



June 14, 2019

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 Rulemaking for Legal Expense
Fund Regulation, 84 Fed. Reg 15146**

Dear Director Rounds,

The Campaign Legal Center (“CLC”) respectfully submits these comments to the Office of Government Ethics (“OGE”) in response to the advance notice of proposed rulemaking governing executive branch legal expense funds. 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.

CLC supports the long overdue development of a robust and enforceable regulatory framework governing the creation, administration, and termination of executive branch legal expense funds. It is vital that this rulemaking finally brings accountability and transparency to legal expense funds; anything less will allow these funds to continue to operate as potential vehicles for endless amounts of largely unregulated cash to flow directly to some of our most influential decisionmakers. The current risk of corruption cannot be understated. It is unacceptable that the status quo regulates a \$200 campaign contribution more strictly than a \$1 million donation to a legal expense fund.

CLC makes the following comments and recommendations for OGE’s consideration as it develops these important rules.

I. Establishment, management, and termination

Establishment

Federal executive legal expense funds should be structured as trusts under the law of the state in which they are established, not as political organizations. The trust should have one human beneficiary who is a current or former federal executive employee. The establishing document should make clear that the trustee has a legally enforceable fiduciary duty to the beneficiary. Prior to the Patriot Legal Expense Fund Trust,¹ this was the norm for executive branch legal expense funds. The trust structure helps ensure that donations are being given to and for the benefit of the known beneficiary, and it reduces the risk that the pool of money is operating as a slush fund for an unknowable number of people.

The Patriot Legal Expense Fund Trust was criticized for its formation as an LLC operated as a political organization under section 527 of the Internal Revenue Code.² In order to maintain tax-exempt status under section 527, political organizations must collect contributions and make expenditures in order to influence or attempt to influence the selection, nomination, election, or appointment of a person for public office.³ This structure distorts the purpose of legal expense funds and lacks the fiduciary protections present in a trust.

The purpose of a legal expense fund is to help defray the cost of potentially expensive legal proceedings that arise from the officeholder's job as a neutral and impartial public servant. A trust structure resolves any ambiguity about the purpose of the money flowing to the government employee: the fund manager, as a trustee, will be responsible for collecting, managing, and distributing funds in the best interest of the employee beneficiary's legal defense. An executive branch employee should not be

¹ U.S. OFFICE OF GOV'T ETHICS, PATRIOT LEGAL EXPENSE FUND TRUST, LLC (Jan. 29, 2018), [https://www2.oge.gov/web/oge.nsf/0/C84BE191420FD2A585258227004EFCC2/\\$FILE/Patriot%20Legal%20Expense%20Fund%20Trust.%20LLC.pdf](https://www2.oge.gov/web/oge.nsf/0/C84BE191420FD2A585258227004EFCC2/$FILE/Patriot%20Legal%20Expense%20Fund%20Trust.%20LLC.pdf).

² See, e.g., Walter Shaub, *Trump's Ethics Office has blessed an unethical legal defense fund for the president's associates*, L.A. TIMES (Feb. 9, 2018, 4:05 AM), <https://www.latimes.com/opinion/op-ed/la-oe-shaub-patriot-fund-20180209-story.html>.

³ I.R.C. § 527(e)(2). "By definition, political organizations are entities that are organized and operated for the purpose of collecting contributions for or making expenditures . . . [to influence or attempt] to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual electors are selected, nominated, elected, or appointed." INTERNAL REVENUE SERV., I. IRC 527 – POLITICAL ORGANIZATIONS, <https://www.irs.gov/pub/irs-tege/eotopici89.pdf>.

permitted to use their legal expense fund as a political tool, even if a win or loss in a legal proceeding may affect the political situation of the beneficiary.

The trust structure provides the best protection for public servants, who can be certain that distributions will not be withheld or disbursed according to political pressures. This allows public servants to continue to perform their official duties in the best interest of the public, without the need to engage in any political gamesmanship to acquire a distribution. It also protects the public and the integrity of the government by ensuring a shared understanding that the fund is being used to help the public servant defray legal costs, not for any partisan political purpose.

This approach also assists ethics officials as they make on-the-ground determinations of potential conflicts with donors, since the beneficiary is the one known person to whom the trustee owes a fiduciary duty. A trust with a single known beneficiary provides clarity for ethics officials who are working with trustees to ensure all donations and distributions are above-board.

OGE should consider allowing legal expense funds to be established only in connection with a known or reasonably foreseeable specific legal dispute or proceeding. This requirement will make the fiduciary responsibilities of the trustee clearer, reassure the public and donors that the donations are actually being used for legal expenses and nothing else, and avoid abuse by ensuring that the life of the fund is limited. For example, in California, the statement of organization required to register a legal expense fund must specify a legal dispute for which the fund was established.⁴

Management

OGE should limit eligible trustees to individuals unaffiliated with the beneficiary or agency for which the beneficiary works. This is necessary to ensure the trustee has no barriers to performing their fiduciary responsibilities. The categories of prohibited trustees should include:

- Any relative of the beneficiary, or member of the beneficiary's household.
- An employee of the beneficiary.
- An employee of any organization affiliated with the beneficiary.
- A federal government employee, or an employee of a government or governmental subdivision that does business with the beneficiary's agency.

⁴ 2 CAL. CODE REGS. tit. 2, § 18530.4(b) (2019). *See also* OR. REV. STAT. § 244.205 (2019) (In Oregon, a public official may establish a legal expense fund trust if the official has incurred or reasonably expects to incur legal expenses related to their official duties).

- Any person involved in a joint venture or other investment with the beneficiary.
- An entity or individual with any business that would be affected by the official duties of the beneficiary.
- A law firm or a partner, associate, or employee of any law firm that is representing the beneficiary in connection with any matter of investigation, who may be entitled to payment of attorney’s fees from the legal expense fund.
- A registered lobbyist or lobbyist organization.
- A foreign government, an agent of a foreign government, and all foreign nationals.

Termination

OGE should require a legal expense fund 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.⁵ Similarly, California requires “legal expense accounts” to terminate within 90 days of a resolution of the legal dispute for which the account was created.⁶

Regardless of the approach, after a fund terminates, OGE rules should require that the fund’s remaining money be refunded to donors on a pro rata basis or donated to a charity unaffiliated with the trustee or beneficiary. North Carolina, for example, provides several permissible ways to distribute unexpended legal expense funds. The money can be returned to donors, given to the North Carolina State Bar or the Indigent Persons’ Attorney Fee Fund, or donated to a charitable organization that does not employ a family member of the elected officer.⁷

Such carefully circumscribed requirements for how unexpended money should be distributed are necessary to prevent a “zombie fund” phenomenon. In the campaign finance context, retired lawmakers and former candidates have continued to spend leftover campaign donations 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

⁵ N.Y.C. ADMIN. CODE, ch. 11, § 3-1104 (2019).

⁶ 2 CAL. CODE REGS., tit. 2, § 18530.4(h)-(i) (2019).

⁷ N.C. GEN. STAT. § 163A-1570(b) (2019).

⁸ See, e.g., Christopher O’Donnell, Eli Murray, Connie Humburg, & Noah Pransky, *Zombie Campaigns*, TAMPA BAY TIMES (Jan. 31, 2018), <http://www.tampabay.com/projects/2018/investigations/zombie-campaigns/spending-millions-after-office/>.

disposition of unused funds will prevent legal expense funds from becoming zombies.

II. Donors and donations

Donor restrictions

Certain types of donors should be prohibited from giving to executive branch legal expense funds. Donations to legal expense funds should continue to be governed by the gift rules, which demand that donations from a “prohibited source” not be accepted.⁹ Additional commonsense limitations on the pool of eligible donors will reduce opportunities for self-interested actors to use legal expense funds to attempt to sway government decision-making. To prevent actual and apparent conflicts of interest, the rules should also prohibit donations from the following sources:

- Foreign governments, agents of foreign governments, and all foreign nationals.
- Federal employees.
- Registered lobbyists or registered lobbyist organizations, regardless of whether the beneficiary is a senior political appointee.¹⁰ People who are paid to influence government officials should not be permitted to give minimally regulated money to government officials’ legal expense funds.
- Any organization that can mask the true source of the money being donated, including LLCs and 501(c)(4)s.

This last category is crucial. The new rules must prohibit donations from organizations that can conceal the true source of their money. While the current OGE template for legal expense funds prohibits donations from anonymous sources, it does not take into account LLCs and other organizations that may not themselves be anonymous, but can be used to intentionally mask the true source of their money. There is a serious risk

⁹ A prohibited source is anyone who seeks official action by the employee’s agency, does business or seeks to do business with the employee’s agency, has interests that may be substantially affected by the performance or nonperformance of the employee’s official duties, or is an organization a majority of whose members fall under any of these categories. 5 C.F.R. § 2635.203(d) (2019).

¹⁰ OGE’s template prohibits solicitation and acceptance of donations from a registered lobbyist or lobbying organization only if the beneficiary is subject to the ethics pledge at Executive Order 13770—meaning that lobbyist solicitations and donations would only be prohibited for senior executive branch political appointees under the current model. U.S. OFFICE OF GOV’T ETHICS, DRAFT FUND TEMPLATE 5 (2012), [https://oge.gov/Web/OGE.nsf/0/2ED2E79D06B31810852581EE0060D92E/\\$FILE/Draft%20Fund%20Template.pdf](https://oge.gov/Web/OGE.nsf/0/2ED2E79D06B31810852581EE0060D92E/$FILE/Draft%20Fund%20Template.pdf).

that 501(c)(4)s and LLCs will be used as vehicles for donors who want to donate to a fund but keep their identities secret.

This dark money phenomenon is already a pervasive problem in the context of election spending, where LLCs and 501(c)(4)s are increasingly being used by anonymous donors as vehicles to hide the donors' identity as the true source of election-related spending.¹¹ A clear prohibition on donations from these entities will prevent this problem in the legal expense fund context. OGE should also specifically prohibit donations in the name of another person, as federal campaign finance law already does.¹²

Donation limits and disclosure

Additionally, donation amounts should be both limited and disclosed. There should be a cap on how much an individual donor can give to the fund. OGE should limit donations to a reasonable dollar amount, indexed for inflation, per donor per fund. New York City employees who establish a legal defense trust may not solicit or receive a donation in excess of \$5,000 per donor.¹³ In Connecticut, public officials and state employees are prohibited from accepting donations in excess of \$1,000 per donor per calendar year, unless the donor is a family member or has some relationship with the employee outside of their official duties.¹⁴

Regardless of what the dollar amount limit is, all donations and distributions should be disclosed on a quarterly basis, and any donation over \$200¹⁵ should be subject to heightened reporting requirements, including the name, occupation, and employer of the donor. If the beneficiary is a public filer, these disclosures should be made publicly available.

Disclosure is vital in the context of donations to legal expense funds. It helps track and deter donors who might seek to exert improper influence on beneficiaries by making large donations to their fund. Public availability also helps the press, public, and watchdog groups identify potential violations of

¹¹ See, e.g., CAMPAIGN LEGAL CENTER, *LLCs: The Perfect Mechanism to Funnel Secret (and Perhaps Foreign) Money Into Elections* (July 30, 2018), <https://campaignlegal.org/update/llcs-perfect-mechanism-funnel-secret-and-perhaps-foreign-money-elections>; CAMPAIGN LEGAL CENTER, *Dark Money Issue Brief* (June 12, 2017), <https://campaignlegal.org/sites/default/files/Dark%20Money%20Issue%20Brief.pdf>; Trevor Potter, *Dark money threatens our elections*, THE HILL (July 12, 2018, 9:00 AM), <https://thehill.com/opinion/campaign/396642-dark-money-threatens-our-elections>.

¹² The Federal Election Campaign Act's "straw donor" ban is at 52 U.S.C. § 30122, and the Federal Election Commission's implementing regulations are at 11 C.F.R. § 110.4.

¹³ N.Y.C. ADMIN. CODE, ch. 11 § 3-1102(e)(1) (2019).

¹⁴ CONN. GEN. STAT. § 1-86d(b)(2)-(3) (2019).

¹⁵ This amount should be indexed for inflation.

the law governing legal expense funds and bring violations to the attention of the relevant government agency.

III. Use of funds

The new rules should strictly limit permissible uses of donated money. Concerns about the abuse of legal expense fund money can be addressed by setting commonsense limits on how the fund money can be used in the scope of legal proceedings. An obvious but important limitation is that the money should not be used to cover legal costs associated with purely personal activities. Much like how campaign finance law prohibits the use of campaign funds for personal legal expenses,¹⁶ the funds should be established, and distributions should be used, solely to defend against a criminal or civil matter that arises directly out of the beneficiary's duties as an officeholder. The funds should also only be used to pay for the cost of attorneys' fees and other costs associated with resolving a legal proceeding, but not for the payment of a fine, settlement, or other financial penalty that results from the proceeding. Additionally, the beneficiary should not be permitted to use the money for any public relations expenses that might stem from a legal proceeding.

California law, for example, permits state candidates and elected officials to use distributions from legal expense accounts for limited purposes. The accounts may be used to defray attorney's fees and related legal costs incurred in a civil or criminal proceeding, or in an administrative proceeding "arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties."¹⁷ But explicitly excluded from "attorney's fees and related legal costs" are expenses for fundraising; media or political consulting fees; mass mailing or other advertising; or any payment or reimbursement for a fine, penalty, judgment, or settlement.¹⁸

New York City also limits the use of legal defense trusts. A trust can be used to pay for traditional legal expenses incurred in connection with a governmental, administrative, criminal, or civil investigation, audit, or action that is related to a political campaign, issue advocacy, the holding of a civil

¹⁶ 52 U.S.C. § 30114(b) (2019); 11 C.F.R. §§ 113.1(g), 113.2(e). The FEC uses the "irrespective test" to determine on a case-by-case basis whether a particular legal expense is personal use, i.e., whether the expense would exist irrespective of the candidate's campaign or responsibilities as a federal officeholder. Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7863–64 (Feb. 9, 1995); *see also* FED. ELECTION COMM'N, *Personal Use*, <https://www.fec.gov/help-candidates-and-committees/making-disbursements/personal-use/> (last visited June 13, 2019).

¹⁷ CAL. GOV'T CODE § 85304(a) (Deering 2019).

¹⁸ *Id.* § 85304(d)(1)-(2).

office or appointment, public office or political party position.¹⁹ A trust can also be used to pay costs reasonably incurred in administering the trust.²⁰ City law expressly prohibits a legal defense fund from making expenditures to pay for “advertising expenses, political consultants, the payment of criminal fines or penalties imposed upon an individual beneficiary, or communications involving election or campaign activities.”²¹ The trust may not be used for “personal use” of the trustee or beneficiary,²² or used to defray legal costs that have been paid for by the city.²³

In North Carolina, a legal expense fund may only be used to pay “reasonable expenses actually incurred by the elected officer in relation to a legal action or potential legal action brought by or against the elected officer in that elected officer’s official capacity.”²⁴

The new federal rules should require the beneficiary and trustee of a legal expense fund to submit a quarterly attestation confirming that the funds are only being used for approved purposes and that no distributions have been used for a prohibited purpose.

IV. Transparency

The document establishing the legal expense fund should be disclosed to OGE, who should serve as the repository for legal expense fund disclosure. If the beneficiary is a public filer, then the document establishing the fund, the quarterly attestation of proper use of funds, and the quarterly disclosures of donations should be made publicly available, either as a matter of course or upon a form 201 request. For the same reason we require personal financial disclosure to be publicly available, information surrounding a legal expense fund, including information about the trustee and donations, should be made public.

The potential for conflicts and undue influence is especially high for public servants who establish and accept distributions from legal expense funds. The funds allow donors to provide cash directly to public servants to support them in any legal challenges they might face. These donations defray costs arising out of a public servant’s official duties—costs that the official would otherwise have to pay themselves. Conflicts concerns are heightened in this context because representation is expensive—especially where a legal

¹⁹ N.Y.C. ADMIN. CODE, ch. 11, § 3-1102(f)(1)(a).

²⁰ *Id.* § 3-1102(f)(1)(b).

²¹ *Id.* § 3-1102(f)(2).

²² *Id.* § 3-1102(f)(3).

²³ *Id.* § 3-1102(f)(4).

²⁴ N.C. GEN. STAT. § 163A-1570(a).

proceeding plays out over an extended period of time. The public should have the ability to assess their government officials' potential conflicts to ensure that they are working in the public's best interest.

Through this rulemaking, it is vital that OGE sets limits on how the funds are structured and funded, ensures fund usage is carefully circumscribed, and requires regular disclosure of donations and distributions.

CLC thanks OGE for the opportunity to submit these comments and appreciates your consideration.

Respectfully submitted,

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