PUBLICCITIZEN

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

June 21, 2022
*Submitted Electronically*

Office of Government Ethics
1201 New York Avenue, NW
Suite 500
Washington, D.C. 20005-3917

**RE: Public Citizen Comment on Proposed Rule: "Legal Expense Fund Regulation"**

Public Citizen strongly supports the proposed rule – "Legal Expense Fund Regulation" (RIN 3209-AA50) – by the Office of Government Ethics (OGE) as currently written.

The proposed regulation clearly and precisely would govern the establishment and operations of legal expense funds for the executive branch. The proposal borrows from the long-tested experiences of congressional rules governing legal expense funds for members of the House and Senate. As written, the proposed rule reasonably addresses all three key components to avoid significant conflicts of interest in creating and managing such funds: (i) contribution limits; (ii) donor source prohibitions; and (iii) disclosure requirements.

The proposed rule not only squarely addresses potential conflicts of interest when executive branch officials seek private funds to pay for legal expenses related to their official or campaign-related duties, it also offers reasonable exceptions to established gift rules which could otherwise impede the functioning of legal expense funds and exceptions to disclosure requirements in order to protect anonymous whistleblowers. The proposed rule is well thought-out and well written, and would achieve the general framework sought by Public Citizen when petitioning for such rulemaking by OGE on September 15, 2017.

## A. BACKGROUND

While Congress has long regulated legal expense funds for its members, there is no standing statutory or regulatory guidance for legal expense funds for executive branch officials. The lack of such guidance was generally viewed as not much of a problem since, unlike Congress, legal expense funds for executive branch officials were few and far between. The only somewhat recent executive branch legal expense funds of note were set up by then-President Bill Clinton in the 1990s to pay for legal expenses involving the Paula Jones sexual harassment lawsuit and the Whitewater scandal.

With so few legal expense funds for executive branch officials, OGE attempted to address ethics issues related to such funds on an ad hoc basis. But this limited guidance was often contradictory and less stringent than the guidelines for Congress.

In 1993, OGE issued an opinion regarding the establishment and financing of legal expense funds by executive branch personnel, which was not viewed either as a regulation nor concrete guidelines. Instead, the 1993 opinion was viewed more as suggestions for executive branch personnel to avoid violating other ethics rules, such as the gift rule. In this informal letter, OGE cited the Supreme Court's decision in *Crandon v. US* (1990), which found that 18 U.S.C. §209's ban on federal employees receiving outside salaries was limited to payment for their work. OGE's letter suggested that contributions to legal expense funds could be perceived as gifts unrelated to employees' normal work, and were therefore permissible, but trustors should make an effort to avoid serious conflicts of interest.[1]

OGE recognized that its 1993 guidance was inadequate, and later advised legal expense funds to avoid accepting donations from registered lobbyists. In 2016, then-Director Walter Shaub pegged the 1993 policy for review, especially the provision suggesting that anonymous donations may be acceptable. But the review was never undertaken, until now.

The rapidly growing number of legal scandals within the executive branch, and the greater need for legal expense funds to help executive branch officials cope with exorbitant legal costs, has prompted this rulemaking.

### B. THE PROBLEM OF CONFLICTS OF INTEREST

The over-arching problem of unregulated legal expense funds for government officials is conflicts of interest, which has the potential of unduly influencing government officials.

Legal expenses can be exorbitantly costly, frequently well beyond the means of an official to cover from personal funds. Legal expense funds enable the official to collect funds and resources from others to help foot the bill. Without appropriate limits on the size of donations, as well as restrictions on whom can offer these funds, a window of opportunity is provided to wealthy special interests with business pending before the government to curry favor with the official with large donations. Without adequate transparency of where all this money is coming from, the public is left in the dark. For that simple reason, it is imperative that clear rules be promulgated for legal expense funds for governmental officials that, at a minimum, establish:

- Limits on the size of contributions;
- Prohibitions on who may contribute; and
- Disclosure requirements.

OGE's proposed rule for executive branch legal expense funds does precisely that.

---

[1] Office of Government Ethics. "93 x 21: Letter to an Alternate Designate Agency Ethics Official" (August 30, 1993), available at: https://www.oge.gov/web/OGE.nsf/All%20Documents/0C4D87012885C50385257E96005FBC7B/$FILE/579f6ba49f8a41f39222f42604c851de2.pdf?open.

Under the proposed rule, executive branch officials may set up a legal expense fund to help pay for "covered legal matters," which are limited to legal matters arising from (i) past or current governmental duties; (ii) prior position in a campaign; or (iii) prior position on a presidential transition team. Legal expense funds may not be set up to help pay for personal legal matters unassociated with official or campaign-related duties.

A legal expense fund must receive prior approval from the appropriate Designated Agency Ethics Official (DAEO) or the Office of Government Ethics before accepting donations and making payments. An official may establish only one legal expense fund at a time, and it must be set up as a trust, managed by a trustee with no personal or business relationship with the official.

Donations may only be made by individuals who are not registered lobbyists, foreign agents, or who have business pending before the official or the official's agency. Donations are capped at no more than $10,000 per year from any one source.

All aggregate donations to, and payments from, a legal expense fund in excess of $250 must be disclosed in quarterly reports, to be promptly posted on the OGE web site for public accessibility. Officials who are "anonymous whistleblowers" are not subject to the public disclosure requirements, though they must still file confidential disclosure reports with OGE.

An official may accept discounted or pro bono legal services from nonprofit organizations and law firms, as long as the sources of the discounted or pro bono legal services have no conflicting interests that may be substantially affected by the official.

Also under the proposed rule, when a legal expense fund is terminated, any excess funds are to be transferred to 510(c)(3) nonprofit organizations that have no ties to the official or the official's immediate family. The distribution of excess funds shall be the sole responsibility of the trustee.

## C. Recommendations

Public Citizen originally proposed the following rules for legal expense funds established and financed by executive branch personnel:

- Establish the authority of an executive branch official or employee to create a legal expense fund as a trust distinct from the standard gift rules, to be administered by an independent trustee with no business or family associations with the beneficiary.
- Limit any executive branch official or employee to establish only one legal expense fund at any one time and permit only the trustor to be the beneficiary of the legal services provided by the fund in order to prevent potential conflicts of interest between donors and multiple beneficiaries.
- Impose a contribution limit of $5,000 per donor per year, though the official and immediate family members of the official may make unlimited contributions to the fund.
- Require that donations only come from individuals, not corporations, unions or other organizational entities.

- Prohibit donations from lobbyists, foreign agents, foreign nationals, and persons who have business pending before the official or employee or their agency ("prohibited sources").
- Mandate full disclosure of the sources and expenditures of funds on a quarterly basis, to be filed electronically and posted on the Internet in a searchable, sortable and downloadable database.
- Require that surplus monies following termination of a legal expense fund either be distributed to a 501(c)(3) charity not established or controlled by the trustor or returned to donors on a pro rata basis.

The final rule under consideration by OGE generally follows the same framework, largely based on the experiences of congressional rules guiding the establishment and administration of legal expense funds. Public Citizen supports OGE's proposed rule pretty much as currently written.

The Notice of Proposed Rulemaking requests additional comments on a few specific subject matters.

*Should 501(c)(3) and (4)'s be allowed to donate to an official's legal expense fund?*

As we have seen in the campaign finance realm, nonprofit contributions to super PACs often serve as dark money avenues for wealthy special interest and corporations to launder money to campaigns. It is reasonable to expect similar abuses of nonprofits laundering dark money to legal expense funds. Therefor, the current proposal of allowing contributions only from individuals is preferable, albeit with the exception that is already contained in the current proposal of allowing nonprofits to provide discounted or pro bono legal services to executive branch officials.

*Upon termination of a legal expense fund, should the recipient nonprofit organizations be named at the formation of the trust or left to the discretion of the trustee?*

During the formation of the trust, the beneficiary official will likely have considerable influence over the plans for administration of the trust. Consequently, it is preferrable to leave the disbursement of excess funds the sole discretion of the trustee upon termination, given that the recipient nonprofits are identified in the termination disclosure reports.

*In providing discounted or pro bone legal services, should a nonprofit be allowed to hire outside attorneys?*

The key factor in ensuring no serious conflicts of interest by a nonprofit providing discounted or pro bono legal services – that the sources of the discounted or pro bono legal services have no conflicting interests that may be substantially affected by the official – already is adequately addressed in the proposed rule. As long as this standard is applied both to the sources *and* attorneys providing discounted or pro bono services, additional restrictions do not seem warranted.

One technical addition Public Citizen encourages for the final rule: the disclosure requirements for legal expense fund reports on the OGE web page should specify that the on-line records be "searchable, sortable and downloadable." Otherwise, an on-line database can become so large and cumbersome as to hinder full disclosure, as evidenced by the unwieldly on-line database of periodic transaction reports under the STOCK Act.

Public Citizen encourages OGE to proceed with the final rule largely as currently written.

Sincerely,

Craig Holman, Ph.D.
Government affairs lobbyist
Public Citizen
215 Pennsylvania Avenue, SE
Washington, D.C. 20003