June 14, 2019

Hon. Emory A. Rounds
Director
U.S. Office of Government Ethics
1201 New York Ave NW, Ste. 500
Washington, DC 20005

Re: Issue One's comment in response to the U.S. Office of Government Ethics Notice and Request for Comments: Legal Expense Fund Regulation, RIN 3209–AA50, 84 Fed. Reg. 15146

Dear Director Rounds:

Issue One respectfully submits this letter in response to the advance notice of proposed rulemaking (ANPR) and notice of public hearing from the U.S. Office of Government Ethics (OGE) regarding its consideration to regulate legal expense funds. As OGE recognizes in its ANPR, "there is currently no statutory framework in the executive branch for establishing a legal expense fund" and OGE's role in regulating legal expense funds is "limited to providing guidance" to ensure that a fund's distributions are "in compliance with the ethics laws and rules." Issue One strongly supports OGE's consideration to write regulations that create a legal expense fund framework that ensures the ethical integrity of the executive branch.

Left unregulated, legal expense funds provide for a real risk of corruption or the appearance of corruption. The funds could be used as a slush fund for executive branch officials; donors could donate large sums of money expecting officials to be beholden to them; and foreign governments and lobbyists could contribute in exchange for access and influence. The legal expense fund regulations promulgated by the U.S. House of Representatives Committee on Ethics provides an effective framework for OGE to replicate when writing its regulations.

The House rules contain six sections that would be helpful to OGE's consideration of legal expense fund regulation:

1. Establishment of Legal Expense Fund Trusts
2. Selection and Duties of Trustees
3. Contributions and Use of Funds
4. Disclosure and Reporting Requirements
5. Termination of Trusts
6. Enforcement

Issue One's comment will explain why the policies contained in these sections should be included in OGE's legal expense fund regulations.

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I. Establishment of Legal Expense Fund Trusts

OGE should require executive branch officials to receive permission from OGE to establish a legal expense fund trust. By requiring officials to ask for permission, OGE can certify that a fund will only be created to pay for the legal expenses associated with permissible matters. In seeking to establish a trust, the trustor must provide their contact information and certify "the nature of the legal proceeding which necessitate[s] the establishment of such a trust fund," "that he or she will be bound by [the regulations]," and that the trustee "bears ultimate responsibility for the administration of the trust."[1]

Additionally, no one may solicit or accept a contribution for the legal expense fund prior to OGE's approval of the trust document; no one may establish or maintain more than one legal expense fund at any time; and no one may amend the trust document or change the trustee without prior written approval. Legal expense funds will be more transparent and accountable if OGE requires a written record of the funds' purpose and management.

II. Selection of Duties and Trustees

It is important that the trustee is entirely independent of the executive branch official benefitting from the legal expense fund, as that independence reduces the risk that the trustee will have an incentive to act unethically or contrary to law or regulation. A signed affidavit and recordkeeping create more accountability and ensure that the trustee clearly understands their responsibilities.

They should "not have any family, business, or employment relationship with the [t]rustor within years prior to the establishment of the trust or at any time while serving as [t]rustee."[2] To verify, OGE should require the trustee provide an affidavit swearing to their independence and that they have read and understand the legal expense fund regulations and will administer the trust in line with the regulations and other ethics rules.

Further, the trustee should retain all the receipts of contributions to the trust and the authorization of expenditures and disbursements from the trust. The trustee should provide the trustor with a copy of those receipts and authorizations so that they can file regular reports to OGE.

III. Contributions and Use of Funds

To prevent legal expense funds from becoming slush funds for government officials, OGE should implement narrow parameters for the use of the funds. First, trust funds should only be used for legal expenses associated with matters that have been approved by OGE, and all excess funds should be returned to contributors once the trust is terminated. The trustee and the trustor should be prohibited from converting the funds in any way, under any

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[1] House Committee on Ethics, Revised Legal Expense Fund Regulations, https://ethics.house.gov/sites/ethics.house.gov/files/Pink%20Sheet%20With%20Regs.pdf
[2] *Id*.

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circumstances.[3] Next, if an official has already paid for legal expenses prior to creating a trust, OGE should only give permission to establish a legal expense fund trust to pay for those expenses after the official submits a written request that details the "amount, time period, and matters for which expenses are being sought."[4] The written request should also include an explanation for the delay in seeking permission to establish a trust.

Third, OGE should require that all contributions to the fund are kept in a separate bank account established for the purpose of holding the contributions. The funds should be segregated from personal, political, or official funds of the trustor or any other individual or legal entity. All contributions should be disclosed in an annual financial disclosure statement to OGE.

Clear regulations on contributions are necessary to prevent corruption or its appearance. To avoid corruption, OGE should prohibit the use of official resources to fundraise for a legal expense fund. Executive branch officials and employees who want to solicit funds in their personal capacity on behalf of another official should be required to receive permission from OGE. Contributions from lobbyists registered under the Lobbying Disclosure Act and foreign agents registered under the Foreign Agents Registration Act should be prohibited. Finally, legal expense funds should be proscribed from accepting more than $5,000 from a single source; any individual or corporate donor should not surpass this contribution limit. These limitations and prohibitions should apply to any contribution of value, including money and in-kind donations of goods or services.

While the House Committee on Ethics allows political action committees and limited liability corporations to contribute to legal expense funds, Issue One recommends prohibiting these groups from contributing to these funds. These organizations have the ability to mask the true source of their funding, and could effectively act as a work-around to allow prohibited or anonymous individuals to contribute hindering transparency. Similarly, foreign nationals and foreign governments should also be prohibited from making contributions to legal expense funds. Allowing executive branch officials to accept donations from foreign nationals would lead the public to question whether their officials are acting in their best interest or in the best interest of foreign countries.

IV. Disclosure and Reporting Requirements

Transparency is a bedrock value of our country. It ensures that government officials are held accountable by giving citizens the ability to know who or what is influencing officials. A lack of transparency fosters distrust in the government and its ability to represent the people. For these reasons, OGE regulations must include disclosure and reporting requirements.

For one, it should be mandatory to publish an easily accessible, public copy of the trust document within a week of OGE's approval of the document. Additionally, the trustor of the legal

[3] Conversions include, but are not limited to funds converted for personal use, legal expenses of a friend or colleague in connection with the matter, costs adjacent to the proceeding, etc.
[4] *Id*.

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expense fund should be required to report to OGE every quarter: any contribution from a corporation or partnership; any contribution, or aggregate contributions, that exceed $250 in a calendar year from a single source; any expenditure, or aggregate expenditures, from the legal expense fund in excess of "$250 in a calendar year to any single payee"; and the names of any employees "whose legal expenses are paid by the legal expense fund."[5] The quarterly reports should include "the full name and street address of each donor, contributor, or recipient."[6] The trustor should be required to file these quarterly reports until the trust has been terminated. Once OGE receives these reports, it should make them publicly available.

V. Termination of Trusts

Executive branch officials face existing restrictions on receiving gifts due to concerns that accepting gifts, particularly large gifts, will allow the gift-giver undue influence over the official. The concern about undue influence also arises in the context of legal expense funds. The purpose of legal expense funds is to provide executive branch officials with the money and services to effectively defend themselves against legal complaints. Once those complaints have been resolved and if officials are left with residual funds, there is the potential for those officials to misuse those funds. Additionally, if individuals or corporations can contribute to an open legal expense fund without a pressing need, they have the opportunity to gain undue access and influence over the official. To prevent these situations from occurring, OGE should require the termination of trusts and create a process to distribute the remaining funds.

Trusts should be terminated: (1) at "the end of the time period for which the trust was established"; (2) when "the purpose of the trust is fulfilled or no longer exists"; (3) at "the direction of the [t]rustor"; or (4) "at the direction [of OGE] for noncompliance with [the] [r]egulations."[7] Within 90 days of the trust's termination, the remaining funds should be donated to a §501(c)(3) organization approved by OGE. Once the trust is terminated, the trustor should "file a final quarterly report of contributions received and expenditures made" between the last filed quarterly report and the termination of the trust. The final report should also include "a statement certifying that any remaining funds were distributed in line with these regulations."[8]

VI. Enforcement

Without effective enforcement, any regulations promulgated by the OGE will have no practical effect. To ensure that OGE writes meaningful regulations, Issue One suggests that OGE monitors the activities of legal expense funds and gives itself the ability to "direct specific remedial actions," including an audit if "there is reason to believe that a trust is being improperly administered, or for other good cause."[9]

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[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*.

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Once OGE decides that a trust should be audited, it should have the ability to select a qualified auditor who will examine the trust's records. If OGE finds that the trust is being administered improperly, that "the trustor and/or the trustee fail to comply with these [r]egulations or the trust agreement, or for other good cause,"[10] OGE should be empowered to terminate the trust and require that the funds are distributed in accordance with the regulations. OGE should publicly post its letter notifying the trustor about its decision to terminate the trust. Finally, OGE should have the authority to recommend disciplinary action upon finding that its legal expense fund regulations have been violated.

VII. Conclusion

All of these policies, particularly in conjunction with each other, will allow executive branch officials to continue to use legal expense funds while retaining the integrity of the executive branch. For these reasons, we urge you to adopt regulations similar to the House rules. Additionally, Issue One applauds OGE's consideration of these regulations and appreciates your interest in receiving public input about such regulation.

Respectfully submitted,

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[10] *Id*.