Rep. Mullin’s most recent annual public financial disclosure form was in the \$500,001 to \$1,000,000 range – distributions from these companies to the Mullins personally totaling \$95,000 through August 2013 were entirely reasonable as returns on equity. With respect specifically to the distributions from Mullin Plumbing West, the OCE, in the Conclusion to its Findings, at page 17, offers as one “reason to believe that the income [Rep. Mullin] received is earned income” that “his ‘distributions’ from the company his wife owns [Mullin Plumbing West] are not a return on any equity that he holds” in that company. But the monthly amounts of \$5,000 (totaling \$40,000 through August 2013) from Mullin Plumbing West were deposited directly from Mullin Plumbing West into a joint bank account of Markwayne Mullin and Christie Mullin. Therefore, these amounts from Mullin Plumbing West were appropriate distributions to, and returns on the equity in Mullin Plumbing West of, Christie Mullin, in which Rep. Mullin appropriately shared as a joint holder of the account receiving the distributions.<sup>5</sup>

**Rep. Mullin did not engage in any services which “in and of themselves” generated any significant amount of income for the Mullin family**

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<sup>5</sup> It should be noted that Rep. Mullin transferred his ownership interest in Mullin Plumbing West to his wife after his election to Congress based on guidance he received from Ethics Committee staff. It appears that Ethics Committee staff provided this guidance because Mullin Plumbing West participates as a subcontractor on a federal government contract and because, pursuant to the federal criminal law at 18 U.S. Code Sections 431 and 432, a Member of Congress may not enter into a contract or agreement with the U.S. Government. It appears that Committee staff may have believed that transfer of Rep. Mullin’s ownership of the Mullin Plumbing West corporation to his wife was needed for him to avoid liability under this criminal provision. However, authoritative interpretation and application of the statute makes clear that a Member of Congress may be a stockholder, even a principal stockholder, of a corporation holding a federal government contract without incurring liability. Although these authoritative sources state that participation in a federal contract through a *partnership* would not mitigate potential criminal liability, there is no basis to believe that participation in such a contract through a Subchapter S Corporation would fall outside the clear “safe harbor” for corporate ownership. See, e.g. 22 U.S. Opp. Off. Legal Counsel 33 (1998). Thus, it appears that Rep. Mullin may have foregone his direct ownership interest in Mullin Plumbing West based on erroneous advice from Ethics.



January 22, 2014

Page 8

**businesses. His services were subject to the family trade or business exclusion from the definition of “outside earned income.”**

House Rule 25, clause 4(d)(1)(D) excludes from the definition of “outside earned income” amounts received from a family-controlled trade or business. With respect to this exclusion from outside earned income, Committee guidance states that “Members should be able to render personal services to manage or protect their equity in a family trade or business without having to allocate these personal services toward the 15-percent limitation.” (*House Ethics Manual*, at page 230.) The Committee has explained that the exclusion was “intended to assure Members . . . that they could continue to make decisions and take actions necessary to manage or protect their equity in a family trade or business.” (House Committee on Ethics, *Advisory Opinion No. 13* (Oct. 1978), reprinted in updated form in the *House Ethics Manual*, at pages 364-371.) The Committee has also noted, however, that if the personal services rendered by a Member in connection with a family trade or business, “*in and of themselves*, generate any significant amount of income, the resulting income should be subject to the . . . limitation.” (*House Ethics Manual*, at page 230; emphasis added.)

In the family trade or business context, what does the Committee mean by services which “in and of themselves” generate a significant amount of income? It can only mean services which directly generate fees through external transactions with clients or customers, as opposed to internal services to the family trade or business itself which may indirectly result in income to the trade or business. No other meaning is consistent with the Committee’s overall permission to Members to remain actively involved (i.e., “to make decisions and take actions”) in the oversight of a family trade or business and in maintaining and growing their equity in that business.

In 2013, Rep. Mullin did not engage in any personal services which, “in and of themselves,” generated a significant amount of income for the Mullin family businesses. He rendered no plumbing services to customers. He did not do hiring or firing for the companies. He did not manage the purchasing or deployment of personnel or equipment for the companies. He did not manage Mullin Plumbing or Mullin Plumbing West on a day-to-day basis in 2013. Robert Morris was Chief Executive Officer and Ray Trimble was Chief Operating Officer of Mullin Plumbing throughout 2013; Daniel Ice was Chief Executive Officer of Mullin Plumbing West. In 2013, Rep. Mullin did engage in the kind of regular but general





January 22, 2014

Page 9

management and oversight activities for his family companies that are clearly permitted by the House rule, and related guidance, on outside income and that are excluded from the earned income calculation.

**Rep. Mullin's advertisement-related activities for the Mullin family businesses were equally subject to the family trade or business exclusion from the definition and determination of earned income. If the Committee were to determine that some portion of the distributions received by Rep. Mullin should be viewed as compensation for participation in advertisements, there is no reasonable basis to conclude that the amount to be allocated for such compensation exceeded the earned income cap of \$26,955 for 2013.**

With respect to any participation in television or radio advertisements (or in the home-related radio program) by Rep. Mullin on behalf of his family businesses in 2013, such participation is also excluded from the kind of services which "in and of themselves" generate income.<sup>6</sup> Although these ads (and programs) are public, and although these ads presumably do sustain and generate awareness of the Mullin plumbing businesses, they are not the kind of transactions with clients or customers which directly, in and of themselves, generate fees. To the contrary, because these ads maintain public awareness of the Mullin name in connection with the family businesses – a name which is the bedrock of the family's equity in those businesses – these ads are clearly the sort of "actions necessary to manage or protect . . . equity in a family trade or business" that the House rule and Committee guidance on income permit. Rep. Mullin's participation in these ads (and programs), therefore, does not constitute the kind of service which – in the family trade or business context – counts towards the earned income limit.

Even if Rep. Mullin's participation in the ads and programs were treated as services subject to the earned income limit, the time spent by Rep. Mullin in 2013 was minimal. Likewise, any compensation that could be viewed as coming from his participation in these ads and programs would be minimal. Without providing a specific and detailed accounting, the total production time spent by Markwayne Mullin in connection with radio and TV ads in 2013 appears to have been approximately 10 hours. As to the hour long House Talk home-related radio

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<sup>6</sup> Counsel understands that the "internet videos" referred to by the OCE in its Findings were repurposed television advertisements and that creation of these videos did not involve additional time or services by Rep. Mullin.



January 22, 2014  
Page 10

programs, although these programs aired weekly, Rep. Mullin did not appear in every one. Assuming for the purposes of analysis, however, that he appeared in almost every one of these programs, his total time of participation would be no more than 50 hours for the year.

For a total of approximately 60 hours of participation by Rep. Mullin over the course of 2013 in ads and programs, the Committee would have to determine what portion of the monthly distributions received by Rep. Mullin, directly or indirectly, from the family businesses in 2013<sup>7</sup> should be attributed as compensation for this participation. For this total participation of approximately 60 hours, there would be no reasonable basis for the Committee to attribute anything approaching \$26,955 as compensation. Therefore, even if Rep. Mullin's services in connection with ads and programs for the Mullin family business were outside the exclusion for services by a Member in connection with managing and protecting equity in a family trade or business, any arguable amount of compensation for these services would certainly fall within the permissible outside earned income limit. Further, going forward a similar level of continued participation by Rep. Mullin in advertisements and programs for the Mullin family businesses would be consistent with and fall within the earned income limit.

Rep. Mullin greatly appreciates the Committee's prompt consideration of this matter and urges the Committee to dismiss the OCE referral with equal promptness. If the Committee or its staff have any follow up questions or wish to discuss any aspect of this response, counsel is available at the Committee's or staff's convenience.

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<sup>7</sup> These distributions totaled \$95,000 through August 2013 from Mullin Plumbing (\$55,000) and Mullin Plumbing West (\$40,000), as noted above.



January 22, 2014  
Page 11

We thank you again for your careful consideration of this response.

Sincerely,

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

Jan Witold Baran  
Counsel for Rep. Mullin

A handwritten signature in black ink, appearing to read "Robert Walker". To the right of the signature are the initials "JWB".

Robert L. Walker  
Counsel for Rep. Mullin