FINAL Proposed Department of Defense (DoD) Standards of conduct Office (SOCO) Response to OGE ANPRM for Legal Expense Fund Regulation:

OVERALL:

Efforts to control contributions for legal expenses may have far-reaching collateral impacts across the Department of Defense (DoD). To this end, it is critical to consider unintended consequences of (1) how "legal expense fund" is defined (i.e., scoping mechanism as to what is/is not included); and (2) whether applicability and reporting requirements should be the same across all categories of federal executive branch employees, in particular, military personnel who are defendants in military criminal and administrative proceedings.

BACKGROUND:

Methodology: In addition to reviewing the proposed rule, we reviewed the Office of Government Ethics (OGE's) advisories and opinions on the topic of legal defense funds, looked at the Congressional rules, and reviewed transcripts from the virtual hearing that OGE held on the proposed rulemaking. The comments below are not in response to any requirement we believe is in the anticipated scope of OGE's current proposal, but are mostly identifying the significant problems that emerge at the periphery of this topic and how they unfold if the scope expands. Of note, most of the comments at the virtual hearing painted all federal employees with a single brush, failing to differentiate between categories of employees, including civilian and uniformed, and how the rules may affect them.

General Comments: The ethical implications of military service members as Government employees--accepting free legal Services, or accepting money from private individuals to pay for legal services, bears greater study. However, of particular DoD concern are prohibitions on accepting legal defense funds which might be seen as chilling a service member's ability to raise funds to retain private counsel in a military court-martial case. Perhaps adding all legal defense funds as an item for disclosure for those service members who are required to file OGE 450s or OGE 278s would address concerns. The ability to raise funds should be as close as possible to that of the average citizen.

The lack of definition as to Legal Expense Funds creates ambiguity as to what type of conduct is to be regulated. For example, it's not clear whether a rule would target legal expenses "which would not have arisen but for their official position" (the Senate's standard) or if the rule may include all legal expenses that an employee may incur or where they may receive pro bono legal services (as uniformed members do).

Specific Comments to Questions:

Question 1.c. of OGE's notice poses the following questions: "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 legal expense funds? Why or why not?"

A significant percentage of federal employees benefit from a range of pro bono services offered by clinics, fairs, and non-profit organizations. In fact, 31% of federal employees are veterans and may receive benefits from Veterans Legal Aid Clinics. Further, there are a large number of non-profit entities that exist, in whole or in part, to provide and facilitate pro bono legal services to veterans and uniformed members on issues involving family law, trusts and estates, consumer protection, landlord/tenant, and tax advice. Additionally, the American Bar Association and state bar associations sponsor large networks of legal practitioners who provide pro bono services to meet the needs of veterans and uniformed members. Placing limits on acceptance of pro bono legal services would eliminate decades of efforts to establish greater access to legal services for these subsets of federal employees who may have unique legal needs.

Although a large percentage of pro bono services fall into categories often grouped as "consumer law," significant pro bono work is also expended in military criminal law, administrative actions, and victim representations. These services are sometimes performed for free or funded by advocacy groups such as the American Civil Liberties Union and the Human Rights Campaign. The scope of services is broad and includes assisting with general administrative matters as well as providing representation in complex court-martials.

Military service members accused of an offense under the Uniform Code of Military Justice receive access to a military defense counsel free of charge. For Non-judicial Punishment, the service member may consult with military defense counsel whereas for judicial proceedings, a military defense counsel is assigned. It is common in both circumstances for military members to personally hire private counsel. Sometimes private counsel will provide pro bono services; sometimes they will offer services at a reduced rate; sometimes the military member pays for the services; and sometimes the services are paid for by a third party (often family members and friends).

Question 3.c. states "Should any disclosure information be made publicly available? If disclosure information is made publicly available, how and where should the information be disclosed?"

As previously discussed, it would be logistically difficult and burdensome to track all contributions for legal assistance made to federal personnel, given that payments by friends and family occur on a near constant basis. A reasonable standard might include reporting any gifts of legal services, in excess of the minimal value threshold, on a financial disclosure report, without requiring non-filers to file a separate report. This would confine reporting to the subset of federal personnel where the public is most interested in transparency without imposing new significant burdens on the more than two million DoD personnel who might otherwise have a new reporting requirement anytime another person covers their legal fees or provides pro bono services.

Question 4.a. asks "Should legal expense funds be the exclusive mechanism for employees to receive contributions toward legal assistance? Why or why not?"

As noted above, it is common for family and friends to pay for legal services for members of the uniformed services. For junior military service members, legal fees from a court-martial can exceed their annual pay. Even fees from low-level misconduct charges or

administrative actions can routinely exceed $20,000. The 5 C.F.R. 2635.204(b) gift exception for gifts based on a personal relationship has traditionally made the payment of legal services by friends and family legally unobjectionable. Any limits on employees receiving contributions for legal assistance that does not recognize this longstanding provision would create significant difficulty that would extend well outside the military community.

One additional note about the scope of legal defense funds. The Senate rules confine use of legal defense funds to legal expenses incurred "by virtue of service in or to the Senate." Any proposed rule that anticipates limiting scope to a subset of legal actions arising from one's government service would still include the tens of thousands of cases that occur annually within the military for military criminal cases and personnel actions. If someone is appealing a decision made regarding their security clearance or defending against a criminal charge for failing to be at their appointed place of duty, the substance of the subject matter exists solely because of their government service and the procedural and jurisdictional bases for the hearings stem from their government employment. While such a rule would also have an effect on civilian government personnel, the impact on military personnel could be enormous with extensive military personnel actions and a parallel criminal justice system that serves the nation's single largest workforce. Accordingly, any rule that imposes restrictions or reporting requirements on legal assistance for proceedings arising from one's government service, must exclude all legal actions where the employee's agency is an opposing party.

PROPOSED RULE LANGUAGE:

Background. Any proposed OGE rule on Legal Defense Funds would have to address both a satisfactory gift exception for all employees and the financial disclosure reporting requirements for OGE 278e and OGE 450 filers. Also, for military service members, guidance should also be provided about appropriate use of one’s uniform in such fund raising.

Proposed Rule. The following is proposed rule language for OGE to consider as an addition to 5 CFR 2635.204:

Legal Defense Funds. An employee, or their legal representative, may accept solicited or unsolicited funds from a public collection, established by the employee, a family member of the employee, or a non-prohibited source, for the purpose of accepting funds to assist the employee with paying the reasonable costs of attorney’s fees to defend the employee in the Federal or State prosecution of criminal charges.

(1) An employee may include or permit the inclusion of their official title or position as one of several biographical details provided to the public, provided that their title or position is given no more prominence than other significant biographical details;
(2) An employee who is ordinarily addressed using a general term of address, such as “The Honorable” or a rank, such as a military or ambassadorial rank, may use or permit the use of the term of address or rank in connection with the public collection;
(3) Any photographs or other visual images of the employee may obtain a balanced representation by the inclusion of imagery of the employee in their assigned uniform at the time of the government assignment being depicted. An image of the employee in uniform should not be the primary visual representation of the public collection;

(4) The public collection may not accept donations from anonymous or prohibited sources. The financial statement of the collection shall include the identities of all donors to the collection and shall be made a matter of public record;

(5) For purposes of employees who are Public Financial Disclosure Report filers, any monies accepted from the public collection shall be considered a reportable gift within the meaning of 5 CFR 2634.304. Gifts donations to the collection of a value more than $390 must be reported by name of the individual donor. Gifts of donations to the collections of a value of $156 or less do not need to reported by name of individual donor and can be aggregated into a single gift from the public collection itself.

(6) For purposes of employees who are Confidential Financial Disclosure Report filers, any monies accepted from the public collection shall be considered a reportable gift within the meaning of 5 CFR 2634.907(g). Gifts donations to the collection of a value more than $390 must be reported by name of the individual donor. Gifts of donations to the collections of a value of $156 or less do not need to reported by name of individual donor and can be aggregated into a single gift from the public collection itself.

(7) Such public collections may also accept the donation of pro bono legal services which shall be afforded a fair market value as ascertained by the donor according to their hourly billing rate and the number of hours of legal service provided.