June 17, 2022

Office of Government Ethics
1201 New York Avenue NW, Suite 500
Washington, DC 20005

Re: Office of Government Ethics Proposed Rule—Legal Expense Fund Regulation; RIN 3209-AA50; 87 Fed. Reg. 23769-23780 (April 21, 2022)

To Whom It May Concern:

The National Employment Lawyers Association (NELA) respectfully submits the following comments concerning the Office of Government Ethics' (OGE) Proposed Rule—Legal Expense Fund Regulation, as published in the Federal Register at 87 Fed. Reg. 23769-23780 (April 21, 2022). NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. Our mission is to advance worker's rights and serve lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have faced illegal treatment in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws and comments on relevant proposed rules. NELA also engages in legislative advocacy on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees. NELA, therefore, has an interest in regulations affecting both federal employees and the operations of NELA members who represent federal employees.

NELA previously commented on November 5, 2019, in response to OGE's Advance Notice of Proposed Rulemaking, RIN 3209-AA50 84 Fed.Reg. 15,146-15,147 (April 15, 2019). NELA stands by its prior comments and further wishes to raise the following concerns based on the experience of NELA members in representing federal employees

NELA opposes the proposed rule (in particular, proposed 5 C.F.R. §§ 2635.1007, 2635.1009), which requires the disclosure of terms of representation and funding sources for most subject employees, because it forces disclosure of this privileged and confidential information. NELA believes that the proposed rule, as written, improperly invades the privileged attorney-client relationship and the power of the judicial branch to govern the bar, by interfering with the structure of the attorney-client relationship and requiring disclosures of confidential information to the very agency, that in the context of such disclosure is the opponent of the federal employee client(s). Such confidential information includes the terms of retainer agreements between attorneys and clients and the client's funding arrangements for paying for representation. NELA is committed to the preservation of the attorney-client privilege and the work product doctrine and opposes governmental policies, practices, and procedures that have the effect of eroding these protections. Information concerning the financial arrangements underlying legal representation implicates

issues of privileged attorney-client communications and attorney work product privilege, which must be protected from disclosure.

The requirement under proposed 5 C.F.R. §§ 2635.1007(a)(2) to publicly disclose to the opponent party agency the "date(s) of distribution, amount, and purpose of any distribution from the legal expense fund exceeding $250 during the quarterly reporting period" is also problematic because it requires the subject employee to report to the opposing party agency a portion of confidential billing statements, which often contain privileged and confidential attorney-client communications and attorney work product.

Compounding the problems set out above, the disclosures under proposed 5 C.F.R. § 2635.1007 are to be placed in a publicly searchable database under proposed 5 C.F.R. § 2635.1007(g). Thus there would be no restriction whatsoever on this financial disclosure information being provided directly to the attorneys representing the opposing party agency (to be then used to the benefit of that agency and the detriment of the employee). Disclosure of such privileged information to the client's opponent (here, the employing agency of the client) puts the client at strategic disadvantage, especially while representation is ongoing. For example, if the opposing party agency learns that a hypothetical client is on an hourly representation basis and has limited funds available for representation, that information can be used to prejudice the client in the opposing party agency's litigation and settlement strategy.

Additional formal regulation (in the form of amendments to the Code of Federal Regulations) is not necessary to address OGE's concerns. OGE's core concerns—corruption or the appearance of corruption caused by payments being made by improper sources to federal employee recipients—are thoroughly addressed in existing OGE regulations. Present OGE regulations (for example, the definitions for gifts under 5 C.F.R. §§ 2365.203(b, f)) already cover many "legal expense fund" situations because they cover situations where a federal employee is given money, irrespective of whether or not the money is allegedly for use in covering legal expenses (or any other purpose). The present OGE regulations address OGE's core concern about improper sources of gifts creating (the appearance of) corruption, while avoiding unnecessary regulation of the means of provision of those gifts (sensibly, as regulations focused on payment methods rather than sources could be more easily circumvented). If corruption or appearance of corruption is the concern animating the proposed rule, a simple restriction focused on prohibiting donations from impermissible donors (for example, prohibiting acceptance of funds from those funding sources who fail to meet the definition of "permissible donors" under proposed 5 C.F.R. § 2635.1006(b), or alternatively from prohibited sources as defined in present 5 C.F.R. § 2635.203(d)) would be sufficient to address OGE's concern without violating attorney-client privilege. Thus, there is absolutely no need for this rule or for these disclosures to address the stated concerns of OGE.

If the OGE wishes to focus on the purpose for a gift in order to restrict it, OGE should consider use of subregulatory guidance as the best vehicle for addressing its concerns, by explaining in layman's terms the proper application of preexisting OGE restrictions on payments from improper sources to legal expense funds, rather than creating unnecessary new regulations. An example of this sort of guidance document is OGE Legal Advisory LA-19-01, "Ethics Guidance for Employees in Non-Pay Status During a Lapse in Appropriations" (February 15,

2019). OGE Legal Advisory LA-19-01 provides guidance based on current OGE regulations, contextualized in a form accessible to federal employees. OGE Legal Advisory LA-19-01 also did not require a formal revision of the CFR, instead explaining how the preexisting OGE CFR provisions applied to the situation of concern. A plain-language guidance document similar to OGE Legal Advisory LA-19-01—such as, for example, a more expanded and plain-language version of OGE Legal Advisory LA-17-10 (September 28, 2017)—would also have the advantage of plain-language drafting contextualized to the relevant circumstance of "legal expense funds," making OGE's guidance more accessible to lay federal employees and thus helping to facilitate compliance.

The proposed rule further creates a moral hazard (if not an outright conflict of interest) by delegating approval authority for legal expense funds and for *pro bono* representation agreements in most cases to agents of the opponent party agency, who must approve such arrangements in most cases prior to representation commencing. *See* proposed 5 C.F.R. §§ 2635.1004(g)(1), 2635.1009(b). This creates a conflict of interest that would incentivize the opposing party agency to withhold or delay approvals under the regulations to benefit its position in litigation, especially in cases where the subject employee may be facing imminent deadlines.

The proposed rule is further objectionable in requiring approval of the opposing party agency of *any pro bono* representation under proposed 5 C.F.R. § 2635.1009(b). This is extremely problematic because it creates an unfair and unnecessary hurdle for litigants receiving *pro bono* representation. It would deter provision of *pro bono* representation and is thus objectionable. Further, the definition of "*pro bono"* legal services in proposed 5 C.F.R. § 2635.1003 is even more problematic due to its vagueness. For example, the present definition does not make clear whether or not it is limited to *direct* provision of legal services in a representational capacity. Without that limit, the definition would appear, for example, to extend to ethically unobjectionable matters such as provision of *amicus* briefing in federal employment matters, if those *amicus* briefs happen to be favorable to the subject employee's position in litigation. Thus, this proposed rule (in addition to being unnecessary, as noted above) if finalized would impede provision of *pro bono* representation.

Another significant problem with this proposed rule is that it does not clarify whether it includes contingent fee representation within the definition of "legal services provided without charge to the employee beneficiary or for less than market value as defined in § 2635.203(c)." A contingent fee is a common and widely recognized form of market valuation for legal services; it is not a form of discounted service even when the client does not pay due to lack of recovery from the opposing party in the legal matter. Accordingly, the proposed rule should be clarified to exclude contingent fee representation from any reporting requirements.

The present proposed rule further fails to adequately justify why the regulation is restricted to just those legal matters which are "arising in connection with the employee's past or current official position." As employment lawyers, NELA objects to placement of this disparate burden on employment law litigation. Selectively hindering a federal employee's ability to fund litigation because the opposing party happens to be the subject employee's employing agency is indefensible. If the corruption concern is that the subject employee would then misuse their

position to benefit legal expense donors, presumably the same concern would apply to donations for non-employment matters to the same degree as it would apply to employment matters.

The proposed rule is extremely vague in describing what OGE considers funds which must be routed through a "legal expense fund." This lack of clarity renders the proposed rule objectionably over-broad as it requires non-gifted funds to be routed through regulated "legal expense funds." In practice, federal employees use a wide variety of funding mechanisms to fund their legal representation, including but not limited to commercial borrowing (including credit cards, commercial personal loans, and mortgages); private borrowing from family members and close friends; private legal insurance plans and prepaid legal services plans which provide legal representation as benefit of coverage; and loans from litigation finance companies. None of these sources would create or open the door to corruption or the appearance thereof, so long as the funding sources meet the definition of "permissible donors" under proposed 5 C.F.R. § 2635.1006(b) (or alternatively so long as the funding sources are not prohibited sources as defined in present 5 C.F.R. § 2635.203(d)), and so they should not be covered by any "legal expense fund" regulations. *Cf., e.g.,* 5 C.F.R. §§ 2635.203(b)(3), 2635.203(c) (excluding "Loans from banks and other financial institutions on terms generally available to the public" from gift restriction regulations).

The vast majority of all NELA members, including those that represent federal employees, are attorneys who work in solo practices or small firms. Most attorneys who represent federal employees are part of small businesses. The addition of regular reporting requirements concerning the financing arrangements of these solo and small firm practitioners with their federal sector clients would be highly onerous. Representation of federal employees is a specialized niche practice. Especially outside of the Washington, D.C., metro area, there is already a dearth of attorneys who will represent federal employees. If this rule becomes final, it would make it even more difficult for federal employees to find representation. Such an outcome would be simply harmful and unfair to federal employees who need legal representation. Further, deterring representation of federal employees is contrary to the public policy concerns that are at the heart of the fee-shifting provisions in statutes that cover numerous categories of federal employees, a public policy long recognized by the courts. *See generally, e.g., Blum v. Stenson,* 465 U.S. 886, 892-96 (1986); *Raney v. Federal Bureau of Prisons,* 222 F.3d 927, 931-38 (Fed.Cir, 2000).

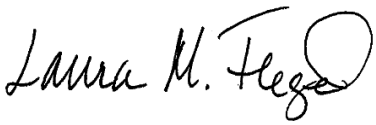
The requirement in proposed 5 C.F.R. § 2635.1004(a) creates an additional unacceptable and unfair financial burden employees – a regressive burden – by requiring that any "legal expense fund" be constituted as a trust under applicable state law. Public employees must not be burdened with the additional legal expense of setting up a trust in addition to their ongoing litigation expenses. This financially onerous regulation will deter and will further hinder federal employees from securing representation to protect their basic employment rights.

Finally, the definitional vagueness described above renders the proposed rule's estimates of the number of affected employees or the level of burden involved-- unrealistically low. It is implausible that there would only be "110 Respondents annually" or "an average of five legal expense fund trusts in existence each year," affected by such a rule change. Similarly, the proposed rule does not take into account the burden of seeking approval for every *pro bono* representation agreement, nor does it factor the expense in setting up trusts (as noted above) into its burden

analysis. It seems clear that this proposed regulatory structure—if implemented—would be far more administratively burdensome for employees, for agencies and for OGE itself than what is depicted in the proposed rule. This additional burden far outweighs any plausible benefit achieved by adding this unnecessary addition to OGE's preexisting regulations of prohibited sources, an addition (which as discussed *supra*) appears likely to cause severe constitutional, public policy and administrative problems.

Thank you for your consideration. If you have questions or wish to discuss these matters, please contact Laura Flegel at lflegel@nelahq.org.

Sincerely yours,



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