FOLEY
FOLEY & LARDNER LLP

ATTORNEYS AT LAW
WASHINGTON HARBOUR
3000 K STREET, N.W.
SUITE 600
WASHINGTON, D.C. 20007-5109
202.672.5300 TEL
202.672.5399 FAX
WWW.FOLEY.COM

WRITER'S DIRECT LINE
202.295.4081
cmitchell@foley.com EMAIL

CLIENT/MATTER NUMBER
999100-0100

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

RE: Legal Expense Fund Regulation – Comments

Dear Sirs:

This is in response to the Advance Notice of Proposed Rulemaking related to Legal Expense Fund Regulation, published by the Office of Government Ethics ("OGE").

I have served as the Trustee for Legal Expense Funds for member(s) of the U.S. Senate and have advised clients and prospective clients with regard to legal expense fund issues related to individuals employed in the executive branch and the US House of Representatives.

What is needed for executive branch employees is a simple and straightforward mechanism that makes it possible for federal employees who lack personal wealth to be able to raise funds to pay for legal counsel and representation in matters related to their public service and employment in the federal government.

There are clear rules for House and Senate members and staff. But no such clear rules exist for federal employees in the executive branch. And, in fact, the rules that do exist make it virtually impossible for certain federal officials and employees to raise funds due to the expansive definitions of 'prohibited source'.

It is not acceptable that persons who voluntarily and willingly come into the federal government should be faced with crippling legal bills that arise from litigation and administrative and other complaints originating from their political opposition. And the rules should not make raising funds so prohibitive as to be non-existent.

I would refer OGE to the rules of the House and Senate, which set forth clearly and simply a straightforward process for registering and obtaining approval for a legal expense fund, with regular reporting of contributions and expenditures over $200, and a provision for terminating the legal expense fund when the trustee determines that its purpose(s) have been served and it is no longer needed.

One area that is important is to create a process and structure which removes the potential for tax liability to donors or the beneficiary (defined herein as the employee who is in need of legal representation related to his/her official duties in the government).

By creating the entity as a Section 527 organization upon approval by OGE of the legal expenses fund, such tax liability issues would be eliminated for both donors and beneficiaries. This would eliminate many questions and concerns for trustees, donors, and beneficiaries.

As long as funds contributed to a Section 527 political organization are spent for an 'exempt function', there is no tax liability to a 'beneficiary'. Exempt function is defined in the Internal Revenue Code as follows:

> "2) Exempt function.
> The term "exempt function" means the function of influencing or attempting 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 or electors are selected, nominated, elected, or appointed. Such term includes the making of expenditures relating to an office described in the preceding sentence which, if incurred by the individual, would be allowable as a deduction under section 162(a)." 26 U.S.C. §527(e)(2)

Work related legal fees are often deductible, when the fees are incurred in relationship to doing or keeping a job. See T.C. Summary Opinion 2017-2. At the very least, filing the legal expenses fund as a Section 527 organization creates a reasonable inference of non-taxability by confirming that the legal fees paid through the fund are related to the office held by the federal employee and are not personal legal fees.

Below are my comments in response to the specific questions posed by OGE.

1. Donors and donations to legal expense funds. For example:

a. Should there be limitations on the types of donors to legal expense funds? If so, what should those limitations be? Why?

The current restrictions on 'prohibited source' contributions make it all but impossible for some persons to raise funds for a legal expense fund. While some agencies are able to define 'prohibited source' narrowly, other agencies have such wide reach within the society that virtually any potential donor could be construed to be a 'prohibited source'.

My recommendation is that the limitations on donors who would be prohibited from contributing to a legal expenses trust would be as follows:

1. Registered lobbyists who presently or in the last twelve months have represent(ed) clients before the Beneficiary's employing agency.
2. Persons who are owners, officers or directors of an entity with formal proceedings or official business pending before the Beneficiary's employing agency or which were pending within the past twelve months.

Provided, that any individual in categories 1 and 2 who is a relative or family member of the Beneficiary are exempt from the prohibitions and would be permitted to contribute.

To bar contributions from anyone / everyone *potentially* subject to regulation by the agency is too broad.

b. Should there be contribution limits to legal expense funds? If so, what should that amount be? Why?

No. But if limitations are established they should be set at a reasonable level, such as $25,000.

c. Should donations of *pro bono* legal services to legal expense funds be permitted? Why or why not? Should employees be allowed to accept *pro bono* services outside of a legal expense fund? Why or why not?

If a lawyer is willing to provide such services, then that should be allowed, with the proviso that no one can provide pro bono legal services who is also a lobbyist or is otherwise prohibited from contributing to a legal expense fund, as described above.

<u>2. Beneficiaries of and use of funds from legal expense funds. For example:</u>

a. Should there be limits on the permissible beneficiaries? If so, what should those limits be and why? Why would there be limits? Why wouldn't every federal employee be entitled to create a legal expense fund.

b. Should there be limits on the number of eligible beneficiaries for a legal expense fund? Why or why not?

Again, if the legal expense funds is established according to the rules, and a group of beneficiaries wish to join together to form such a fund, that should be their prerogative. That makes it more difficult to raise money, as there will be different prohibited sources for employees of different

agencies, but that should be their decision. If there is to be a restriction, it should be that multiple beneficiaries must be employed by the same agency in order to more easily review the donors to ensure there are no prohibited source contributions.

c. What limits, if any, should there be on permissible uses of donated funds?

The funds should only be used for the purposes for which the funds is established, as outlined in the trust instrument. That would include only legal representation in matters related to the beneficiary's nomination, confirmation, or service in the federal government. All legal and other expenses (such as fundraising costs) should be reviewed and approved by the trustee of the legal expenses fund, and certified for compliance in the regular reporting by the fund.

3. Transparency of legal expense funds. For example:

a. Should the document establishing the legal expense fund be required to be publicly disclosed? Why or why not?

The OGE should follow the same format for registration, filing and reporting as set forth in the House and Senate rules for legal defense funds. The organizing documents are submitted to the relevant committee, which are reviewed and approved, but which are not public documents until approved.

b. Should contributions be subject to reporting requirements? If so, should there be a threshold amount for disclosure? What type of information should be disclosed and what should the requirements for disclosure be? Why?

There should be a separate form for reporting to OGE, but which is separate from the beneficiary's personal financial disclosure report. It is not accurate to report contributions to the legal expenses trust as 'gifts' because they are not gifts – the contributions are what are described: contributions. And there should not be a tax liability associated with making such contributions, which is a potential when the OGE arbitrarily requires that the contributions be reported as personal gifts when they are not.

House and Senate rules provide for quarterly reporting of contributions to and expenditures from a legal defense fund, together with a certification that no prohibited contributions were received and that expenditures were for the purpose(s) approved by the Ethics Committee.

These are public reports of contributions and disbursements, by the Trustee, but not by the Beneficiary(s).

c. Should any disclosure information be made publicly available? If disclosure information is made publicly available, how and where should the information be disclosed?

The OGE should follow the same procedures as the House and Senate – the quarterly reports of contributions and expenditures, the certification of compliance with the rules, and those should be public, and once the purposes of the legal expense fund is completed, a termination report should be filed and publicly available.

4. Establishment, management, and termination of legal expense funds. For example:
a. Should legal expense funds be the exclusive mechanism for employees to receive contributions toward legal assistance? Why or why not?

If an employee has personal resources or family members who can assist with payment of legal fees, that should be permitted without any notice to OGE or filing requirements. If an employee does not have personal or family resources, and is only able to pay legal expenses attendant to government service by seeking contributions, a formal legal expense fund should be established.

b. What types of requirements should be imposed on legal expense fund trustees or managers, if any?

A trustee or manager should be an eligible 'donor' (i.e., not a prohibited source). Other than that, it should be the beneficiary's duty to designate a responsible person to serve in that capacity.

c. Should there be any restrictions on the legal structure used to establish a legal expense fund (*e.g.*, trust, limited liability company, etc.)? Why or why not?

There should be specific steps for all legal expense funds that would be consistent for all of them, to-wit:

1. Separate EIN for the Legal Expenses Trust.
2. Trust Agreement, per the attached form approved by OGE in recent years.
3. Instructions to file the legal expenses fund with the IRS as a Section 527 entity in order to ensure there is no tax liability that could accrue to either the donors or the beneficiary for the payment of legal expenses associated with the public office he/she holds.

d. What entities, if any, should have oversight authority over legal expense funds? Why?

Follow the House and Senate example: require a filing of the trust instrument with OGE, and approval of the form and format. Then, require filing with the IRS as a Section 527 organization (with the filings required by the IRS for Section 527 organizations) and quarterly filings with OGE

of contributions and expenses in excess of $200. Filing of a termination report when the work is concluded.

That should be all the 'oversight' that is required.

e. Should there be limitations on solicitation of donations to a legal expense fund? If so, what limitations should be placed on solicitations and why?

No government resources should be used for soliciting contributions to a legal expenses trust and prohibited sources should not be allowed to solicit contributions. The beneficiary should not be allowed to solicit any person or entity subject to regulation by the employing agency. Other than that, there should be no government restrictions on solicitations.

f. What, if any, requirements should there be concerning how legal expense funds can be terminated? Why?

The legal expense fund should be terminated when its business is completed. Similarly, the trustee should also terminate the 527 committee with the IRS.

g. Should existing legal expense funds be required to conform to new regulations? Why or why not?

These rules should be prospective and not retroactive, unless an existing legal expenses trust voluntarily wishes to adapt to the new regulations.

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These are my comments in response to the request from the OGE related to legal expense trusts. Please feel free to contact me at (202) 295-4081 or via email at cmitchell@foley.com

Sincerely,

Cleta Mitchell

Cleta Mitchell, Esq.