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Submitted Electronically

Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, D.C. 20005-9237

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

Public Citizen respectfully encourages the Office of Government Ethics (OGE) to promulgate clear and precise regulations governing the establishment and operations of legal expense funds for executive branch personnel. These regulations should borrow from rules already established for congressional personnel and include, at a minimum:

- Contribution limits;
- Source prohibitions; and
- Disclosure requirements.

On September 15, 2017, Public Citizen filed a petition for rulemaking on legal expense funds for the executive branch with OGE. Very few legal expense funds had previously existed for executive branch personnel and in the few occasions when they were established, the officials implemented voluntary contribution limits and disclosure requirements, making regulations generally unnecessary. However, the rapidly growing number of such funds being established under the current Trump administration, each organized differently and with limited, if any, disclosure, made it clear that uniform regulations of these entities are now needed. Public Citizen is delighted that OGE recognizes the problem and is now undertaking such rulemaking.

A. Background

When members of Congress and officials of the Executive Branch get in trouble with the law or face alleged ethical violations, they may establish a fund – commonly referred to as a legal expense fund – to defend themselves. These funds are governed by House and Senate ethics rules for members of Congress and congressional staff, along with scattered and undeveloped guidelines from the Office of Governmental Ethics for the executive branch. The rules governing congressional legal expense funds are more restrictive and much more specific than the informal few guidelines that govern officials of the executive branch. As such, the congressional regulations of these funds provide a helpful blueprint for the executive branch.

1. Congressional Legal Expense Funds

House

Following House Rule XXV, clause 5(a)(3) and direction from the House Committee on Ethics, the House gift rule allows Members to accept contributions for a legal expense fund, established as a trust, as long as the legal expenses in question arise from one of the following matters:

- The individual's candidacy for or election to federal office.
- The individual's official duties or position in Congress (including a matter before the Standards Committee).
- A criminal prosecution.
- A civil matter bearing on the individual's reputation or fitness for office. [1]

Legal expense funds must be administered by an independent trustee, with no "family, business or employment relationship" with the beneficiary, but ultimate responsibility for a trust's administration lies with the trustor.[2]

Trusts require Ethics Committee approval before they can start soliciting or receiving donations, and they must file quarterly reports with the Legislative Resource Center until they are terminated. They may not accept more than $5,000 from a single donor in a calendar year, and donations may not come from registered lobbyists or foreign agents. Furthermore, any funds remaining after the legal matter has been settled must be distributed to charity not controlled by the trustor or returned to the donors on a pro rata basis.[3] Beneficiaries must file quarterly reports which include the full name and address of all contributors and recipients exceeding $250 within a calendar year, as well as any from LLCs, corporations, or labor unions.[4] Additionally, contributions above $335 in a calendar year must be disclosed on the beneficiary's annual Financial Disclosure Statement.[5] The quarterly reports can be found on the Legislative Resource Center computers, which require visiting the physical office in the Cannon House Office Building (room 135).

House legal expense funds may accept pro bono legal services without limit to file an amicus brief in the trustor's capacity as a member of Congress; to bring a civil action challenging the validity of any federal law or regulation; and to bring a civil action challenging the lawfulness of any agency or official action. Other legal services shall be counted as a contribution to the fund

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[1] House Committee on Ethics. "Contributions to a Legal Expense Fund." U.S. House of Representatives (n.d.), available at: http://ethics.house.gov/contributions-legal-expense-fund.

[2] House Committee on Ethics. *Memorandum for All Members, Officers, and Employees RE Revised Legal Expense Fund Regulations.* U.S. House of Representatives (2011), page 1, available at: http://ethics.house.gov/sites/ethics.house.gov/files/Pink%20Sheet%20With%20Regs.pdf

[3] House Committee on Ethics. "Contributions to a Legal Expense Fund."

[4] House Committee on Ethics. *Memorandum for All Members, Officers, and Employees RE Revised Legal Expense Fund Regulations.* U.S. House of Representatives (2011), page 5.

[5] House Committee on Ethics. "Contributions to a Legal Expense Fund."

by the law firm. Pro bono legal services must be disclosed on the quarterly reports at fair market value.[6]

Senate

Senate legal expense funds operate somewhat similarly to their House counterparts. Trusts must be approved by the Select Committee on Ethics for the purpose of paying for legal proceedings "relating to or arising by virtue of service in or to the Senate." Legal expense funds are to be administered by an independent trustee with no business or family ties to the beneficiary. Senate rules prohibit contributions from registered lobbyists or foreign agents, as well as from senate staffers, corporations, labor unions, a member's principal campaign committee, or foreign nationals (though campaign funds may be used separately to pay legal expenses, subject to approval of the ethics committee). Anyone else may contribute up to $10,000 a year, though the trustor (and relatives) may contribute as much as they wish.[7] Senate legal expense funds may also accept pro bono legal services for specified purposes but must disclose these services at fair market value. A senator may not accept pro bono legal services for the purpose of joining in a lawsuit in his or her official capacity.

Trustees must file quarterly reports with both the Select Committee on Ethics and the Office of Public Records. These reports must include the name and address of donors and recipients of over $25 a year as well as descriptions of expenditures.[8] Like House legal expense filings, Senate disclosures are only accessible via a visit to the Office of Public Records (Hart Senate Office Building, room 232).

One Legal Expense Fund

In both the House and the Senate, members and employees may establish only one legal expense fund at any one time. In the House, however, a member's legal expense fund may be used to pay related costs of other current or former congressional staff, subject to approval of the House Ethics Committee.

2. *Executive Branch Legal Expense Funds*

Executive Branch legal expense fund guidelines are often contradictory as well as less stringent than the guidelines of Congress. In 1993, OGE issued an opinion regarding the establishment and financing of legal expense funds by executive branch personnel, which is not viewed either as a regulation nor concrete guidelines. Instead, the 1993 opinion is viewed more as suggestions for executive branch personnel to avoid violating other ethics rules, such as the gift rule. In this informal letter, OGE cites 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

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[6] House Ethics Committee. "Revised Legal Expense Fund Regulations." (Dec. 20, 2011), available at: https://ethics.house.gov/sites/ethics.house.gov/files/Pink%20Sheet%20With%20Regs.pdf

[7] Senate Select Committee on Ethics. *Senate Ethics Manual*. Government Printing Office (2003), pages 30-31, available at: https://www.ethics.senate.gov/downloads/pdffiles/manual.pdf

[8] Senate Select Committee on Ethics. *Senate Ethics Manual*, page 31.

payment for their work. OGE's letter suggests that contributions to legal expense funds could be perceived as gifts unrelated to employees' normal work, and are therefore permissible, but trustors should make an effort to incorporate the following guidelines:

- Donors must contribute anonymously.
- The administrating trustee is not connected to the employee's official duties.
- The trust does not solicit funds from the employee's coworkers.
- Contributions do not come from sources with a vested interest in the officeholder or the officeholder's agency.
- Contributions do not violate executive gift rules.[9]
- No specific disclosure requirements are recommended by OGE in keeping with anonymous donations.

Reflecting that the 1993 guidance only constituted suggestions as opposed to real guidance, former President Bill Clinton set up two legal expense funds in the 1990s to help pay for his legal expenses and those of Hillary Clinton associated with charges of lying under oath, the Whitewater scandal and the Paula Jones sexual harassment lawsuit. Neither fund followed the guidelines suggested by OGE. Clinton's second legal expense fund, for example, imposed a voluntary contribution limit of $10,000 per donor per year and opted to disclose the sources of the funds to the public on a biannual basis.[10]

OGE recognized that its 1993 guidance was riddled with flaws, 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.

Most recently, the "Patriot Legal Expense Fund Trust," established in 2018 by supporters of the Trump administration, highlights the glaring conflicts of interest that can result from the absence of clear and precise regulations governing such funds. The Patriot Fund is organized and run in a manner that allows unlimited donations to be distributed to multiple beneficiaries, anyone connected with the Trump administration, campaign or transition team who is in anyway caught up in the investigation of Russian meddling in the 2016 election, and selected at will by the manager of the Fund. Though the charter of the Fund declares that donations from conflicting sources will not be used to benefit any particular recipient with a conflict of interest, money is fungible. Major donors, such as Sheldon and Meriam Adelson, are seeking specific favors from the Trump administration. In fact, Meriam Adelson was even awarded the Presidential Medal of

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[9] 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.

[10] Wolf Blitzer, "New Clinton Legal Expense Fund Created," CNN (2005), available at: http://www.cnn.com/ALLPOLITICS/1998/02/18/defense.fund/

Freedom by Trump shortly after she and her husband donated $500,000 to the Fund.[11] The potential conflicts of interest are enormous, and the needed transparency and accountability is minimal at best.

B. Recommendations

It is in the interest of all parties concerned for OGE to establish clear and precise rules governing the establishment, financing and operations of legal expense funds for the executive branch beyond the rules governing gifts for officials. Executive branch personnel need to understand proper procedures for such funds; OGE needs to know when and how the operation of legal expense funds may run afoul of conflict of interest rules; and the public needs reassurance that executive branch personnel under legal challenge are not being placed in a position of undue influence by large donors.

OGE should recognize that legal expense funds are increasingly necessary for executive branch personnel, but they may yet pose some serious conflict of interest concerns if not established and financed properly. OGE should learn from and adapt the congressional rules governing legal expense funds in creating rules to govern such funds for the executive branch. Such rules should include: (i) contribution limits so that no donor may attempt to buy undue influence with the official; (ii) source prohibitions to avoid serious conflicts of interest; and (iii) full transparency of the sources and expenditures of legal expense funds to assure the public that the funds are not being abused as a means of currying political favor.

Public Citizen proposes 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").

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[11] Robert Schlesinger, "Trump Giving Meriam Adelson the Medal of Freedom Captures the Transactional Nature of His Presidency," NBC News.com (Nov. 16, 2018), available at: https://www.nbcnews.com/think/opinion/trump-giving-miriam-adelson-medal-freedom-captures-transactional-nature-his-ncna937121

- 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.

Respectfully submitted,

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