

NWX-OFFICE OF GOVT ETHICS (US)
Moderator: Patrick Shepherd
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11:52 am CT

Coordinator: Welcome and thank you for standing by. Today's call is being recorded. If you have any objections you may disconnect at this time.

All participants are in a listen-only mode until the question and answering comments section of today's conference. I would now like to turn the conference over to Patrick Shepherd. You may begin.

Patrick Shepherd: Thank you very much. Good afternoon. I'm your moderator, Patrick Shepherd. Welcome to the virtual hearing being held in connection with OGE's Advance Notice of Proposed Rulemaking Concerning Legal Expense Funds.

We are grateful for your interest and look forward to receiving your comments. In addition to the scheduled speakers, members of OGE's Rulemaking Team, and interested members of the public who are listening to this call.

At this stage of the rulemaking process, the purpose of the hearing is to hear from you. So OGE will be in a listening mode today.

This hearing and the current comment period, which is open through June 15, are the first opportunities for interested members of the public to provide us with input.

Any rulemaking will follow the full notice and comment process, and include all of the opportunities for input prescribed in the Administrative Procedures Act.

In addition to these opportunities under the Administrative Procedures Act, OGE will also provide additional opportunities for interested stakeholders to engage in discussions with OGE directly. To keep up with this process please follow us on Twitter and check our Rulemaking page on OGE's Open Government portal.

Again, this call is being recorded. A transcript and all written comments received to date will be published on OGE's Web site in the next week or so. Again, those will appear on the Rulemaking page.

Some ground rules for today's call. Each speaker will be acknowledged in the order that they registered for the call. And you will have five minutes to provide your remarks. After five minutes have elapsed, I will let you know. And you will have an additional 30 seconds to conclude your remarks.

I'll ask that you to please be respectful of these timeframes. If you have comments that do not fit within the allotted time, please feel free to submit those to us in writing.

If you do not require the full five minutes, please let me know that you are finished. And we will move on to the next speaker.

Our first speaker today is Kevin Minoli. Operator, could we open the call to Mr. Minoli.

Coordinator: If Mr. Minoli would please press star then zero from his phone so I can locate his line to open him.

Patrick Shepherd: If Mr. Minoli is not available right now, perhaps we could go to the next speaker and come back, to give him an opportunity at the end.

Our next speaker if Mr. Minoli is not available is, Kathleen Clark. Operator, could we open the call to Kathleen Clark, please?

Kathleen Clark: Hi, this is Kathleen Clark.

Patrick Shepherd: Hello Kathleen. Hi, this is Patrick Shepherd. We can hear you loud and clear. Are you ready to begin?

Kathleen Clark: Yes, I am. Thank you so much.

Patrick Shepherd: Sure. No problem.

Kathleen Clark: Yes, so my name is Kathleen Clark. I'm a lawyer here in Washington, DC. And I'm a Law Professor at Washington University. I've written about legal expense funds and have studied the House and Senate rules, as well as, the past practice of the Office of Government Ethics regarding legal expense funds.

And as you all know, unlike the Senate and the House of Representatives, OGE has not yet issued regulations on these funds. And as a result, the public does not know how many legal expense funds have been created for Executive

Branch employees, who is donating to them, how much money they have donated, and which employees have benefitted from them.

Or perhaps more accurately, we don't have comprehensive information regarding those points.

OGE has provided a template or a model document for the creation of these funds. But that template gives short shrift to a key regulatory restriction on gifts, the prohibition on accepting gifts that are given because of an employee's official position.

In applying that restriction to legal expense funds, OGE's template narrows that restriction so that a fund has to reject a gift, only if a donor indicates verbally or in writing that the contribution is given because of the beneficiary's official position. Or fails to certify that the donor is not giving the gift because of the beneficiary's official position.

Many legal expense fund contributions, and in particular those from people who aren't relatives or close friends of an employee, appear to be motivated by the employee's official position.

OGE's current approach is akin to a wink and a nod. A donor can contribute to an expense fund as long the donor certifies that the contribution isn't given because of the employee's official position, even if the circumstances suggest that's precisely the reason for the contribution.

I am heartened that the Office of Government Ethics is - has started this regulatory process. The regulations that OGE adopts should ensure clear lines of responsibility for legal expense funds by clarifying that any fund providing benefits to an Executive Branch employee, must comply with OGE's ethics

standards. Requiring that OGE review the documents created, creating a legal defense fund. And certify that it complies with the regulation. Requiring any Executive Branch employee creating a fund, to take personal responsibility for ensuring that it complies with the law.

And prohibiting Executive Branch employees from accepting any benefit from a fund unless it was created by an Executive Branch employee and certified by the Office of Government Ethics.

In addition, the regulations should prevent corruption by prohibiting donations from anonymous donors, from entities, because those can facilitate anonymous donations.

From foreign nationals, from foreign agents, and lobbyists. And it should prohibit donations that are given because of an employee's official position, as I discussed earlier.

I also think that the donations should be capped at about \$2700, except for relatives. And, impose a two-year cooling off period, requiring an employee to recuse from matters in which a donor is a party or represents a party.

I plan to submit in writing, more detailed information about these recommendations. And I really appreciate the opportunity to participate in this virtual hearing today. Thank you so much.

Patrick Shepherd: Thank you very much.

Coordinator: Excuse me. This is the operator. I have found Kevin Minoli and, his line is now open.

Kevin Minoli: Okay. Good afternoon.

Patrick Shepherd: Hi. Good afternoon.

Kevin Minoli: Can you hear me now?

Patrick Shepherd: Yes, we can hear you. Are you ready to begin?

Kevin Minoli: Yes, I am. Sorry about that - the confusion earlier but, thank you for the opportunity.

For folks who - just for background, I served as EPA's Designated Agency Ethics Official from roughly 2013 through September 30th of 2018, when I left the government for private practice.

My comments focus on mainly the role of the Designated Agency Ethics Official with regard to any employee's legal defense fund within their agency. And I would encourage the Office of Government Ethics to ensure that any obligations that come out, or regulations that come out of this effort are clear and understandable by all, in terms of what the role of the DAEO is. And what the role of the DAEO is not.

In particular, outlining the responsibilities with regard to an employee's legal defense fund, and those things that are beyond a DAEO's responsibility, is going to be critical.

Being clear on whether they have the ability to inquire or investigate when they have a concern whether someone is complying with any of OGE's requirements for legal defense funds. And then what they are to do, should they determine that someone is not in compliance. Do they have any authority

to enforce against that person and compel compliance or, to take action to address the non-compliance?

In both the investigation question and the enforcement question, there either needs to be clear authority for the DAEO to take those actions or, I would encourage an explicit obligation to refer to, as particular entity, whether it's an Inspector General's Office, or back to the Office of Government Ethics, for them to take those actions.

But it's not good - not a great place for a DAEO to be, where there are requirements that they have the obligation to understand and revise on, but lack the ability to enforce, if they're not complied with.

My second point is that I would support a requirement that there be some sort of permission or notification that must occur when a new individual sets up a legal defense fund.

At EPA we require people to get prior approval for outside activity requests. We have an obligation under the STOCK Act to provide notice very quickly after you begin negotiating for employment. And it seems appropriate that there would be some sort of obligation or similar obligation to do that here.

And then finally, my third point is, there must be some amount of transparency, in order for the individual who has the legal defense fund, to have - to be able to respond to allegations that the defense fund is being funded by inappropriate people.

And for the Designated Agency Ethics Official or, the Office of Government Ethics to be able to respond to concerns, that that is the case as well.

Without some limited amount of transparency, potentially to include a confidential submission of the donor list to someone much like people do confidential financial - statements of financial interest. Without that, neither the beneficiary nor the person who is responsible for ensuring it complies with the ethics, will have the tools and the information that they need, to be able to respond when someone accuses them or raises a concern about who is donating to that fund.

Those are my three points. I would just like to thank the Office of Government Ethics for their support during my time. Having a strong OGE is critical to being able to ensure that programs all across the government have the support that they need and the ability to do the job that they have to do. Particularly, when things are more challenging than they might otherwise have been in the past.

So, thank you and I appreciate your time. And my comments are now concluded.

Patrick Shepherd: Thank you very much. Our next speaker today is Virginia Canter. If we could open up the line?

Coordinator: Virginia, if you could please press star zero from your phone so I could find your line. Your line is now open.

Virginia Canter: Thank you for allowing me the opportunity to address you today. My name is Virginia Canter. And I am the Chief Ethics Counsel for Citizens for Responsibility in Ethics, in Washington.

CREW is a non-profit, non-partisan organization committed to reducing the impact of money in politics. And fostering a government that is ethical and accountable.

Given our unique insight into the corrupting impact of unchecked, unaccountable money in our political system, we strongly support your consideration of a regulation to establish a more active role for OGE in protecting government integrity from the serious ethical risks posed by legal expense funds.

I would like to begin by thanking you for your leadership in launching this regulatory effort. CREW is grateful for your decision to collect input from the public prior to drafting a regulation. And to convene this public hearing.

We strongly agree with your stated goals of transparency, openness, and accessibility. And we encourage you to add the goals of prevention and oversight as guiding principles for this effort.

We hope this discussion will be the beginning of a dialogue with the public that will inform your future draft proposed regulation. To be very clear, legal expense funds can be used to facilitate unlimited gifts of cash to Executive Branch employees from a variety of sources outside the government.

Legal expense funds can become gift acceptance vehicles that create the very real risk of outside influence over top government officials.

For the reasons we discussed in our written comments and that I summarized today, the Executive Branch needs an ethics regulation that establishes strong, uniform standards for legal expense funds, that institutes adequate safeguards and transparency to protect government integrity.

Most importantly, CREW recommends that OGE require each legal expense fund to be structured as a trust with only one beneficiary whose trustee is independent and owes a fiduciary duty to the sole beneficiary.

This recommendation is the most important of the various ones we offer in our written comments. Mandating this structure is critically necessary to prevent the possibility that the operator of a legal expense fund could seek to exert improper influence over an Executive Branch employee by making or withholding distributions out of loyalty to someone other than the employee.

This recommendation prevents conflicts of interest by removing a potential source of outside influence. It also restores the ethical norm that had been in place prior to the Trump administration.

Oversight of legal expense funds has always been problematic. But the situation became critical in January 2018 with the creation of the Patriot Legal Expense Fund Trust LLC.

Unlike a traditional legal expense fund organizes a trust for one beneficiary, the Patriot Fund is a political organization with limitless eligible recipients. This difference creates an unacceptable risk that the fund could be used to influence witnesses by distributing or withholding money based on the content of a witness' testimony or willingness to cooperate with investigators.

The Patriot Fund also accepts donations from prohibited sources. Ostensibly for beneficiaries outside the government, but which taints the entire pool of donations that may be distributed to Executive Branch employees.

Donations from prohibited sources are likely to lead to impermissible, outside influence on the beneficiary.

This is why we would like to emphasize another of our recommendations. It is critical that OGE prohibit legal expense funds from accepting donations from a prohibited source for the sole beneficiary.

Failure to properly screen donors and segregate funds from prohibited sources places government employees in danger of violating OGE gift rules. And undermines public confidence in our government programs and operation. Because of the major ethics risk, attending to legal expense funds, we also recommend that OGE require each legal expense fund to be approved by OGE in advance of the employee's acceptance of distribution.

And that OGE require the legal expense fund to disclose to the government, information about the donations received, and distributions made on behalf of the beneficiary.

I will conclude with one final thought. OGE must not issue a regulation permitting future legal expense funds to follow the example of the Patriot Fund. The harmful effects of such a regulation would extend long after the Trump administration ends.

A regulation that institutionalizes the Patriot Fund's dangerous practices would be worse than no regulation at all. This is why it is critical for OGE to develop a strong regulation that restores the single beneficiary trust structure and establishes new safeguards to reduce the significant ethical risk to our institutions and our public servants posed by legal expense funds.

Thank you for your time and for your consideration.

Patrick Shepherd: Thank you very much. Our next speaker today is Craig Holman. If you could open the line to Craig Holman, please.

Coordinator: Craig, if you could please press star zero from your phone so that I may open your line.

Craig Holman: Hello? Can you hear me?

Patrick Shepherd: Yes, we can.

Craig Holman: Good. Good, thanks. This is Craig Holman with Public Citizen. You know, raising funds for an official's legal problems provides massive opportunities for not only conflicts of interest, but donors seeking ingratiation from the officials.

You know, until recently there have been very few legal expense funds in the Executive Branch. And as a result, OGE hasn't really developed any kind of rules or guidance for the structure of these funds.

They are much more common in Congress, and have been for quite some time. As a result, the House Ethics Committee and the Senate Select Committee on Ethics have established very clear rules for legal expense funds that involve contribution limits, source prohibitions, and disclosure requirements.

What Congress has set up provides I think, a fairly good model for OGE to follow. If we take a look at the House side, the rules governing legal expense funds in the House, first have to be established as a trust, administered by an independent trustee. They require prior approval by the Ethics Committee

before receiving or spending any funds. There's a \$5000 contribution limit to these funds. And lobbyists and foreign agents are prohibited from making any donations to these funds.

There is also the quarterly disclosure reports in which the name and address of donors and recipients of \$250 or more per year, are fully disclosed. And as well as the purpose of each expenditure.

And then finally, to terminate the funds, any excess funds can be given to charity. Not controlled by the trustor, or returned to donors on a prorated basis.

The Senate has addressed similar key elements of these trust funds as well, a little bit differently. First in the Senate, these trusts require prior approval. Second, they have a \$10,000 contribution limit to the legal expense funds. Third, lobbyists, foreign agents, foreign nationals, corporations, labor unions, and Senate staff are prohibited from making contributions to these funds. And the Senate also requires quarterly reports disclosing the donors and the recipients of \$25 or more.

And in both the House and the Senate, they have a very important feature. And that is, there can only be one legal expense fund per member. So they cannot, you know, cross these types funds from office to office.

When we take a look at what the Executive Branch has set up so far, there has been conflicting advice from OGE over the years. And no one is really sure what the proper way of establishing these funds, or how they're supposed operate, in the Executive Branch.

In 2016 OGE realized this was a problem. But the review was never done until now. And fortunately, OGE is undertaking this rulemaking.

Under the Trump administration it's become quite a problem. You know the last time I counted there's at least eight types of legal defense funds that are of different nature and disclosing different information, if at all.

So, I would recommend that in the rulemaking, OGE follow the established practice that has been set up by the Congressional rules. There should be one legal defense fund per official. There needs to be contribution limits for donors. There must be source prohibitions so that conflicting prohibited sources are not allowed to make donations to these funds.

There should be quarterly reports for disclosure, and follow the practice of terminating any kind of surplus funds to either donors or to a charity, not controlled by the trustor.

So the practice establishing good, legal expense funds is already fairly clearly laid out. And I recommend that OGE follow these established practices.

Thank you.

Patrick Shepherd: Thank you very much for your contributions. Our next speaker is Delaney Marsco. Please, if we could open the phone line.

Coordinator: Delaney, you may please press star zero. As a reminder Delaney, if you could please press star zero so that I may open your line. Delaney's line is now open.

Delaney Marsco: Hi, this is Delaney Marsco. I'm Ethics Council at the Campaign Legal Center. Thank you for holding this hearing today, and for allowing CLC to participate in this important process.

This rulemaking must result in a robust, enforceable framework to being accountability and transparency to legal expense funds. We can't allow these funds to operate as potential vehicles for endless amounts of largely unregulated cash, to flow directly to our most influential decision makers.

Right now a \$200 campaign contribution is more regulated than a \$1 million contribution, to a legal expense fund. This is totally unacceptable. And the current risk of corruption is far too high.

The Campaign Legal Center intends to submit detailed written comments. But today I just want to highlight six points, as the agency considers this long overdue rulemaking.

First, federal executive expense funds should be structured as trusts with one human beneficiary who must be a current or former federal executive employee. The trust structure helps ensure that contributions are being given to and for the benefit of the known trustee. And it reduces the risk that the pool's money is operating as a slush fund for an unknowable number of people.

Second, there should be a cap on how much an individual donor can give to the fund. And regardless of what that dollar amount limit is, all contributions and distributions should be disclosed on a quarterly basis.

Any contribution over \$200 should be subject to heightened reporting requirements including the name, occupation, and employer of the donor.

And if the beneficiary is a public filer these disclosures should be made publicly available.

Disclosure is vital because it helps and deter donors who might seek to use their improper influence on beneficiaries by making large contributions to their funds.

Public availability also helps the press, public, and watchdog groups identify potential violations of the law governing legal expense funds. And bring violations to the attention of the relevant government agencies.

Third, certain types of donors should be prohibited from giving to Executive Branch legal expense funds. The new regulation should not only bar contributions from prohibited sources as defined by the gift rules, they should also prohibit donations from foreign governments, agents of foreign governments, and registered lobbyists or registered lobbyist organizations, regardless of the status of the beneficiary.

People who are paid to influence government official should not be permitted to give any amount of largely unregulated cash to government official's legal expense funds.

Fourth, any organization that can mask the true source of money being donated should be a prohibited source. The new rule should take into account LLCs and other organizations that may not themselves be anonymous, but can be used to intentionally mask the true source of their money.

There's a serious risk that 501c4's an LLCs will be used as vehicles for donors who want to donate to a fund but, keep their identity secret. This is already the case in election spending where LLCs and 501c4's have been used

as vehicles for anonymous donors to contribute to Super Pac's. And only the LLCs or 501c4's are disclosed to the public.

A clear prohibition on donations from these entities will prevent this problem in the legal expense fund context. OGE might also consider specifically prohibiting contributions in the name of another person.

Fifth, there should be limits on permissible use of the donated funds. Concerns about the abuse of legal expense fund money can be addressed by setting common sense limits on how funds can be used in the scope of legal proceedings.

Funds should not be used to cover legal costs associated with purely personal activities. Much like how on campaign finance law, you're prohibited from using campaign funds for personal legal expenses.

The funds should also only be used to pay for the cost of attorney's fees and other costs associated with resolving a legal proceeding. But not for the payment of a fine, settlement, or other financial penalties that results from the proceeding. California for example, takes this regulatory approach for legal expense funds.

Finally, excess funds should be refunded to donors on a prorated basis or donated to charity after a fund terminates. Strict requirements for how unexpended funds should be distributed are necessary to prevent a zombie fund phenomenon.

In the campaign finance context retired lawmakers and former candidates have continued to spend leftover campaign donations for years after leaving

office. OGE should set clear rules to prevent legal expense funds from becoming zombies.

These reforms and others are necessary to prevent conflicts and undue influence for public servants who establish and accept distributions from legal expense funds. The conflict's concerns are heightened in this context because representation can get really expensive, especially where a legal proceeding plays out over an extended period of time.

You know, these funds cover costs that public officials would otherwise have to pay themselves, out of pocket. So it's especially important that OGE sets limits on how the funds are structured and funded. And that they ensure fund usage is carefully circumscribed. And that they require regular disclosure of donations and distributions.

Thank you again. And CLC looks forward to providing you with detailed written comments. That concludes my comments.

Patrick Shepherd: Thank you very much. And our final speaker today is Scott Amey. If we could open the line up to Scott, please.

Coordinator: Scott, if you could please press star zero from your phone so that I may open your line.

Scott Amey: Good afternoon.

Patrick Shepherd: Good afternoon.

Scott Amey: Hello. Okay, the Project on Government Oversight -- POGO -- shares OGE's vision to achieve a high level of public confidence in the integrity of Executive Branch programs and operations.

Since 1981 POGO has worked as a non-partisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing.

We champion good government reforms to achieve a more accountable, ethical, and an effective federal government that safeguards constitutional principles.

We urge OGE, in its role as the head of all Executive Branch ethics programs, to craft a strong and transparent regulatory framework, governing legal expense funds. That system must protect integrity from potential risks presented by them.

First and foremost, the system governing the Patriot Legal Expense Fund Trust cannot become the norm. As created, the screening, self-policing, distribution policies, and lack of OGE oversight are a recipe for an ethics disaster including violations of federal laws and regulations governing gifts, supplementation of salary, bribery, potential obstruction of justice, and other ethical standards governing Executive Branch officials.

OGE should ban any anonymous donations, making all donations and distributions to and from legal expense funds publicly available on OGE's Web site. This requirement should include gifts of cash and pro bono legal services.

POGO also urges OGE to adopt the single beneficiary trust structure to prevent a seemingly Political Action Committee-esque structure, without the many protections that apply to PACs.

Finally, I would ask that OGE seriously consider the comments submitted by CREW last week and today, which are well-reasoned and will help protect government integrity.

Thank you for the opportunity to work with OGE to create a framework for establishing and overseeing legal expense funds. That includes my comments.

Patrick Shepherd: Thank you very much. And thank you to all of today's speakers for your input. As a reminder, the opportunity for written comments will remain open through June 15. We appreciate your participation and we appreciate the participation of all the members of the public who are listening to today's hearing. That concludes our hearing for today. Thank you very much.

Coordinator: Thank you for your participation in today's conference. You may disconnect at this time.

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