June 21, 2022

Hon. Emory A. Rounds, III
Director
U.S. Office of Government Ethics
1201 New York Avenue NW, Suite 500
Washington, D.C., 20005

*Submitted electronically to usoge@oge.gov*

Re: **Comments on Proposed Rule Legal Expense Fund Regulation, RIN 3209-AA50**

Dear Director Rounds:

Campaign Legal Center ("CLC") respectfully submits these comments to the Office of Government Ethics ("OGE") in response to the proposed rules governing executive branch legal expense funds ("LEFs"). CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy across all levels of government. Our work promotes an American political process that is accessible to all citizens, resulting in representative, responsive, and accountable government.

The purpose of our comments is to alert OGE of the risk of adopting loopholes that currently exist in Congressional LEF regulations, and to reiterate the need for restrictions on 501(c)(4) organizations providing certain legal services to employees. Specifically, this letter explains that:

1. Contingency fee legal arrangements should require OGE pre-approval;

2. Pro bono legal services should require a certification that third parties are not earmarking payments for the legal services;

3. LEFs should have a definitive termination date based on the conclusion of the legal matter to avoid misuse of funds;

4. 501(c)(4) organizations should not contribute to LEFs; and

5. 501(c)(4) organizations should not provide pro bono legal services to an employee.

As detailed below, these five suggestions will significantly improve the effectiveness and enforcement of LEFs by limiting the ability of employees and third parties to circumvent the letter and the spirit of the rules.

## I. Contingency Fee Legal Arrangements Should Require OGE Pre-Approval

OGE has based much of the proposed rule on congressional rules governing LEFs. While congressional rules provide a blueprint for the executive branch to follow, those rules are not without loopholes that OGE should endeavor to avoid. One potential loophole involves contingency fee arrangements. Under the current proposed rule, employees could accept legal services that would not technically fall under the rule's definition of "pro bono legal services," because the expectation of payment for those services means they are not provided "without charge to the employee beneficiary." However, contingency fee arrangements may constitute de facto pro bono legal services because: there is no reasonable expectation of legal success and payment; a third-party may be paying for the services; or the contingency fee arrangement provides for a discounted payment to the attorney.

In 2011, the Office of Congressional Ethics ("OCE") found that a member of Congress improperly accepted and failed to report an impermissible gift of pro bono legal services that was paid for by a third party.[1] Although there was a proposed contingency fee agreement with the lawmaker's counsel, the OCE found that a third-party had already paid the counsel.[2] As a result, the counsel was guaranteed payment for services and the contingency fee agreement was a fiction. More recently, a congressman was alleged to have received extensive legal services to file high-profile defamation lawsuits that may have been based on an unapproved contingency fee arrangement.[3] Without clear rules governing how

[1] U.S. Off. of Cong. Ethics, OCE Referral Regarding Rep. Jean Schmidt, Review No. 11-6574 (May 18, 2011), https://www.govinfo.gov/content/pkg/CPRT-112HPRT67438/pdf/CPRT-112HPRT67438.pdf.
[2] *Id.* at 16.
[3] *See* Colin Kalmbacher, *'Blatant Violation of House Rules': Watchdog Questions How Nunes Is Funding 6 Lawsuits at Once*, LAW & CRIME (Feb. 26, 2020), https://lawandcrime.com/high-

contingency fee arrangements are treated under this new rule, employees could disguise pro bono legal services as contingency fee arrangements, leaving the public with little transparency surrounding who ultimately pays for and provides public employees' legal services.

To avoid these issues in the executive branch, OGE should include in their rules that contingency fee agreements are treated identically to pro bono arrangements and must be pre-approved by agency ethics officials or OGE.

## II. Pro Bono Legal Services Should Require Certification of No Third-Party Funding

Another loophole found in the congressional LEF regulations is the potential for third parties to earmark money to pay for so-called "pro bono" legal services. For example, an OCE investigation into a member of Congress' contingency fee arrangement found that the "pro bono" services provided to the lawmaker were actually paid for up front by a third-party group prior to the lawmaker receiving consent to establish an LEF.[4] Consequently, the "pro bono" services were actually paid legal services.

Under the current proposed rules, a law firm or legal services entity is permitted to provide employees with pro bono legal services.[5] OGE should require as part of these rules that both the entity providing the services and the employee receiving the services certify in a public disclosure that no third party is paying for the pro bono services on the employee's behalf.

## III. LEFs Should Have Definitive Termination Dates

Leaving a fund open-ended without a required termination period is another loophole in the congressional rules. OGE should require an LEF to terminate at a specified time after the conclusion of the legal dispute for which it was established. In New York City, a "legal defense trust" must be terminated within 90 days of the last expenditure made in relation to the investigation, audit, or action for which it was created.[6] Similarly, California

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profile/blatant-violation-of-house-rules-watchdog-questions-how-nunes-is-funding-6-lawsuits-at-once/.

[4] OCE Referral Regarding Rep. Jean Schmidt, *supra* note 1, at 5, 13-14.

[5] U.S. Off. of Gov't Ethics, Proposed Legal Expense Fund Regulation, 87 Fed. Reg. 23780 (Apr. 21, 2022) (Proposed § 2635.1009).

[6] NYC Admin. Code § 3-1104.

requires "legal expense accounts" to terminate within 90 days of a resolution of the legal dispute for which the account was created.[7]

Such carefully circumscribed requirements for how unexpended money should be distributed are necessary to prevent employees from having LEFs that continue to spend funds after the legal matter has died, *i.e.*, a "zombie fund." In the campaign finance context, retired lawmakers and former candidates have continued to spend leftover campaign donations in zombie funds for years after leaving office, in some cases for personal expenses.[8] In combination with reporting requirements and consistent oversight of the funds, clear rules governing the disposition of unused funds will prevent LEFs from becoming zombie funds.

## IV. 501(c)(4) Organizations Should Not Contribute to LEFs

OGE should not expand the exceptions to proposed section 2635.1006, which currently does not allow 501(c)(4) organizations to donate to LEFs. This prohibition aligns with other provisions of the proposed rules that specifically prohibit the acceptance of donations from individuals who donate anonymously or donate on behalf of or at the direction of others. These restrictions work together to support the main purposes of these regulations: increasing transparency and reducing concerns regarding the appearance of corruption in the creation and operation of LEFs for the benefit of executive branch employees.

Allowing 501(c)(4) organizations to donate to LEFs would render the other safeguards in these proposed rules meaningless. For example, 501(c)(4) organizations are responsible for the highly controversial financing of political campaigns by undisclosed sources that provide unlimited contributions, *i.e.*, dark money. These dark money groups are often used by donors to easily hide their political spending from the public and avoid accountability for trying to influence the political process. Dark money organizations can serve as intermediaries for those making contributions on behalf of others and can accept anonymous donations. If these groups are permitted to donate to LEFs, they would not only be responsible for dark

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[7] Cal. Code Regs. tit. 2, § 18530.4(i).

[8] Hailey Fuchs, *Inside the totally legal, fairly macabre, classically political world of the true Zombie PACs,* POLITICO (Feb. 11, 2022), https://www.politico.com/news/2022/02/11/politicians-died-their-pacs-are-still-living-00008102; Kenneth P. Doyle & Nancy Ognanovich, *Zombie Campaigns-to-Be Hold Millions in Cash With Murky Rules*, BGOV (July 19, 2021), https://about.bgov.com/news/zombie-campaigns-to-be-hold-millions-in-cash-with-murky-rules/.

money influencing the political process, but also influencing our public officials.

Prohibiting 501(c)(4) organizations from donating to LEFs will increase transparency and the public's trust in the LEF process.

## V. 501(c)(4) Organizations Should Not Provide Pro Bono Legal Services to an Employee

CLC supports section 2635.1009 of the proposed rule, which prohibits employees from accepting free or discounted legal services if they are paid for by 501(c)(4) organization, even if the legal services are ultimately provided by attorneys outside of the nonprofit organization.

CLC believes that prohibiting 501(c)(4) organizations from providing free or discounted legal services is prudent. Such arrangements would be indistinguishable from these groups donating directly to an LEF, which is currently prohibited by the proposed rules to increase transparency and reduce the appearance of corruption. Allowing a 501(c)(4) organization to pay for all or part of an employee's legal services may pose an even greater risk for the appearance of corruption: legal services can be very costly, and because these organizations are not required to publicly disclose all their donors, prohibited sources could indirectly pay for the legal services. The limits in the proposed rule for accepting pro bono legal services should not allow 501(c)(4) groups to pay for an employee's legal services.

Notably, the House of Representatives specifically prohibits an outside third party, like a 501(c)(4), from paying for pro bono legal expenses incurred by its members. Such an arrangement would constitute a gift of services, the value of which would be subject to the limitations of the House gift rule; where no exception to the gift rule applies, "each time [a third party] paid the legal fees of the lawyers…in connection with the representation of [a member of Congress], that payment was a gift."[9] As a result, the House rules "do not allow an outside third party to pay for legal expenses [a member of Congress] incurs," and only allow the acceptance of pro bono legal services in most cases if they are allowable contributions to an LEF.[10]

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[9] U.S. House of Reps. Comm. on Ethics, In the Matter of Allegations Relating to Representative Jean Schmidt, H.R. Rep. No. 112-195, at 16-17 (2011), https://www.govinfo.gov/content/pkg/CRPT-112hrpt195/pdf/CRPT-112hrpt195.pdf.
[10] U.S. House of Reps., Gifts Guidance, https://ethics.house.gov/house-ethics-manual/gifts#_Pro_Bono_Legal.

## VI. Conclusion

CLC supports the long overdue development of a robust and enforceable regulatory framework governing the creation, administration, and termination of executive branch LEFs. This rulemaking is crucial to bringing accountability and transparency to LEFs, which until this point could operate as potential vehicles for endless amounts of largely unregulated cash to flow directly to influential decisionmakers. Thank you for the consideration of these comments.

Sincerely,

_____/s/_____
Kedric Payne, General Counsel and
Senior Director, Ethics

_____/s/_____
Delaney Marsco, Senior Legal
Counsel, Ethics