PROJECT ON GOVERNMENT OVERSIGHT

**Comment on OGE Notice of Proposed Rulemaking: "Legal Expense Fund Regulation" 87 Fed. Reg. 23769 (RIN 3209–AA50)**

The Project On Government Oversight (POGO) submits this comment on the notice of proposed rulemaking concerning legal expense funds, 87 Fed. Reg. 23769, that the U.S. Office of Government Ethics (OGE) issued on April 21, 2022.

While POGO commends OGE for undertaking this rulemaking, the effort is rendered meaningless by an exception that swallows the rule. *A loophole in the regulation would allow officials to ignore the new restrictions it establishes.* Unless this loophole is closed, OGE would permit officials to continue existing fundraising practices for legal expenses — practices that OGE admits in its rulemaking notice have "lacked transparency and created concerns regarding the appearance of corruption."

America deserves better than optional government ethics.

OGE also proposes to loosen its gift rules without adequate safeguards. The regulation would, for the first time in OGE's history, expressly allow federal employees to accept large gifts of cash from sources outside the government. Unless OGE requires employees to implement broad and lengthy recusals from matters affecting the donors of such gifts, this change risks creating an appearance of corruption. OGE has chosen, instead, to require only a narrow and short-lived recusal. Worse, employees could choose not to recuse at all if they decide — *for themselves* — that a reasonable person would trust their impartiality.

These are not the only concerns. The regulation would compel anonymous whistleblowers to submit information that could lead to exposure of their identities. The regulation would also permit for-profit law firms, including firms that lobby for regulated industries and foreign governments, to supply unlimited legal support to top political appointees; however, it would deny a nonprofit whistleblower protection organization the opportunity to do the same. The regulation unnecessarily risks intimidating victims of sexual harassment by emphasizing that a senior military officer facing "court-martial charges for sexual harassment" can raise funds for legal expenses. POGO's comment addresses these and other significant problems with the regulation.

**The Fatal Flaw**

This proposed regulation will achieve nothing unless OGE removes the exception at 2635.1002(b)(2), which makes compliance optional. That provision would allow executive branch officials to continue relying on the gift rule exclusions and exceptions they have historically cited to justify legal expense funds. As OGE recognizes, reliance on these existing authorities has already given rise to public concerns about an "appearance of corruption" that the

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notice of proposed rulemaking says "OGE shares."

The origin of those public concerns is well documented. Five senators — one of whom is now the vice president — planted the seed for this rulemaking when they wrote to OGE on August 2, 2018, about an unethical, multi-party legal expense fund blessed by OGE's then-acting director (who currently serves as general counsel). That fund, The Patriot Legal Expense Fund Trust, LLC ("Patriot Fund"), was structured as an opaque political organization.[1] The senators sounded the alarm about the risks of corruption that the fund posed:

> The Fund lacks transparency: both donors and recipients could potentially be shielded from public disclosure and it is impossible to know which donors supplied money for contributions to which employees, making it impossible to discern whether donations are legal or ethical. The Fund also creates the potential for influencing witness testimony. While the fund manager cannot reward recipients monetarily for favorable testimony after-the-fact, there is no prohibition on pressuring witnesses to provide favorable testimony beforehand or numerous other potential ways of incentivizing such testimony. Finally, the structure of the Fund could allow donations from prohibited sources to reach federal officials.[2]

In a response dated September 11, 2018, OGE's director pledged to issue a regulation that would make legal expense funds "transparent, open, and accessible to the public."[3] Nine months later, OGE received another letter from several senators, including two who had not signed the first. They wrote that they remained concerned "about the structure of the [Patriot Fund] and the prospect that future funds might be structured in a similar fashion if OGE does not take regulatory action."[4]

As OGE's notice of proposed rulemaking reveals, these senators had cause for concern. Nothing in the proposed regulation would prevent a repeat of the Patriot Fund debacle. Despite the director's promise to concerned senators, this proposed regulation will not make legal expense funds "transparent, open, and accessible to the public" — because the exception at 2635.1002(b)(2) will negate every restriction it establishes.

OGE's decision to include a rule-gutting exception in the proposed regulation begs the question: Why is OGE bothering to pursue this rulemaking effort? Issuing a final rule that contains this exception would make a farce of the office's responsibility to oversee an effective executive

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[1] Walter M. Shaub, Jr., "Trump's Ethics Office has blessed an unethical legal defense fund for the president's associates," *Los Angeles Times*, February 9, 2018, https://www.latimes.com/opinion/op-ed/la-oe-shaub-patriot-fund-20180209-story.html.

[2] Letter from Senator Margaret Hassan and other senators to Emory Rounds, Director, Office of Government Ethics, August 2, 2018, https://www.hassan.senate.gov/news/press-releases/senator-hassan-leads-letter-asking-the-office-of-government-ethics-to-review-problematic-legal-expense-fund-set-up-for-trump-personnel-involved-in-russia-investigation.

[3] Letter from Emory Rounds, Director, Office of Government Ethics, to Senator Margaret Hassan and other senators, September 11, 2018, https://www.oge.gov/Web/OGE.nsf/Congressional%20Correspondence/495516AF975202A7852585B6005A1FE4.

[4] Letter from Senator Margaret Hassan and other senators to Emory Rounds, Director, Office of Government Ethics, June 11, 2019, https://www.hassan.senate.gov/imo/media/doc/OGELegalExpenseFundReg.Final.pdf.

branch ethics program. It would betray OGE's promise to the senators and its duty to the public.

**A Gift Exception Without Guardrails**

In the notice of rulemaking, OGE proposes to let employees accept gifts of cash or legal services. This policy shift is crafted to allow cash donations from individuals who seek to influence official policy, those who do business with the employees' agencies, or those who have business interests the agencies regulate. The new regulation would allow employees to accept unlimited legal support from law firms, including firms that are registered lobbying organizations or foreign agents, while restricting support from public interest groups.

*Stronger Recusal Obligation Needed*

OGE has proposed to mitigate the risks of preferential treatment for donors by requiring that employees who receive gifts of cash or services recuse themselves from matters directly involving the donors. But the recusal guidelines OGE establishes in 2635.1002(c) are too weak for several reasons:

- The recusal only lasts for one year, which is too short a duration for an employee's gratitude to a donor to fade.
- The scope of the recusal covers only a particular matter involving specific parties, and it does not include regulations or other industry-wide matters affecting a donor (particular matters of general applicability). This recusal is too narrow. Should an employee participate in a policy matter that benefits the donor of a cash gift, it would likely create a public perception that the donor purchased a favor.
- Rather than creating a new recusal obligation, OGE merely cross-references its impartiality regulation, 5 C.F.R. § 2635.502. Under that provision, the agency could waive the recusal and let the employee participate in a matter directly involving the donor. But a waiver might not even be necessary: that provision does not require recusal unless the employee believes a "reasonable person" would question their impartiality. Under the current provision, therefore, by simply refusing to acknowledge an obvious concern, an employee could legally refuse to recuse.

This weak recusal standard is no match for the serious risks that OGE's proposed regulation would create. Instead of using the language in its proposed regulation, OGE should impose the following recusal obligations, with no option for a waiver:

- Any employee who receives a cash donation should be required to recuse for five years from any particular matter affecting the donor's financial interests, the donor's employer, or any for-profit business in which the donor has a substantial interest. A donor should be deemed to have a substantial interest if the donor is a member of the board of directors or holds at least 5% of the ownership interests in the business.
- Any employee who receives pro bono legal services should be required to recuse for five years from any particular matter involving specific parties in which the service provider is a party or represents a party.

*Payment of Legal Expenses by a Nonprofit*

In the preamble to this proposed rulemaking, OGE solicits comments on "whether employees may accept legal services at a reduced cost or free of charge when the legal services are paid for by a nonprofit organization, such as a 501(c)(3) or 501(c)(4), but the services are provided by attorneys outside of that organization." POGO urges OGE to permit the payment of legal services by 501(c)(3) nonprofits. POGO does not support permitting the same for 501(c)(4) organizations, which can legally engage in unlimited lobbying and some electioneering work.

Permitting 501(c)(3) nonprofits to hire legal counsel for federal employees would put them on an equal footing with for-profit law firms, which could provide gifts of pro bono services under OGE's proposed regulation. Large law firms routinely influence the government on behalf of for-profit industries and foreign governments. One prominent law firm in Washington, D.C., for example, earned over $6 billion in gross revenue in 2021 alone,[5] and the law firm that created the Patriot Fund registered as a foreign agent in 2012.[6] It makes no sense at all to allow pro bono services from these politically connected, paid influence peddlers while barring assistance from public interest groups.

Any exception for nonprofit organizations, however, should be limited to organizations that legitimately serve the public interest. Impermissible donors should not be allowed to skirt the rules by creating new nonprofits to evade regulatory restrictions. OGE should restrict donations to organizations described in section 501(c)(3) of the tax code that have been operational for at least two years and have an established record of involvement in issues related to government integrity, whistleblower protection, federal employment policies, or fraud, waste, and abuse in the government.

OGE should also expressly permit representation and funding by federal employee unions, consistent with the declaration in 5 U.S.C. § 7101(a)(1) that representation by federal employee unions safeguards the public interest.

*Conceptual Error in the Eligibility Requirements for Donors of Pro Bono Services*

There is a conceptual error in the provision that restricts who can donate pro bono services. In 2635.1009(a)(1), OGE writes that the donor can be an individual who is not a lobbyist or foreign agent. In 2635.1009(a)(2), OGE writes that the donor can be *any* person who does not have "interests that may be substantially affected by the performance or nonperformance of an employee's official duties." Because the disjunctive "or" separates these two paragraphs, paragraph (a)(2) negates the requirements of paragraph (a)(1). An individual who is a lobbyist or foreign agent will not qualify under paragraph (a)(1), but paragraph (a)(2) will allow that individual to provide pro bono services to an executive branch employee.

The following language would both correct the error in 2635.1009 and allow legitimate

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[5] "Kirkland & Ellis LLP," ALM Global, LLC, https://www.law.com/law-firm-profile/?id=173&name=Kirkland-Ellis&slreturn=20220504114530.

[6] Wiley Rein LLP, FARA Registration (Form NSD-1), June 8, 2012, https://efile.fara.gov/docs/6108-Registration-Statement-20120611-1.pdf.

nonprofits and federal employee unions to provide or sponsor pro bono legal services:

(a) Acceptance of permissible pro bono legal services. An employee may solicit or accept the provision of pro bono legal services for legal matters arising in connection with the employee's past or current official position, the employee's prior position on a campaign, or the employee's prior position on a Presidential Transition Team from:

(1) Any individual who:

(i) Is not an agent of a foreign government as defined in 5 U.S.C. 7342(a)(2);

(ii) Is not a lobbyist as defined by 2 U.S.C. 1602(10) who is currently registered pursuant to 2 U.S.C. 1603(a); and

(iii) Does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties;

(2) A non-profit organization that:

(i) is described in section 501(c)(3) of the Internal Revenue Code;

(ii) has existed and been operational for at least two years; and

(iii) has an established record of involvement in issues related to government integrity, whistleblower protection, federal employment policies, or fraud, waste, and abuse in the government; or

(3) the exclusive representative of the employee's bargaining unit, as defined in 5 U.S.C. 7103(16).

(b) An individual described in paragraph (a)(1) may accept funding, staffing support, and other resources in connection with the representation of the employee from an organization that does not have interests that may be substantially affected by the performance or nonperformance of an employee's official duties, provided that the organization is—

(1) a law firm that is the individual's primary employer;

(2) a non-profit organization described in paragraph (a)(2); or

(3) a labor organization described in paragraph (a)(3).

**Whistleblowers**

POGO applauds OGE's desire to protect federal whistleblowers in this rulemaking, but changes to the proposed regulation are necessary to accomplish that aim. OGE must make every effort to avoid the exposure of anonymous whistleblowers. The danger of such exposure cannot be overstated, as illustrated by the sentencing of a Michigan man to federal prison last year for threatening the life of a federal whistleblower's attorney.[7]

*Procedures for Whistleblowers*

Even though they can seek prior approval from OGE rather than their agencies, subjecting legal expense funds to a prior approval process jeopardizes the anonymity of whistleblowers. Rather than requiring individualized approval, OGE should let whistleblowers use a model trust agreement published on its website. The model could include a declaration that the trustee meets the criteria in 2635.1004(c). This approach is consistent with the standard in 2635.1004(g)(i), which mandates approval of any compliant trust agreement when the trustee meets eligibility

[7] Josh Gerstein, "Man who threatened whistleblower's lawyer gets 1-year sentence," *Politico*, June 10, 2021, https://www.politico.com/news/2021/06/10/man-threatened-whistleblower-gets-sentence-493159.

requirements.

There's also already a precedent for this approach. OGE published a model trust agreement for legal expense funds before the Patriot Fund scandal.[8] The office could modify that model to conform to the proposed regulation. As OGE did with a model qualified blind trust agreement, OGE could make the use of the model legal expense fund trust mandatory for any whistleblower who elects not to seek individualized prior approval.[9]

The proposed quarterly reporting requirements for whistleblowers also create risk. In some cases, releasing donors' names may give clues about a whistleblower's identity or employing agency (e.g., a donation from an association of current and former FBI agents). To mitigate this risk, OGE should allow whistleblowers to file each quarterly report up to one year after the normal deadline.

OGE's plans for intelligence community employees create even greater risks. In the case of any document received from a covert intelligence community whistleblower, 2635.1004(f)(2) provides that OGE will "handle the document as classified, according to procedures agreed upon with the employee's agency." By contacting the employing agency to negotiate procedures, OGE will reveal that a member of the agency's staff is a whistleblower. This disclosure risks triggering an intensive hunt for the whistleblower by officials skilled in uncovering information. OGE should protect national security *and* whistleblowers by exempting covert intelligence community whistleblowers from reporting requirements.

It is important for OGE to understand that even requiring whistleblowers to coordinate with OGE may chill whistleblowing activity. OGE is, after all, led by a political appointee who works closely with the White House. The office cannot guarantee that all future directors will scrupulously guard the anonymity of whistleblowers. In the case of intelligence community whistleblowers, POGO also questions whether OGE has the capacity to secure classified records. Confidentiality and the perception of confidentiality are essential to encouraging truth-tellers to come forward in the public interest. Any risks OGE may perceive in this recommended approach are vastly outweighed by the risks that compromising whistleblower anonymity would pose to government integrity.

*Definition of "Whistleblower"*

POGO is glad that OGE's definition of "whistleblower" covers individuals who "believe" they qualify for whistleblower protections, even if they later fail to persuade the government that they do. But the definition needs to be broader. It should also cover:

- federal officials who are covered by OGE's regulations but are not covered by 5 U.S.C. § 2302, including military officers, FBI agents, commissioned corps members, and

[8] Office of Government Ethics, "Legal Expense Trust Fund Template," August 15, 2017, https://www.oge.gov/Web/OGE.nsf/37bf4d7550bd126d852585de0063e635/869d09198a93fa9c852585b6005a1dc7?OpenDocument.

[9] Office of Government Ethics, "Model Qualified Blind Trust Agreement," https://oge.gov/Web/oge.nsf/Resources/Model+Qualified+Blind+Trust+Agreement.

Postal Service employees;

- employees who exercise their right to petition or furnish information to Congress pursuant to 5 U.S.C. § 7211 – like Lt. Col. Alexander Vindman (ret.), who filed a retaliation lawsuit after testifying in an impeachment hearing;[10]
- employees who suffer retaliation based on their association with, or assistance to, a whistleblower or congressional witness – like Lt. Col. Yevgeny Vindman, whom the Defense Department inspector general determined, by a preponderance of the evidence, was a victim of retaliation for his brother's congressional testimony;[11]
- employees who are not whistleblowers but fear retaliation or investigation because they are suspected of being whistleblowers – including executive branch employees who face the sort of investigation that Supreme Court clerks are now facing;[12] and
- employees who face retaliation for using legitimate channels of dissent – like State Department employees who use the official "Dissent Channel."[13]

**Other Concerns**

In addition to the concerns outlined above, there are a several other sections that POGO recommends OGE revisit:

*2635.1003 (Example 2)* – This example poses a hypothetical involving a legal expense fund for a senior military officer facing court martial for sexual harassment. OGE should replace this example with one that does not risk intimidating victims of sexual harassment. To understand the stakes, OGE should review POGO's report on the Department of Homeland Security's failure to protect employees from sexual harassment and retaliation for reporting sexual harassment.[14]

*2635.1003 (definition of "Arising in connection with employee's past or current official position")* – To avoid creating opportunities for persons outside the government to influence top officials, OGE should modify 2635.1003 to emphasize that this definition does not cover assisting individuals with presidential nominations for Senate-confirmed positions.[15]

*2635.1004(g)(2)(ii) and 2635.1007(f)(2)(ii)* – The proposed regulation indicates that OGE will conduct a second-level review of legal expense funds for officials listed in 2635.1004(g)(2)(ii)

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[10] Michael Schmidt, "Vindman, Key Figure in Trump Impeachment, Alleges Retaliation in Lawsuit," *New York Times*, February 2, 2022, https://www.nytimes.com/2022/02/02/us/politics/alexander-vindman-trump-lawsuit.html.

[11] Jordan Williams, "Pentagon IG finds Vindman's brother 'likely' faced retaliation by Trump officials," *The Hill*, May 18, 2022, https://thehill.com/policy/defense/3493128-pentagon-ig-finds-vindmans-brother-faced-retaliation-by-trump-officials/.

[12] Tierney Sneed, "Escalation of the Supreme Court's leak probe puts clerks in a 'no-win' situation," *Politico*, June 1, 2022, https://www.cnn.com/2022/06/01/politics/supreme-court-clerks-leak-investigation-phones-affidavit-abortion/index.html.

[13] Department of State, "Dissent Channel," 2 FAM 070, https://fam.state.gov/fam/02fam/02fam0070.html.

[14] Adam Zagorin and Nick Schwellenbach, "Protecting the Predators at DHS," Project On Government Oversight, April 7, 2022, https://www.pogo.org/investigation/2022/04/protecting-the-predators-at-dhs.

[15] See Nick Miroff, "Trump's Homeland Security pick is caught up in a conflict of interest complaint," *Washington Post*, November 16, 2017, https://www.washingtonpost.com/world/national-security/trumps-homeland-security-pick-is-now-caught-up-in-a-conflict-of-interest-complaint/2017/11/15/8e029866-ca26-11e7-aa96-54417592cf72_story.html.

and 2635.1007(f)(2)(ii). The list includes officials whose financial disclosure reports OGE reviews, pursuant to 5 U.S.C. app. § 103, and certain other White House appointees. OGE should expand this list to include agency heads whose disclosures OGE does not review. The need for increased oversight became clear when a former director of the Centers for Disease Control and Prevention resigned amid an ethics scandal.[16]

*2635.1006(c)* – Placing a cap on the size of donations may have the unintended effect of multiplying conflicts of interest by increasing the number of donors. OGE could lift the cap on donations and, instead, require the employee to recuse from any particular matter affecting a cash donor, the donor's employer, and any business entity in which the donor has a substantial interest.

**Structure of Legal Defense Funds**

POGO applauds OGE's decision to require all legal expense funds to be structured as single-beneficiary trusts for which the sole beneficiary is the grantor. Permitting legal expense funds to be structured as political organizations or to have multiple beneficiaries would be disastrous because these alternate structures lack transparency, give financial leverage over the employee to outside parties with no fiduciary duty to the employees, and fail to prevent impermissible parties from donating to employees. The public and congressional outrage over the Patriot Fund is evidence of the harm to public trust in government that such structures inflict.

**Conclusion**

POGO opposes this regulation in its current form and proposes several changes to improve it.

Most importantly, OGE has made the shocking decision to include an exception in this regulation that would give federal officials the option to ignore the new restrictions it establishes. Issuing a final regulation without eliminating that exception would betray the promise OGE gave senators to make legal expense funds "transparent, open, and accessible to the public." That betrayal would inflict a serious wound to OGE's credibility, for the public would see this regulation as a sham to quell public outrage over the government's abusive legal expense fund practices.

The proposed regulation fails to establish adequate safeguards to ensure that a new policy of permitting large cash gifts will not corrupt government activities. While OGE would require employees to recuse from matters involving donors, the proposed recusal is short-lived and riddled with loopholes. Employees would be free to decide not to recuse based on a personal belief that the public blindly trusts their impartiality. Even in cases where employees acknowledge the public's concern, agency officials could waive the recusal obligation.

POGO objects to OGE's decision to bar public interest groups from defending whistleblowers while permitting massive for-profit law firms that are registered as lobbying organizations and

[16] Debra Goldschmidt and Ben Tinker, "CDC Director Brenda Fitzgerald resigns," *CNN*, January 31, 2018, https://www.cnn.com/2018/01/31/health/cdc-director-fitzgerald-resigns-bn/index.html.

foreign agents to provide pro bono services to top political appointees. OGE should permit support for whistleblowers from 501(c)(3) nonprofits with established records of public service.

The proposed regulation negatively impacts whistleblowers in other ways. OGE's overly legalistic definition of "whistleblower" excludes a broad range of patriotic truth-tellers who risk everything to protect government integrity, including employees who exercise their statutory right to petition Congress. OGE's proposed rule would afford some procedural protections to a narrowly defined group of whistleblowers, but these procedures do not go far enough to protect them. The solution is to protect a broader range of truth-tellers and to give them the option of using a model legal trust agreement in lieu of seeking individualized approval.

Thank you for this opportunity to comment on the proposed rule. POGO urges you to adopt its suggestions to avoid wasting an opportunity to strengthen the government's ethics rules.