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David J. Apol
Director
Office of Government Ethics
1201 New York Avenue, NW
Suite 500
Washington, D.C. 20005

September 15, 2017

RE: PETITION FOR RULEMAKING ON LEGAL DEFENSE FUNDS

Dear Director Apol:

Public Citizen requests, pursuant to 5 U.S.C. §553(e) and 5 U.S.C. App. §402(b)(2), that the U.S. Office of Government Ethics (OGE) initiate rulemaking to promulgate specific procedures for the establishment and operation of legal defense funds for executive branch personnel, which include contribution limits, source prohibitions and disclosure requirements.

While the House Ethics Committee and Senate Select Committee on Ethics have established specific procedures for legal defense funds for members of Congress, no such concrete guidelines and procedures exist for the executive branch. This has not been much of a problem in the past, given the previous infrequent use of legal defense funds by executive branch personnel. However, more executive branch personnel today are facing legal challenges and may need to make use of legal defense funds and other avenues to pay for those challenges. Yet, OGE has very few guidelines as how to establish and finance such funds and no specific rules ensuring the avoidance of conflicts of interest. It is due time that OGE establish such rules governing legal defense funds.

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 defense fund or legal expense trust – 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 (OGE) for the executive branch, imposing various requirements. The rules governing congressional legal defense funds are more restrictive and much more specific than the informal few guidelines that govern officials of the executive branch.

Legal defense funds have only rarely been employed by executive branch personnel in recent history, making the lack of clear rules governing executive branch legal defense funds less problematic – until now. Executive branch personnel today are facing increasing legal challenges

and are in greater need of clear rules and guidelines as how to properly establish and finance legal defense funds.

1. Congressional Legal Defense Funds

House

Following House Rule XXV, clause 5(a)(3) and direction from the House Committee on Ethics, Members of the House may accept contributions to a legal defense 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

Certain pro-bono work, such as help filing amicus curiae briefs, does not require trust disclosure.² Legal defense funds must be administered by an independent trustee, but ultimate responsibility for a trust's administration lies with the trustor.³

Trusts require Ethics Committee approval before they can start soliciting or receiving donations, and 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 returned to the donors.⁴ 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.⁵ Additionally, contributions above \$335 in a calendar year must be disclosed on the beneficiary's annual Financial Disclosure Statement.⁶ 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).

¹ House Committee on Ethics. "Contributions to a Legal Expense Fund." U.S. House of Representatives. <http://ethics.house.gov/contributions-legal-expense-fund>.

² House Committee on Ethics. "Contributions to a Legal Expense Fund."

³ 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. <http://ethics.house.gov/sites/ethics.house.gov/files/Pink%20Sheet%20With%20Regs.pdf>

⁴ House Committee on Ethics. "Contributions to a Legal Expense Fund."

⁵ 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.

⁶ House Committee on Ethics. "Contributions to a Legal Expense Fund."

Senate

Senate legal defense funds operate 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.” Senate rules prohibit contributions from registered lobbyists or foreign agents, as well as senate staffers, corporations, labor unions, a member’s principal campaign committee, or foreign nationals. Anyone else may contribute up to \$10,000 a year, though the trustor (and relatives) may contribute as much as they wish.⁷

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 contributors donating over \$25 a year as well as descriptions of expenditures.⁸ Like House legal defense forms, Senate disclosures are only accessible via a visit to the Office of Public Records (Hart Senate Office Building, room 232).

2. Executive Branch Legal Defense Funds

Executive Branch legal defense fund guidelines are less stringent than those of Congress. In 1993, OGE issued an opinion regarding the establishment and financing of legal defense 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 payment for their work. OGE’s letter suggests that contributions to legal defense 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.

⁷ Senate Select Committee on Ethics. *Senate Ethics Manual*. Government Printing Office, 2003, pages 30-31.. <https://www.ethics.senate.gov/downloads/pdf/manual.pdf>

⁸ Senate Select Committee on Ethics. *Senate Ethics Manual*. Page 31.

⁹ Office of Government Ethics. “93 x 21: Letter to an Alternate Designate Agency Ethics Official” (August 30, 1993). [https://www.oge.gov/web/OGE.nsf/All%20Documents/0C4D87012885C50385257E96005FBC7B/\\$FILE/579f6ba49f8a41f39222f42604c851de2.pdf?open](https://www.oge.gov/web/OGE.nsf/All%20Documents/0C4D87012885C50385257E96005FBC7B/$FILE/579f6ba49f8a41f39222f42604c851de2.pdf?open).

Reflecting that the 1993 guidance only constituted suggestions as opposed to real guidance, former President Bill Clinton set up two legal defense 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 defense 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 its 1993 guidance was riddled with flaws and later advised legal defense 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, and in 2017 the new Director David Apol quietly reversed the agency's unofficial policy prohibiting anonymous donations from lobbyists to White House staffers who have legal defense funds.¹¹ That action prompted this petition for rulemaking.

B. PETITION FOR RULEMAKING

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 defense funds for the executive branch. Executive branch personnel need to understand proper procedures for such funds; OGE needs to know when and how the operation of legal defense 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 defense funds are increasingly necessary for executive branch personnel, but yet may pose some serious conflict of interest concerns if not established and financed properly. OGE should learn and borrow from congressional rules governing legal defense funds in creating rules to govern such funds in 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 defense 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 defense funds established and financed by executive branch personnel:

- Impose a contribution limit of \$5,000 per donor per year, though the official and immediate family members of the official may contribute as much as they wish.
- Require that donations only come from individuals, not corporations, unions or other organizational entities.

¹⁰ Wolf Blitzer, "New Clinton Legal Defense Fund Created," CNN, 2005. <http://www.cnn.com/ALLPOLITICS/1998/02/18/defense.fund/>

¹¹ Darren Samuelson, "Trump Ethics Watchdog Moves to Allow Anonymous Gifts to Legal defense Funds," Politico (Sep. 13, 2017), <http://www.politico.com/story/2017/09/13/trump-ethics-watchdog-legal-defense-242690>

- Prohibit donations from lobbyists, foreign agents, and persons who have business pending before the official or the official's agency.
- 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.
- Establish a recusal requirement for recipient officers from taking official actions that have a direct and substantial impact on specific donors for two years

Public Citizen requests that OGE promptly initiate rulemaking on the establishment, financing and operations of legal defense funds by executive branch personnel that lays down appropriate contribution limits, source prohibitions and disclosure requirements consistent with conflict of interest and other ethics laws, rules and regulations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Craig Holman". The signature is fluid and cursive, with a large initial "C" and "H".

Craig Holman, Ph.D.
Government affairs lobbyist
Public Citizen's Congress Watch division
215 Pennsylvania Avenue SE
Washington, D.C. 20003
202-454-5182