

United States Senate

WASHINGTON, DC 20510

June 11, 2019

Director Emory Rounds
U.S. Office of Government Ethics
1201 New York Avenue, N.W., Suite 500
Washington, DC 20005

Re: Legal Expense Fund Regulation, RIN 3209-AA50

Dear Director Rounds:

Thank you for the Office of Government Ethics' (OGE) engagement with congressional staff and for your continued attention to the issue of legal expense funds. We are encouraged by your focus, but still have concerns about the structure of the Patriot Legal Expense Fund Trust, LLC ("Patriot Fund") and the prospect that future funds might be structured in a similar fashion if OGE does not take regulatory action. As such, we are pleased that OGE has started to engage on this issue and respectfully submit this comment pertaining to the Advanced Notice of Proposed Rulemaking that OGE submitted on April 15, 2019, regarding its consideration of a legal expense fund rule.

This letter delineates our recommendations for the proposed rule. As a starting point, we – and the ethics community – believe that any legal expense fund should be a trust benefitting only a single beneficiary, as was precedent prior to the Trump Administration, and be administered by a trustee who owes a fiduciary duty to that sole beneficiary. We also believe that there is a need for increased transparency and oversight by OGE and agency ethics officials.

Many of our concerns about the Patriot Fund stem from the fact that the fund is structured to allow for multiple recipients to receive money from the same fund, which is administered by a fund manager whose loyalty is not necessarily to the eligible recipients. Requiring that any legal expense fund be administered by a trustee who owes a fiduciary duty exclusively to a single recipient would simplify oversight from a government ethics perspective, and it would ensure that federal employees do not receive money from a pooled fund that is tainted by donations that could come from prohibited sources. It would also eliminate the risk that a fund manager of a pooled fund could seek to influence employees who are witnesses in investigations or legal proceedings by distributing or withholding money.

Ensuring the integrity of government operations, investigations, and legal proceedings should be the primary focus of any new rule. Any proposed rule should not only require that the structure of a legal expense fund provides a clear, legal path for a beneficiary to ethically accept money from a fund, but also ensure that a fund is not open to abuse. The Patriot Fund leaves much to be desired in this regard.

You have said that the rule that you are drafting “will ensure that legal expense funds with executive branch employee recipients will be transparent, open, and accessible to the public.”¹ We believe that including the requirements below will help you accomplish those goals.

OGE’s template on legal expense funds already serves as a good guide for these funds, but we are concerned that OGE blessed a fund – the Patriot Fund – that incorporated few of the template’s guidelines. We recommend that OGE require the following parameters – many of which already exist in OGE’s own legal expense funds template – by incorporating them into a rule regarding legal expense funds:

1. Transparency parameters

- a. Donors must give directly to the fund, and the list of donors must be publicly disclosed on a quarterly basis.
 - i. Donors cannot give money on behalf of unnamed donors.
 - ii. A list of all donors should be filed with OGE on a quarterly basis and published in a centralized location on OGE’s website.
- b. Distributions must be disclosed on a quarterly basis.
 - i. The fund must publish both the name of the federal employee on whose behalf it made a distribution and the law firm(s) to which it made the distribution.
 - ii. A list of all distributions should be filed with OGE on a quarterly basis and published in a centralized location on OGE’s website.

2. Distribution parameters

- a. OGE should establish a new gift rule prohibiting employees from accepting donations of money to cover legal fees and expenses, except through an OGE-approved legal expense fund that satisfies the requirements of OGE’s regulation.
 - i. The rule may also include an exemption allowing for reimbursement from the following:
 1. Family members of the employee
 2. An insurer pursuant to an insurance agreement
 3. A current or former employer or client, if the legal fees or expenses are related to the employee’s services to the employer or

¹ Letter from Emory A. Rounds, Director, Office of Gov’t Ethics, to Senator Margaret Wood Hassan, et al., Sept. 11, 2018, <https://bit.ly/2Q9WX7n>.

client and the employee has complied with procedures for outside employment, if applicable

4. Funds intended primarily for expenses associated with discrimination or whistleblower-related claims, including retaliation (including as a defense against an allegedly retaliatory personnel action or investigation) so long as the recipient is not a political appointee
- b. Any legal expense fund must be a trust that has only one beneficiary and that has a trustee who owes a legally enforceable fiduciary duty to that sole beneficiary under the law of the jurisdiction in which the trust is established.
 - c. The trust agreement must establish a prohibition against distributing money for any purpose other than paying the employee's legal fees and related expenses (e.g., money cannot be transferred from a legal expense fund to a campaign or reelection campaign).
 - i. The only exception to this restriction should be that, consistent with OGE's past practice, the trustee must distribute any unused funds to a 501(c) charity that the employee has neither selected nor suggested.

3. Donor parameters

- a. The trust agreement must bar prohibited sources, foreign nationals, agents of foreign governments, lobbyists, federal employees, relatives of the employee, and organizations from either serving as the trustee or donating to the trust.
- b. The trust agreement must require the trustee to consult with agency ethics officials regarding each donation more than \$1,000 to ascertain whether the donor is a prohibited source or is otherwise precluded. The language of the trust agreement should not merely say that the trustee "may" consult with ethics officials, as in OGE's current template; rather, it needs to say that the trustee "must" consult with ethics officials.
 - i. Any impermissible donation must be returned promptly, with the trustee immediately certifying in writing to ethics officials that the donation was returned.
- c. The trust agreement must bar the acceptance of a donation from any source who indicates, either verbally or in writing, that the donation is being made "because of" the employee's official position or in exchange for either an official act or favorable testimony.
- d. On a quarterly basis, the trustee and agency ethics officials must certify to OGE in writing, subject to 18 U.S.C. § 1001, that they exercised reasonable due diligence with respect to each donation accepted during the preceding quarter to ascertain jointly that the donor was not a prohibited source and was not otherwise precluded from making the donation to the trust.

4. Recusal parameters

The employee should be required to recuse under a new Standards of Conduct section (e.g., a new section 2635.504 of Title 5, Code of Federal Regulations). The new section would provide that the employee must not participate personally and substantially in any particular matter directly and predictably affecting the financial interests of any source of donations aggregating more than \$5,000, for a period of two years from the date of the most recent donation from that source.

Thank you for your work on this issue and we look forward to continued dialogue as OGE drafts the proposed rule.

Sincerely,



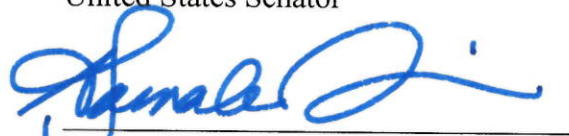
Margaret Wood Hassan
United States Senator



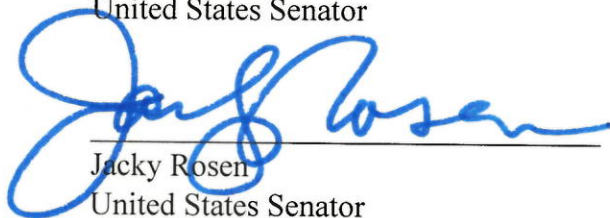
Gary C. Peters
United States Senator



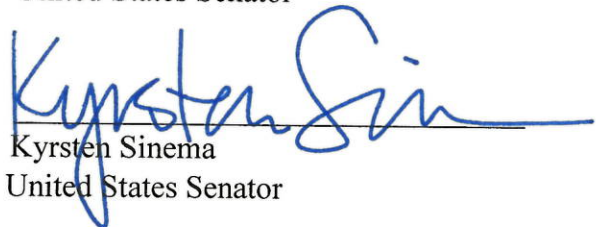
Thomas R. Carper
United States Senator



Kamala D. Harris
United States Senator



Jacky Rosen
United States Senator



Kyrsten Sinema
United States Senator