

May 15, 2019

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

Re: Comment of Citizens for Responsibility and Ethics in Washington in response to *Notice and Request for Comments: Legal Expense Fund Regulation*, U.S. Office of Government Ethics, RIN 3209-AA50, 84 Fed. Reg. 15146 (April 15, 2019)

Dear Director Rounds:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully submits this comment in response to the advance notice of proposed rulemaking and notice of public hearing (“ANPR”) that the U.S. Office of Government Ethics (“OGE”) issued on April 15, 2019 regarding its consideration of a legal expense fund regulation. In the ANPR, OGE acknowledges that its “limited approach” to legal expense funds “does not fully address potential appearance concerns with the creation and operation of legal expense funds for the benefit of executive branch employees.”¹ CREW agrees. The current approach does not work, and CREW supports your consideration of a regulation to establish a more active role for OGE in protecting government integrity from the serious ethical risks that legal expense funds pose.

The stakes are high for OGE’s contemplated legal expense fund regulation: *Legal expense funds can be used to facilitate unlimited gifts of cash to executive branch employees from a variety of sources outside the government.* These gift-acceptance vehicles create the very real risk of outside influence over top government officials, who may be vulnerable to influence due to mounting legal fees. The current regulatory regime even allows employees to shield donors from public scrutiny by identifying only the legal expense fund as the source of cash gifts in their financial disclosure reports. In this and other ways, legal expense funds exploit loopholes in the government ethics program and operate without meaningful oversight. In devising an approach to mitigate the threat of ethical failure, OGE must get it right.

Legal expense funds were always problematic, but the situation became dire in January 2018 when the executive branch departed from its longstanding practice for mitigating the risks they pose. The point of departure was OGE’s effective blessing of the Patriot Legal Expense Fund Trust, LLC (“Patriot Fund”), a political organization that functions as a legal expense fund. Eligible recipients for this political organization’s distributions comprise an indeterminate pool of current and former members of the Trump administration, the Trump transition team, and the Trump campaign caught up in the various investigations into Russian interference in the 2016 election, including the investigation of Special Counsel Robert S. Mueller III. The manager of this political organization, who owes no fiduciary duty to any eligible recipient, is permitted to

¹ *Notice and Request for Comments: Legal Expense Fund Regulation*, U.S. Office of Government Ethics, RIN 3209-AA50, 84 Fed. Reg. 15146 (Apr. 15, 2019), <https://bit.ly/2vTflJj>.

coordinate with the Trump campaign to decide whether—and to whom—she should make distributions, yet she is prohibited from communicating with individual eligible recipients. In stark contrast, every executive branch legal expense fund before the Trump administration was a trust whose trustee owed a fiduciary duty to a government employee who was the trust’s sole beneficiary, and the trustee was required to communicate with the employee and ethics officials to identify and exclude gifts from “prohibited sources” under the gift rules.²

This radical departure from longstanding norms has created a heightened risk of ethical failure and an urgent need for action. CREW therefore requests that you reconsider OGE’s effective blessing of the Patriot Fund and issue a regulation that mitigates the ethical risks of legal expense funds. The worst outcome of the ANPR would be for OGE to lend further legitimacy to the Patriot Fund by institutionalizing its bad practices in a regulation. Such a regulation would assure the spread of this dangerous new model for legal expense funds and could inspire further experimentation running counter to the letter and spirit of the executive branch’s ethics rules.

CREW submits this comment to aid in OGE’s development of strong, uniform standards for legal expense funds. This comment has three parts.

First, we offer recommendations for a legal expense fund regulation. These recommendations would restore ethical norms long in place before the Trump administration and Patriot Fund. CREW’s recommendations would also improve upon those norms to go further than in the past toward mitigating the risks of legal expense funds.

Second, we discuss ethical problems with the Patriot Fund to highlight the basis—and need—for our recommendations. OGE has determined that adherence to the Patriot Fund’s limited liability agreement (“LLC Agreement”) “should ensure” that federal employees receiving distributions of cash “do not violate” applicable ethics requirements. This determination, however, ignores numerous problems with the Patriot Fund, including: a defective organizational structure; coordination with a political campaign that is under investigation; acceptance of gifts from prohibited sources; defective screening procedures; acceptance of anonymous donations; acceptance of gifts given because of official position; and failure to disclose either the identity of recipients or the sources of gifts to individual recipients. Our discussion of these problems answers questions posed in the ANPR.

Third, this comment examines two incidents related to the Patriot Fund that illustrate the practical reality of OGE’s current passive approach to legal expense funds. A news report indicates that President Trump’s former attorney, John Dowd, attempted to abuse a legal defense fund, likely the Patriot Fund, to prevent a witness from cooperating with investigators. In addition, Patriot Fund manager Nan Hayworth may have violated provisions of the LLC Agreement that prohibit her from serving as either a government employee or a member of the Trump campaign, thereby raising doubts about her unmonitored role in ensuring the Patriot

² A “prohibited source” is any individual or organization that is substantially affected by the employee’s duties or that does (or seeks to do) business with the agency, conducts activities regulated by the employee’s agency, or seeks official action. 5 C.F.R. § 2635.203(d).

Fund's compliance with other applicable requirements. These incidents highlight the problems created by permitting the Patriot Fund's structure and organization, and they underscore the need for regulations that safeguard government integrity from the risks of legal expense funds.

I. Recommendations for OGE's Contemplated Regulation on Legal Expense Funds

Rather than banning legal defense funds outright, OGE has opted to permit them but has traditionally imposed safeguards to mitigate some of the risks they pose.³ During your confirmation hearing, members of Congress raised concerns about the Patriot Fund, and at least 23 members of Congress have written to OGE expressing similar concerns.⁴ In response to one such letter from members of Congress, you pledged that OGE would issue a regulation to ensure that, in the future, legal defense funds will be "transparent, open, and accessible to the public."⁵

These articulated goals of transparency, openness, and accessibility are laudable and, indeed, should guide OGE's development of a legal expense fund regulation. But in developing this regulation, OGE should also be guided by other two goals: *prevention* and *oversight*. OGE's regulatory mission statement seems to dictate their addition:

The executive branch ethics program is a conflicts-based program, rather than a solely disclosure-based program. While transparency is an invaluable tool for promoting and monitoring ethical conduct, *the executive branch ethics program requires more than transparency*. This program seeks to ensure the integrity of governmental decision making and to promote public confidence *by preventing conflicts of interest*. Taken together, the systems in place to identify and address conflicts of interest establish a foundation on which to build and sustain an ethical culture in the executive branch.⁶

We are cognizant of OGE's explanation that this reference in the above-quoted regulation to "conflicts of interest" includes conflicts of interest stemming from "the receipt of gifts."⁷

³ See Office of Gov't Ethics, Legal Expense Trust Fund Template, Aug. 15, 2017 ("OGE Template"), <https://bit.ly/2RY2Y8C>.

⁴ Senate Homeland Security and Governmental Affairs Committee, Hearing, Nominations of Emory A. Rounds III, to be Director, Office of Government Ethics, et al., May 23, 2018 (statement of Sen. Hassan beginning at approximately the 59-minute mark; statement of Sen. Jones beginning at approximately 1:06:40), <https://bit.ly/2yBK2c>; Letter from Elijah E. Cummings, Ranking Member, House Oversight and Government Reform Committee, et al., to David J. Apol, Acting Director, Office of Gov't Ethics, Apr. 2, 2018 ("House Oversight Letter"), <https://bit.ly/2ECNsMx>; Letter from Senator Margaret Wood Hassan, et al., to Emory A. Rounds, Director, Office of Gov't Ethics, Aug. 2, 2018 ("Senate Homeland Security and Governmental Affairs Letter"), <https://bit.ly/2OK3Yz8>.

⁵ 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>.

⁶ 5 C.F.R. § 2638.101(c) (emphasis added).

⁷ 5 C.F.R. § 2638.101(b) ("In the broadest sense of the term, 'conflicts of interest' stem from financial interests; business or personal relationships; misuses of official position, official time, or public resources; and the receipt of gifts.").

CREW's recommendations would mitigate ethical risk by advancing all of these goals. The Ethics in Government Act ("EIGA") vests OGE's Director with broad authority to issue regulations "pertaining to conflicts of interest and ethics in the executive branch" and would permit OGE to adopt CREW's recommendations.⁸ OGE's Director also has authority to provide "overall direction of executive branch policies related to preventing conflicts of interest."⁹

We urge you to exercise your authority by issuing a regulation on legal expense funds for executive branch employees that incorporates the following recommendations:

1. *Exclusive mechanisms for paying or reimbursing legal fees*

CREW recommends that OGE prohibit the solicitation or acceptance of any payment or reimbursement of legal expenses (i.e., fees and costs) incurred by an executive branch employee, unless the payment or reimbursement is made by—

- a. A legal expense fund approved in writing in advance by OGE;
- b. A relative of the employee;
- c. An insurer pursuant to an insurance agreement; or
- d. A current or former employer or client, provided that the legal expenses are related to the employee's services to the employer or client and that the employee has complied with procedures for outside employment, if applicable.¹⁰

This prohibition is necessary to limit the potential for conflicts of interest that arise from payment or reimbursement of legal expenses. Employees would be compelled to use the mechanism of an OGE-approved legal expense fund, except in limited circumstances involving payments made by relatives, insurers, or a former employer or client. Otherwise, an employee could avoid requirements established by OGE for legal expense funds by calling such a fund a "political organization" or something other than a "legal expense fund." In this way, the regulation would advance the goals of oversight and prevention of conflicts of interests.

This prohibition would not apply to the provision of *pro bono* legal services. Unlike cash distributions from legal expense funds, the provision of *pro bono* legal services comes directly from the true source of the gift. Therefore, the regulation need not establish a prohibition against the receipt of *pro bono* legal services beyond existing prohibitions under the gift rules.¹¹ But, given the potentially high value of such a gift, the regulation should affirmatively compel an employee to consult with government ethics officials to obtain their determination as to whether the gift rules permit acceptance of the gift of *pro bono* legal services (e.g., by ascertaining whether the lawyer or law firm is a "prohibited source" under 5 C.F.R. § 2635.203(d)) and the applicability of disclosure requirements under the EIGA and OGE's regulations.

⁸ 5 U.S.C. app. § 402 (b)(1).

⁹ 5 U.S.C. app. § 402(a).

¹⁰ As used here, the term "employer" is intended to include, among other things, organizations in which the employee has served voluntarily or as a member of a board of directors.

¹¹ 5 C.F.R. § 2635.202.

2. *Mandatory structure for legal expense funds*

CREW recommends that OGE mandate that each legal expense fund must be structured—

- a. As a trust;
- b. With only one beneficiary;
- c. Whose trustee owes a fiduciary duty to the sole beneficiary, under the law of the applicable jurisdiction.

This recommendation, *the most important of CREW's recommendations*, is necessary to prevent the possibility that an operator of the 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 advances the critical goal of prevention of conflicts of interest by removing a potential source of outside influence. It restores the ethical norm prior to the Trump administration, which was for all executive branch legal expense funds to adhere to this trust instrument structure. In the next section of this comment, we discuss problems with the Patriot Fund's deviance from this ethical norm.

3. *Trustee eligibility*

CREW recommends that OGE require the trustee position to be held by an individual and that the trustee not be—

- a. A prohibited source for the sole beneficiary;
- b. A registered lobbyist or an employee of a lobbying organization;
- c. An employee or elected official of the United States government;
- d. An employee or agent of a foreign or state government, including but not limited to a registrant under the Foreign Agent Registration Act ("FARA");
- e. A relative of the beneficiary;
- f. An employee of either the beneficiary or the beneficiary's relative; or
- g. An employee or agent of a person identified in (a) – (e).

These restrictions are generally consistent with OGE's template for legal expense funds and advance the goal of preventing conflicts of interest by reducing ethical risk and preventing violations of the gift rules or the Emoluments Clauses of the Constitution.

4. *OGE authorization*

Consistent with CREW's first recommendation, which would largely limit employees to accepting distributions from legal expense funds approved by OGE, CREW recommends that OGE require each legal defense fund to be approved by OGE in advance of an employee's acceptance of distributions and that—

- a. Prior to approval, the employee's representatives must provide OGE with a draft of all relevant documents, as enumerated in OGE's regulation;
- b. Upon a determination by the OGE Director that the proposed legal expense fund will satisfy applicable requirements, OGE's approval will be issued in writing;

- c. Upon establishment, the trustee must file with OGE copies of the following executed documents:
 - i. The trust agreement;
 - ii. All side or supplemental agreements, if applicable;
 - iii. Written procedures for compliance with applicable ethics requirements; and
 - iv. A certification that the trustee meets the eligibility requirements, which must include: the trustee's name, business address, employer, and a description of the trustee's relationship with the employee;
- d. Following establishment, the trustee must file with OGE any proposed amendments or supplements to these materials and obtain prior approval from OGE before the amendment becomes effective; and
- e. No redaction of these documents may be made other than, if applicable, redaction of any fee schedule, the personal address or contact information of any person, the name of any minor child, and any account number.

This recommendation advances the goal of oversight. It would ensure that OGE approval is based on the most recent version of the legal defense fund and further ensure that any subsequent actions taken by interested parties to alter the terms of the legal expense fund are not inconsistent with OGE requirements. For example, our review of OGE responses to FOIA requests suggests that OGE has not obtained the Patriot Fund's final executed LLC Agreement, the names of its board members, or any amended or supplemented materials.¹² As a result, there seems to be no assurance that the draft LLC Agreement that OGE reviewed is what guides the operations of the Patriot Fund.

5. Donor eligibility

CREW recommends that OGE prohibit the legal expense fund from accepting donations from any of the following—

- a. A “prohibited source” for the sole beneficiary;¹³
- b. Any organization;¹⁴
- c. A registered lobbyist, a registered lobbying organization, or any employee of a registered lobbying organization;¹⁵
- d. An executive branch employee;¹⁶

¹² Office of Gov't Ethics, Response to FOIA No. FY18-039 (request for all records related to the Patriot Legal expense fund as of September 2018), initial rolling response, <https://bit.ly/301ea8c>, second rolling response, <https://bit.ly/2V11tGY> (last viewed May 6, 2019).

¹³ 5 C.F.R. § 2635.203(d).

¹⁴ We do not limit the term “organization” to a legal entity; rather, we include any organization that can be used to shield the true donor's identity with respect to any donation.

¹⁵ An executive order bars presidential appointees from accepting gifts from lobbyists and encourages OGE to consider expanding the prohibition to other employees. Executive Order 13770, §§ 1(5), 4(c)(3)(ii), Jan. 28, 2017.

¹⁶ Consistent with OGE's template for legal expense funds, we recommend a complete ban on federal employee donations to resolve doubt as to compliance with OGE's gift rules. 5 C.F.R. pt. 2635, subpt. C.

- e. A foreign government and any employee or agent of a foreign government, including but not limited to a registrant under the FARA;¹⁷
- f. A state government and any employee or agent of a state government;¹⁸ and
- g. An employee or agent of any person identified in (a) – (f).

A prohibition on donations from organizations is necessary because the sources of an organization’s funding will often be unknown to an employee and ethics officials. However, we recognize that OGE might feel a need to include narrow exceptions in its regulation permitting donations from (i) the national committee of a political party, as defined in the Federal Election Campaign Act,¹⁹ or (ii) for former members of the staff of a campaign of a candidate for elected office in the United States, the campaign—*provided that*, as to both exceptions, the donation is not otherwise prohibited by law *and that* the organization is not a prohibited source for the employee.²⁰ This recommendation advances the goal of preventing conflicts of interest by reducing ethical risk and preventing violations of the gift rules or the emoluments clauses of the Constitution.

6. *Gifts that are given “because of” official position or are otherwise impermissible*

CREW recommends that OGE prohibit the legal expense fund from accepting donations from any source who indicates either verbally or in writing that the donation is being given because of the beneficiary’s official position.²¹ Likewise, CREW recommends that the regulation make clear that it does not override other laws or regulations barring certain gifts. This recommendation achieves the goal of preventing conflicts of interest by preventing violations of the gift rules.

7. *Donor Screening*

CREW recommends that OGE require that the trustee conduct the following screening of each donor:

- a. The trustee must collect signed and dated statements from all donors, which the trustee will file *on their behalf* with the beneficiary’s employing agency or office, containing the following information:

¹⁷ We recommend a blanket prohibition on donations from employees of foreign governments to avoid difficulties inherent in ascertaining when they are acting on behalf of governments. U.S. Const., art. I, § 9, cl. 8.

¹⁸ U.S. Const., art. II, § 1, cl. 7.

¹⁹ This recommended exception is intended to apply narrowly to organizations described in 52 U.S.C. § 30101(14), (16), but it is intended to exclude all other political organizations described in 26 U.S.C. § 527(e).

²⁰ We intend for this limitation on the exceptions to apply regardless of the applicability of any existing exception under 5 C.F.R. § 2635.204. We are aware that OGE has determined that the Republican National Committee is a prohibited source for employees of the Trump administration’s White House (and presumably this determination would apply to Democratic National Committee in a Democratic administration). Office of Gov’t Ethics, AIMS Entry 13489, Resolved Interaction with Benjamin Ginsburg, Sept. 28, 2017, records available in response to FOIA No. 19/006 (“AIMS Entry 13489”) (recounting guidance provided by OGE’s General Counsel), <https://bit.ly/2KIGV6g>. It is not clear, however, whether the same is true for all Presidential appointees serving in agencies outside the White House.

²¹ 5 C.F.R. § 2635.202.

- i. Name,
 - ii. Employer,
 - iii. Primary state of legal residence or employment,
 - iv. Confirmation that the donor meets the eligibility requirements in Item 5; and
 - v. An explicit acknowledgment that the donor is aware that the document is being submitted to the United States government and of the applicability of the prohibition against false statements in 18 U.S.C. § 1001;²²
- b. The trustee must review the materials submitted by each donor and conduct reasonable due diligence, including consultation with the sole beneficiary and agency ethics officials for the employing agency or office, to ensure that the donor is not a prohibited source;
 - c. In the case of any donor contributing more than \$1,000, the trustee must interview the donor to confirm that the donor meets the eligibility requirements in Item 5; and
 - d. The trustee must promptly refund any donation that, despite this screening, is later determined to have been impermissibly accepted.

This recommendation advances the goal of prevention of conflicts of interest. To illustrate the importance of this recommendation, we discuss problems with the Patriot Fund's inadequate screening of donors in the second section of this comment.

8. Government oversight

CREW recommends 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 in the following manner:

- a. The trustee must file a signed and dated quarterly report with the employing agency or office;
- b. The report must:
 - i. Provide a full accounting of the sources of donations received by the trust during the preceding quarter, and included copies of the signed and dated statements collected from the donors;
 - ii. Provide a full accounting of distributions by the trust during the preceding quarter, including the name of the recipient, the date of the distribution, and the amount of the distribution;
 - iii. Provide a full accounting of all donations refunded to their sources, including the name of the source, the date and amount of the refund; and
 - iv. Either disclose any violation of the legal expense fund regulation or affirmatively declare that there are have been no known violations;
- c. If the beneficiary is an employee who is subject to public financial disclosure requirements ("public filer") under the EIGA, the employing agency or office must forward a copy of each quarterly report to OGE within 30 days of receipt; and

²² This requirement will create greater incentive for donors to make complete and accurate certifications.

- d. If the beneficiary is a confidential filer, the employing agency or office must make the report available to OGE upon request in the course of any program review or inspection conducted by OGE.

This recommendation serves the important goals of transparency, prevention, and oversight because it provides agency ethics officials and, for high-level employees, OGE with the tools needed to ensure compliance with government ethics rules.

9. Recusal or cap on donations

CREW recommends that OGE's regulation either put a cap on donations from individual sources or establish a recusal obligation for major donors. CREW recommends an aggregate cap of \$5,000 for each donor for the life of the legal expense fund. Alternatively, CREW recommends a four-year recusal obligation as to "particular matters" with respect to any source whose aggregate donations to the legal expense fund exceed \$5,000. Specifically, this recusal obligation would prohibit the employee from participating personally and substantially in any particular matter that the employee knows will directly and predictably affect the financial interests of the donor, the donor's employer, spouse or minor child, or any company in which the donor holds at least a 10% ownership stake.

This recommendation advances the goal of prevention of conflicts of interest and is similar to OGE's regulation on extraordinary payments.²³ It goes further than that regulation, however, as to both the dollar threshold and the breadth of the recusal. This heightened standard is needed because, unlike a former employer, a donor may not be motivated by an outside relationship with the employee. With the Supreme Court's decision in *McDonnell v. United States* having weakened the definition of "official act" in the bribery statute, there is no longer any adequate statutory protection against donors buying access to government officials.²⁴ The Court opened the door to abuse, but this recommended provision would, at least partly, close that door with respect to gifts of cash made through legal expense funds.

10. Unused funds

CREW recommends that OGE establish the following requirements for the legal expense fund's unused funds:

- a. In connection with dissolution of the legal expense fund, the trustee must distribute all unused funds to a non-profit organization—
 - i. That the trustee has selected in his or her sole and exclusive discretion, without input from the beneficiary;²⁵
 - ii. That qualifies for tax treatment under 26 U.S.C. § 501(c)(3); and
 - iii. That is unaffiliated with the trustee, the beneficiary, or the beneficiary's known relatives; and

²³ 5 C.F.R. § 2635.503.

²⁴ *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

²⁵ This restriction is necessary to avoid "constructive receipt" by the employee. See 5 C.F.R. § 2636.303(c).

- b. Within 30 days of either dissolution of the trust or the beneficiary's separation from federal service, whichever comes first, the trustee must file with the employing agency or office a final report that meets the requirements applicable to quarterly reports. In the case of separation from federal service prior to dissolution, the trustee must include a signed statement from the sole beneficiary pledging to comply with the foregoing requirements for distribution of unused funds to a non-profit organization upon the subsequent dissolution of the trust.

This recommendation advances the goals of transparency, oversight, and prevention of conflicts of interest.

11. Public access to legal expense fund records

CREW has an additional recommendation limited to legal expense funds established for the benefit of public filers under the EIGA.²⁶ As to such legal expense funds, CREW recommends that the regulation require OGE to post all records discussed in the preceding recommendations (Items 1-10) on its website. We are aware of the letter OGE wrote to Congress in 2004 expressing doubt about its ability to expand public disclosure of the financial interests of public filers.²⁷ But we think the letter articulates an unduly restrictive view of OGE's authority to require transparency.²⁸ We also doubt that the concerns expressed in the letter are applicable to gifts of cash donated by outside sources to public filers, which are different in nature from their personal assets and liabilities.

In the letter, OGE cites a subsection of EIGA that provides: "The provisions of this title *requiring the reporting of information* shall supersede *any general requirement* under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest."²⁹ OGE's letter suggests that this language makes EIGA the exclusive authority for disclosures related to conflicts of interest, invalidating all others.³⁰ A more natural reading, however, is that EIGA's disclosure requirements supersede any narrower requirements, which might permit employees to disclose less information than EIGA, but they do not invalidate broader requirements.

It seems doubtful that Congress intended prospectively to invalidate its own subsequent enactments or any regulatory requirements designed to guard against conflicts of interest through increased transparency. In 2011, for example, Congress established a new requirement that

²⁶ 5 U.S.C. app. § 101(f).

²⁷ Office of Gov't Ethics, Inf. Adv. Op. 04 x 3, Apr. 19, 2004, <https://bit.ly/2Up8AIM> ("OGE 04 x 3").

²⁸ See *Duplantier v. United States*, 606 F.2d 654, 670–71 (5th Cir. 1979) ("Regardless of whether a public official is elected or appointed to office, his or her legitimate expectation of privacy is necessarily circumscribed. As the First Circuit recognized in a case involving nonelective officers, '(p)rivacy in the sense of freedom to withhold personal financial information from the government or the public has received little constitutional protection.' *O'Brien v. DiGrazia*, 1 Cir., 1976, 544 F.2d 543, 545-46, Cert. denied sub nom. *O'Brien v. Jordan*, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977).").

²⁹ 5 U.S.C. app. § 107(b) (emphasis added); OGE 04 x 3, at 2.

³⁰ *Id.*

certain procurement officials must file publicly available reports of informal employment inquiries.³¹ This requirement goes beyond EIGA's requirement to publicly report such inquiries *only after* they become firm arrangements or agreements for employment.³² Similarly, OGE added a new requirement in 2015 that public filers must indicate which of their assets are related to their employment, something that EIGA does not require them to do.³³ Also, back when OGE wrote its 2004 letter, OGE required public filers to publicly disclose that they had received tax relief in connection with the sales of assets to resolve conflicts of interest, another disclosure that EIGA does not require.³⁴ Accepting the view expressed in OGE's 2004 letter would lead to the improbable conclusion that EIGA invalidates all three of these disclosure requirements.

For this reason, we do not believe the subsection cited in OGE's 2004 letter bars OGE from requiring public disclosure. We believe EIGA gives OGE ample authority to issue a regulation establishing such a requirement.³⁵ As the last line of defense against governmental conflicts of interest, OGE has a legitimate interest in regulating the acceptance of gifts by executive branch employees, and that oversight can include disclosure of legal expense fund records by public filers.

Any privacy interest on the part of a gift-accepting public filer is outweighed by the extraordinary risk in the post-*McDonnell* era that donors may give cash in hopes of gaining access to, or otherwise influencing, government officials. The public has an overwhelming need to ensure that executive branch employees are not favoring donors of cash gifts with disproportionate access to government. Balanced against this need, the employee has little privacy to protect because the most sensitive information contained in these records—the amounts and sources of cash gifts exceeding \$390—will ultimately be disclosed publicly in annual and termination financial disclosure reports.³⁶ Further reducing privacy concerns, CREW's recommendations are designed to exclude gifts from family members. Moreover, any employee can avoid public disclosures by simply declining gifts of cash from non-relatives to cover legal expenses arising from the employee's work for the government or a campaign.

OGE seems to agree with CREW's view of the relative equities here: Highlighting an important normative value of the government ethics program, OGE's gift regulations signal concern about outside sources obtaining disproportionate access to government by giving gifts to

³¹ 41 U.S.C. § 2103.

³² 5 U.S.C. app. § 102(a)(7).

³³ Office of Gov't Ethics, OGE PA-15-01, 3-5, Mar. 2, 2015, <https://bit.ly/2IHqHaL>.

³⁴ Office of Gov't Ethics, *Public Financial Disclosure, A Reviewer's Reference 2d Ed.*, Nov. 2004, at 3-17 ("The filer must indicate whether an asset was sold pursuant to a CERTIFICATE OF DIVESTITURE that OGE had issued."), https://www.fdm.army.mil/documents/rf278guide_04.pdf; 5 U.S.C. app. § 102(a)(5) (disclosure of sales).

³⁵ A provision of Title IV of EIGA authorizes OGE's Director to develop "rules and regulations to be promulgated by the President or the Director pertaining to conflicts of interest and ethics in the executive branch." 5 U.S.C. app. § 402(b)(1). A clause of that provision describes this authority as "including" the authority to develop procedures for collection and release of public financial disclosure reports, but the word "including" is used to introduce an example of—not a limitation on—the Director's authority. *Id.*

³⁶ Office Gov't Ethics, OGE LA-17-07, June 8, 2017, <https://bit.ly/2XpmlDA>.

executive branch employees.³⁷ Additionally, OGE routinely posts records on its website that the EIGA does not compel it to post, including: ethics agreements, Certification of Ethics Agreement Compliance forms, and waivers—all of which can contain personal financial information or details of outside activities.³⁸ OGE also posts online a wide range of ethics records that it has released under the Freedom of Information Act.³⁹ There is no reason why OGE cannot do the same for the records of legal expense funds for public filers.

II. Ethical Problems with the Patriot Fund

We turn now to the Patriot Fund to illustrate the need for OGE to adopt our recommendations and to address questions OGE posed in its ANPR. The decision to cast aside the ethical norms for legal expense funds has created an unreasonable risk of ethical failure. OGE's contemplated regulation should be designed to address that risk and prevent a recurrence of these problems.

A. OGE Effectively Blesses the Patriot Fund

On January 29, 2018, the law firm Wiley Rein LLP (“Wiley”), which drafted the Patriot Fund’s LLC Agreement, requested that OGE review the agreement “for federal ethics compliance.”⁴⁰ Wiley structured the fund as a Delaware limited liability company that functions as a political organization,⁴¹ an arrangement that departs radically from OGE’s longstanding practice for legal expense funds.⁴² Among other differences, each prior executive branch legal expense fund was organized as a trust for only one beneficiary, with a trustee who owed a fiduciary duty to that beneficiary.⁴³

That same day, Acting OGE Director David Apol responded that while OGE “does not approve or disapprove of specific legal defense funds,” the LLC Agreement contained adequate safeguards to “ensure that the employee recipients do not violate any provision of 5 U.S.C. §§ 7351 and 7353, or of the Standards of Ethical Conduct for Employees of the Executive

³⁷ 5 C.F.R. § 2635.201(b)(2)(iv) (“(2) An employee who is considering whether acceptance of a gift would lead a reasonable person with knowledge of the relevant facts to question his or her integrity or impartiality may consider, among other relevant factors, whether: ...(iv) Acceptance of the gift would provide the donor with significantly disproportionate access.”).

³⁸ Office of Gov’t Ethics, Presidential, Vice Presidential, Appointee, and Nominee Records, <https://bit.ly/2mWYJwW> (last viewed Apr. 17, 2019).

³⁹ Office of Gov’t Ethics, FOIA Responses, <https://bit.ly/2QKvFVR> (last viewed Apr. 17, 2019).

⁴⁰ Email from Robert L. Walker, Wiley Rein LLP, to Seth H. Jaffe, Chief, Ethics Law & Policy Branch, Office of Gov’t Ethics, Jan. 29, 2018, <https://bit.ly/2S9zwfN>.

⁴¹ Limited Liability Company Agreement of Patriot Legal Expense Fund Trust, LLC, January [30], 2018 (“LLC Agreement”), at 1-2, <https://bit.ly/2S9zwfN> (attached to Letter from David J. Apol, Acting Director, Office of Gov’t Ethics, to Robert L. Walker, Wiley Rein LLP, Jan. 29, 2018 (“Apol Letter”)).

⁴² Lachlan Markay, Some Big Names in Republican Fundraising Are Financing Trump’s Legal Defense Fund, *Daily Beast*, Aug. 6, 2018 (noting that the Patriot Fund is a departure from past practice), <https://thebea.st/2CFrE0c>; Mark Hand, Scott Pruitt’s attempt to defend himself against his scandals could turn into a new scandal, *Think Progress*, May 2, 2018, <https://bit.ly/2PrNUBK>.

⁴³ OGE Template.

Branch at 5 C.F.R. part 2635, as a result of the planned activities of the managers on their behalf.”⁴⁴ Those provisions govern gifts executive branch employees may receive.

It is not known who paid Wiley’s fees, and a source “with knowledge of the fund” told ABC News that “the White House was unaware of whom created the fund and only dealt with the law firm.”⁴⁵ This reporting raises a question as to whether a prohibited source paid the legal fees to establish the Patriot Fund. In the case of a traditional legal expense fund established as a trust for the benefit of only one employee, OGE would have deemed the payment of legal fees by a prohibited source to be an impermissible gift.⁴⁶ But the Patriot Fund took OGE into uncharted territory, and it is not clear how—or even *if*—OGE analyzed the possibility that this gift came from a prohibited source or, perhaps an even more troubling possibility given that we have no information about the source of the money, a foreign government. Absent other information, the two most likely sources of the gift would logically appear to be Wiley or the Republican National Committee, both of which are prohibited sources for White House appointees.⁴⁷

A month later, the Patriot Fund announced its establishment, emphasizing that OGE had reviewed a draft of its LLC agreement for legal compliance.⁴⁸ Since then, the fund has accepted large donations, made distributions, and refused to say who received the distributions.⁴⁹ Patriot Fund manager Nan Hayworth later released a video soliciting donations without mentioning restrictions against donations from foreign governments, prohibited sources or federal employees.⁵⁰

The novel and complex approach pioneered by the Patriot Fund creates significant risks but provides for little or no government oversight.⁵¹ As former OGE General Counsel Marilyn

⁴⁴ Apol Letter.

⁴⁵ John Santucci and Matthew Mosk, Legal fund in development to help Trump administration and campaign staff pay legal bills in Russia probe, *ABC News*, Feb. 2, 2018, <https://abcn.ws/2CYPGEh>.

⁴⁶ Office of Gov’t Ethics, OGE LA-18-11, Sept. 12, 2018 (“Agency ethics officials need to remind employees that they may not accept gifts from prohibited sources to pay for legal expenses, and that they should seek ethics advice before accepting a gift to pay for legal expenses.”), <https://bit.ly/2Gocb4O> (“OGE LA-18-11”). As discussed below, accepting donations from prohibited sources is one of the many problems with the Patriot Fund.

⁴⁷ Wiley is a prohibited source because it lobbies the White House, *see, e.g.*, Wiley Rein LLP, First Quarter 2018 Lobbying Disclosure Report on behalf of Nucor Corp., Apr. 20, 2018, <https://bit.ly/2NsJ4Uy>; Wiley Rein LLP, First Quarter 2018 Lobbying Disclosure Report on behalf of American Line Pipe Producers Ass’n, Apr. 20, 2018, <https://bit.ly/2OERrZz>, and OGE has determined that the Republican National Committee is a prohibited source for White House staff, AIMS Entry 13489.

⁴⁸ Patriot Legal Expense Fund Trust, LLC, Patriot Legal Expense Fund to Assist Persons Involved in Investigations, *PR Newswire*, Feb. 27, 2018 (“Patriot Fund Press Release”), <https://prn.to/2CQmShw>.

⁴⁹ Renae Reints, GOP Megadonors Give \$500,000 to Legal Fund for Trump Aides Caught Up In Russia Probe, *Fortune*, Feb. 1, 2019, <https://bit.ly/2KOLN9W>; Soo Rin Kim, Mar-a-Lago member gives \$150K to legal defense fund for Trump allies questioned in Mueller probe, *ABC News*, Oct. 15, 2018, <https://abcn.ws/2NGOXIR>; Jeremy Diamond, Pro-Trump legal fund making payments, but won't say who's benefiting, *CNN*, Oct. 15, 2018, <https://cnn.it/2NNPvfW>.

⁵⁰ Patriot Legal Expense Fund (video), <https://bit.ly/2MMScOG> (last viewed April 16, 2019).

⁵¹ *See, e.g.*, Apol Letter; LLC Agreement, at 18 (§ 10.7 Confidentiality).

Glynn observed, the Patriot Fund is “obviously rife with potential problems.”⁵² Others have also raised serious concerns about it.⁵³ During your confirmation hearing, Senator Margaret Hassan cautioned: “The fund manager can not only dole out money as she sees fit, meaning the fund recipients could be rewarded monetarily for giving more favorable testimony in the investigation, but her management also gives the president’s team plausible deniability if there are any illegal gifts to the fund.”⁵⁴ Along these lines, Ms. Glynn questioned whether the fund’s acceptance of donations from prohibited sources tainted the entire pool.⁵⁵ In addition, in April 2018, eighteen members of the House Oversight committee wrote OGE to express a number of concerns about the Patriot Fund,⁵⁶ and five members of its counterpart in the Senate wrote OGE to express similar concerns in August 2018.⁵⁷

B. Problems with the Patriot Fund

CREW has identified several problems with the Patriot Fund and respectfully requests that OGE reconsider its effective blessing of the fund’s LLC Agreement. Whether or not OGE rescinds its January 29, 2018, letter to Wiley, OGE must not issue a regulation permitting future legal expense funds to follow the bad example of the Patriot Fund. Unlike the Patriot Fund, which will cease to pose ethics problems for the executive branch ethics after President Trump’s appointees have left government, 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 even worse than no regulation at all.

1. *Defective organizational structure, conflicting loyalties*

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

Before the Trump administration, legal expense funds in the executive branch were established as trusts with one beneficiary.⁵⁸ Under state law, the trustee had a legally enforceable

⁵² Cristina Alesci, Jeremy Diamond and Katelyn Polantz, Ethics office unofficially OKs legal defense fund for White House staffers, CNN, Feb. 2, 2018, <https://cnn.it/2DY19oP>.

⁵³ See, e.g., Steve Benen, New questions surround the ‘Patriot Legal Expense Fund’, MSNBC, Mar. 1, 2018, <https://on.msnbc.com/2qmE59N>; Michael Warren, Lawyer Fees and Loopholes, The Patriot Legal Expense Fund is here to help Trumpworld, *Weekly Standard*, June 29, 2018, <https://tw.s.io/2Ard2jq>.

⁵⁴ Senate Homeland Security and Governmental Affairs Committee, Hearing, Nominations of Emory A. Rounds III, to be Director, Office of Government Ethics, et al., May 23, 2018 (statement of Sen. Hassan beginning at approximately the 59-minute mark), <https://bit.ly/2yBKk2c>.

⁵⁵ Michelle Ye Hee Lee, Legal defense fund for Trump aides launches amid questions about donor transparency, *Washington Post*, Feb. 28, 2018, <https://wapo.st/2OMtbJ2>.

⁵⁶ House Oversight Letter.

⁵⁷ Senate Homeland Security and Governmental Affairs Letter.

⁵⁸ See, e.g., OGE Template (trust for one employee); Office of Gov’t Ethics, Inf. Adv. Op. 93 x 21 (Aug. 30, 1993) (silent as to structure, but discussing a fund for one employee), <https://bit.ly/2vJICaf>; Office of Gov’t Ethics, Inf. Adv. Op. 85 x 19 (Dec. 12, 1985) (same), <https://bit.ly/2vKkSle>.

fiduciary duty to act in the beneficiary's best interest.⁵⁹ Donations to the trust had to be used to pay the beneficiary's legal expenses.⁶⁰ Ms. Glynn, who served as OGE's General Counsel for 11 years, advised one of OGE's managers in October 2017 that she did not recall anyone ever raising the prospect of a multiparty legal expense fund.⁶¹ As recently as August 2017, OGE issued a template for legal expense funds to be established as single-beneficiary trusts.⁶²

OGE's approach apparently began to change on November 28, 2017, when OGE received a call from an attorney for a federal employee who wanted to establish a legal expense fund as either a trust or a political organization.⁶³ Breaking with past practice, an OGE staffer responded that, "so long as all substantive aspects of the model trust document were followed," a political organization structure was "permissible."⁶⁴

With the prospect of a shift from a trust structure to a political organization structure, there would no longer be a trustee who owed a fiduciary duty to a beneficiary. The loss of that duty created a new risk that a legal expense fund manager might be serving the interests of unseen masters, rather than the interests of eligible recipients. The loyalty of the fund's manager might lie, for instance, with the subject of an investigation, and her aim might be to protect that subject from investigators—even at the expense of the eligible recipients. The situation and its attendant risks are vastly different from those of a trustee who, loyal only to a sole beneficiary, seeks to ease the financial burden on the beneficiary. As a result of this shift from a trust to a political organization, there is now a danger that a legal expense fund could make or withhold distributions to influence eligible recipients for the benefit of the subject of an investigation.

The next shift came in January 2018 with OGE effectively blessing the Patriot Fund. If OGE's initial experiment with the political organization structure created a potential for influence, the Patriot Fund created the likelihood of it. Instead of one eligible recipient, the Patriot Fund has a limitless number of eligible recipients potentially vying with one another for distributions.⁶⁵

The biggest risks flowing from this arrangement are that witnesses could feel pressure not to cooperate with investigators or, worse, to provide false testimony. The language of the LLC Agreement instructs Dr. Hayworth not to make distributions based on whether eligible recipients

⁵⁹ *NLRB v. Amax Coal Co., a Div. of Amax*, 453 U.S. 322, 329–30 (1981) ("Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties.... To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.'"); 38 Am. Jur. Proof of Facts 3d 279 (originally published in 1996) ("Trustees are fiduciaries. As such, they owe certain duties to the trust and to the beneficiaries of the trust. One of the most prominent of these is the duty of undivided loyalty.").

⁶⁰ See OGE Template.

⁶¹ Office of Gov't Ethics, AIMS Entry 13751, Resolved Interaction with Marilyn Glynn, Oct. 30, 2017, records available in response to FOIA Request No. FY18-034 (2nd rolling response), at 25, <https://bit.ly/2xpHglg>.

⁶² OGE Template.

⁶³ Office of Gov't Ethics, AIMS Entry 13932, Resolved Interaction with Rebecca Gordon, Nov. 28, 2017, records available in response to FOIA No. FY18-034 (2nd rolling response), at 7-8.

⁶⁴ *Id.*

⁶⁵ LLC Agreement, at 10-11 (§ 5.1.7).

have provided testimony that is “beneficial” to the President or his campaign and not to influence or obstruct an investigation.⁶⁶ However, the LLC Agreement ensures that she is free to ignore this instruction by shrouding the Patriot Fund’s activities in secrecy,⁶⁷ barring her from communicating directly with eligible recipients,⁶⁸ and permitting her to coordinate with campaign officials.⁶⁹ Moreover, the LLC agreement indicates only that “no Distributions shall be *made*” on this basis; it does not prohibit Dr. Hayworth from *withholding* distributions if an eligible recipient’s testimony is not beneficial to the President.⁷⁰

Dr. Hayworth’s own words heighten this concern. She has declared that the purpose of donating to the Patriot Fund is to “keep faith with the people who share President Trump’s commitment to make America great again.”⁷¹ This politically charged statement raises a question as to whether she would distribute money to a witness she perceived as having broken “faith” with President Trump. Dr. Hayworth owes no fiduciary duty to eligible recipients, has access to money donated irrevocably by others, and can exert influence by demonstrating a pattern of giving money only to those whose testimony is beneficial to President Trump.

The risks of abuse would have been lower with a single-beneficiary trust than with a political organization because the trustee’s fiduciary duty would prevent abuse and the lack of other beneficiaries would eliminate competition among witnesses.⁷² In the third part of this complaint, we examine the example of President Trump’s former attorney, John Dowd, apparently attempting to abuse a legal expense fund that appears to have been the Patriot Fund. He seems to have tried to divert money from the fund to two witnesses to prevent their cooperation with investigators. As possible evidence of his motive, we note that he does not appear to have made good on a pledge to contribute his own money after they entered into a cooperation agreement. Whatever his reasons, and whether or not OGE believes the dubious explanation anonymous White House sources have offered, this incident illustrates the risks posed by the Patriot Fund’s political organization structure.

2. *Coordination with a political campaign that is under investigation*

By allowing the Patriot Fund to coordinate with the Trump campaign, the LLC Agreement creates a specific risk that President Trump or his campaign—subjects of some of the

⁶⁶ LLC Agreement, at 10 (§ 5.1.5(ii)-(iii)).

⁶⁷ LLC Agreement, at 18 (§ 10.7).

⁶⁸ LLC Agreement, at 11 (§ 5.1.7(i)).

⁶⁹ *Id.*

⁷⁰ LLC Agreement, at 10 (§ 5.1.5) (emphasis added).

⁷¹ Patriot Legal Expense Fund (video), <https://bit.ly/2MMScOG>.

⁷² See *United States v. Mitchell*, 463 U.S. 206, 226 (1983) (“It is well established that a trustee is accountable in damages for breaches of trust.”). A prospective donor to a trust would also have less ability to influence a witness than the manager of a political organization. A pledge to donate money in the future would be unenforceable, and any explicit offer of a *quid pro quo* would put the prospective donor at risk of criminal prosecution. See, e.g., 18 U.S.C. § 201(b)(3).

investigations—could exert improper influence over some of the eligible witnesses.⁷³ The Trump campaign is deeply involved in the Patriot Fund’s operations. The Patriot Fund’s custodian of records and even its mailing address are linked to the Trump campaign: “The legal fund’s custodian of records is the Trump campaign’s treasurer Bradley Crate, whose firm Red Curve Solutions is listed as the mailing address for the legal fund.”⁷⁴ Campaign spokesperson Mark Serrano is the Patriot Fund’s spokesperson.⁷⁵ Dr. Hayworth, the Patriot Fund’s manager, also identifies herself as a member of the “Trump Campaign Advisory Board.”⁷⁶

The LLC Agreement justifies the Patriot Fund’s coordination with the campaign by designating the campaign as an eligible recipient.⁷⁷ However, this justification does not hold up. Federal campaign finance law prohibits direct corporate contributions to federal campaigns. Even if the Patriot Fund were to opt to be treated as a partnership, which would allow it to make some contributions to the campaign, the amount it could legally distribute to the campaign would be much too small to be useful.⁷⁸ This obstacle raises questions as to whether the LLC agreement’s designation of the campaign as an eligible recipient was merely a vehicle to give the Trump campaign access to the Patriot Fund’s manager. These circumstances suggest that influencing witnesses may have been a goal of the Patriot Fund from its inception.

The Trump campaign could exert influence over an eligible recipient by recommending against a distribution or by misrepresenting Dr. Hayworth’s views. The LLC Agreement, which allows Dr. Hayworth to speak with the Trump campaign, bars her from communicating directly with other eligible recipients.⁷⁹ Instead, the Trump campaign is reportedly acting as the gatekeeper for eligible recipients who request distributions.⁸⁰ Campaign officials could refuse to pass on a distribution request or could imply that Dr. Hayworth will cut them off if they cooperate with investigators.

⁷³ Carol D. Leonnig and Josh Dawsey, ‘Individual 1’: Trump emerges as a central subject of Mueller probe, *Washington Post*, Nov. 29, 2018, <https://wapo.st/2v9ORmi>; Matt Apuzzo, Adam Goldman and Nicholas Fandos, Code Name Crossfire Hurricane: The Secret Origins of the Trump Investigation, *New York Times*, May 16, 2018, <https://nyti.ms/2rN5u5i>.

⁷⁴ Diamond, *CNN*, Oct. 15, 2018; see also Federal Election Commission, *Donald J. Trump for President, Inc.*, About this committee, <https://bit.ly/2G9PSDh> (last viewed Apr 18, 2019); Patriot Legal Expense Fund Trust, LLC, IRS Form 8872, 2018 Year-End Report, Jan. 31, 2019, <https://bit.ly/2Ee8RKc>.

⁷⁵ Diamond, *CNN*, Oct. 15, 2018.

⁷⁶ President’s Council on Sports, Fitness & Nutrition, *Dr. Nan Hayworth*, Sept. 20, 2018, <https://bit.ly/2AAO5Cq>; Transcript, *CNN Reports At Least 8 Other People in Trump Jr. Meeting*, *CNN*, Apr. 14, 2017 (“Nan Hayworth . . . who is also a member of the Trump campaign advisory board.”), <https://cnn.it/2OfQ56p>.

⁷⁷ LLC Agreement, at 10-11 (§ 5.1.7).

⁷⁸ See 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2. If the fund elected partnership tax treatment, it could make small contributions to the campaign, limited to \$2,700 per partner, if the partners forfeited their rights to make personal contributions and notified the campaign how to attribute contributions among them. However, the LLC Agreement makes no provision for securing their agreement or giving notice. See 11 C.F.R. § 110.1(b)(1), (e), (g)(2)-(3), (k)(1); see also Federal Election Commission, *Who can and can’t contribute*, <https://bit.ly/2zb4oUu> (last viewed Apr. 18, 2019).

⁷⁹ LLC Agreement, at 11 (§ 5.1.7(i)).

⁸⁰ Diamond, *CNN*, Oct. 15, 2018 (requests for distributions are being “facilitated by Trump campaign officials”).

The conduct of the President and some campaign officials shows there is cause for concern. The campaign's former manager, Paul Manafort, was convicted of lying to federal officials and other crimes.⁸¹ Former Trump campaign advisers Rick Gates, Michael Flynn, and George Papadopoulos have also been convicted of lying to federal officials, as has President Trump's longtime lawyer, Michael Cohen.⁸² The Justice Department recounted in a pleading how "Individual 1" (known to be President Trump) directed Mr. Cohen to commit a crime,⁸³ and the *Washington Post* has documented over 10,000 false or misleading claims by President Trump.⁸⁴ Moreover, Special Counsel Mueller's damning report raises specific concerns about the potential for obstruction.⁸⁵

Tellingly, NBC reported shortly before the release of the redacted report that White House staffers were terrified of President Trump's "wrath" in the event that he should learn what they told investigators: "One person close to the White House said there is 'breakdown-level anxiety' among some current and former staffers who cooperated with the investigation at the direction of Trump's legal team at the time."⁸⁶ It is difficult, therefore, to understand OGE's decision to effectively bless a legal expense fund structure that leaves these staffers dependent upon President Trump's campaign to process their requests and communicate the views of the Patriot Fund's manager.

3. *Acceptance of gifts from prohibited sources*

The gift rules prohibit executive branch employees from accepting gifts from prohibited sources.⁸⁷ But the LLC Agreement permits the Patriot Fund's manager to solicit and accept donations from prohibited sources.⁸⁸ The agreement seeks to cure the taint by requiring the manager to route money from prohibited sources to recipients who are not executive branch employees.⁸⁹ Money, however, is fungible. Segregating donated funds into separate accounts is nothing but an accounting fiction: Every dollar given to eligible recipients outside the government frees up a dollar for eligible recipients in the government.⁹⁰

⁸¹ Chad Day, Judge finds Manafort lied to investigators in Russia probe, *Associated Press*, Feb. 14, 2019, <https://bit.ly/2DYfnUp>.

⁸² Andrew Prokop, All of Robert Mueller's indictments and plea deals in the Russia investigation, *Vox*, Mar. 22, 2019, <https://bit.ly/2EFPcEq>.

⁸³ Dara Lind, Michael Cohen: "Individual 1 is Donald J. Trump", *Vox*, Feb. 27, 2019, <https://bit.ly/2GmDSv1>.

⁸⁴ Glenn Kessler, Salvador Rizzo, and Meg Kelly, President Trump has made more than 10,000 false or misleading claims, *Washington Post*, Apr. 29, 2019, <https://wapo.st/2Lk3fDv>.

⁸⁵ Noah Bookbinder, Mueller's Damning Report, *New York Times*, Apr. 18, 2019, <https://nyti.ms/2vjXSJL>.

⁸⁶ Carol E. Lee, Hallie Jackson, and Kristen Welker, White House officials concerned about being exposed by Mueller report, *NBC News*, April 16, 2019, <https://nbcnews.to/2UCd4Ro>.

⁸⁷ 5 C.F.R. §§ 2635.202(b)(1), 2635.203(d).

⁸⁸ LLC Agreement, at 11-12 (§ 5.1.8) and Schedule C.

⁸⁹ *Id.*

⁹⁰ Notably, one OGE opinion raises concerns about accepting gifts from an organization engaged in "soliciting and accepting cash contributions" from prohibited sources to defray the cost of gifts, emphasizing that the gift rules prohibit even the indirect acceptance of a gift. *See* OGE Inf. Adv. Op. 89 x 9 (1989) ("Because the standards of conduct prohibit even the indirect acceptance of a gift from a prohibited source, the practice of vendors paying for individual meals, albeit indirectly through contributions to a society whose membership consists almost solely of

This segregation arrangement does not cure the taint. The logical extension of this arrangement would be to allow the commingling of other types of interests under government ethics laws and regulations. For example, it could lead to OGE allowing employees to retain investments in hedge funds that hold both conflicting and non-conflicting assets as long as they promise to forego profits attributable to the conflicting assets. Such an approach would weaken the government's prevention of conflicts of interest.

4. Failure to disclose sources of funding for distributions to individual recipients

Even if this segregation arrangement were enough to cure the taint of the Patriot Fund's acceptance of donations from prohibited sources, there is no way to know if Dr. Hayworth is adhering to that arrangement. The task of segregation is an exacting one that demands scrupulous tracing of each donation through the lifecycle of receipt, custody, and distribution. The decision to let the Patriot Fund accept donations from prohibited sources created a risk that its manager might distribute money donated by prohibited sources to executive branch employees, and the LLC Agreement establishes no mechanism for oversight.⁹¹

Full disclosure of the lifecycle of donations would be needed to be certain they are not flowing from prohibited sources to executive branch employees. The LLC Agreement, however, does not require Dr. Hayworth to disclose which eligible recipients are benefiting from Patriot Fund's distributions or whose money is funding them.⁹² Section 7.5 of the LLC Agreement indicates that Dr. Hayworth "may" disclose information she "deems necessary or appropriate in compliance with Applicable Law,"⁹³ but such disclosure is voluntary and might be limited to legally required disclosures.⁹⁴ In fact, Dr. Hayworth seems to be subject to confidentiality provisions of the LLC Agreement barring other public disclosures that are applicable to all members of the Patriot Fund,⁹⁵ and the Patriot Fund does not appear to have publicly identified any individual recipients.⁹⁶ In addition, Dr. Hayworth is barred from communicating directly

Government employees, could nonetheless result in violations by members as to whom they are prohibited sources."). While that opinion predated the current gift rules, it was interpreting a regulation prohibiting gifts that would also be prohibited under the current gift rules. *See* 5 C.F.R. §§ 2635.202(a)-(b), 2635.203(f).

⁹¹ LLC Agreement, at 11-12 (§ 5.1.8) and Schedule C.

⁹² *See* LLC Agreement.

⁹³ LLC Agreement, at 15 (§ 7.5).

⁹⁴ The LLC Agreement defines "Applicable Law" as "all laws and other rules, regulations or written policies of a Governmental Authority promulgated thereunder, applicable to any particular instance, as each may be amended or supplemented from time to time." LLC Agreement, Schedule A, at A-1.

⁹⁵ Section 10.7 obligates Patriot Fund members to ensure that "Fund information shall not become publicly available." LLC Agreement, at 18. Section 3.1.1, indicates that the manager can be a "member." *Id.* at 4. It is not clear that the Patriot Fund has any other members. *See* Diamond, *CNN*, Oct. 15, 2018.

⁹⁶ Diamond, *CNN*, Oct. 15, 2018 (noting that the identities of members have not been revealed); Patriot Legal Expense Fund Trust, LLC, IRS Form 8871, Political Organization Notice of Section 527 Status, Part V, Feb. 27, 2018 (List of All Officers, Directors, and Highly Compensated Employees, identifying only Dr. Hayworth), <https://bit.ly/2PYoSrI>.

with eligible recipients, which suggests that even they may not know whose money they are receiving, and thus if it came from a prohibited source.⁹⁷

As a political organization, the Patriot Fund files publicly available tax forms identifying donors who contribute \$200 or more and the recipients of distributions. These filings, however, do not reveal whether the Patriot Fund has segregated any money donated by prohibited sources and distributed it only to individuals outside the government. All of the disclosed recipients to date have been law firms and other organizations, and there is no way to ascertain from these filings which eligible recipients' legal fees have been covered by these distributions.⁹⁸

In the absence of required disclosures to ethics officials or even the employees who receive distributions, the Patriot Fund is, at best, relying on the anonymity of donors to resolve ethical problems. This arrangement stands at odds with OGE's declarations in 2017 that it would not permit anonymous donations to employees,⁹⁹ as well as its guidance in 2018 that ethics officials should remind employees not to accept distributions from prohibited sources through legal expense funds.¹⁰⁰ The high-risk experimentation with a novel political organization structure for a legal expense fund lacks the transparency needed to ensure compliance with government ethics rules.

5. *Defective screening procedure*

The Patriot Fund's screening of donors to identify prohibited sources is also deficient. The fund essentially relies on an honor system, allowing donors to self-certify that they are not prohibited sources. The lack of a requirement that the manager validate their self-certifications, consult agency ethics officials, or ask eligible recipients for information about their official duties makes this screening procedure unreliable.¹⁰¹ In addition, the LLC Agreement incorrectly defines the term "prohibited source," as explained below.

⁹⁷ LLC Agreement, at 10-11 (§ 5.1.7(i), restricting communications with eligible recipients).

⁹⁸ Patriot Legal Expense Fund Trust, LLC, IRS Form 8872, 2018 1st Quarter Report, Apr. 17, 2018, <https://bit.ly/2VOo8L2>; Patriot Legal Expense Fund Trust, LLC, IRS Form 8872, Amended 2018 2nd Quarter Report, Nov. 19, 2018, <https://bit.ly/2Hadt3P>; Patriot Legal Expense Fund Trust, LLC, IRS Form 8872, 2018 3d Quarter Report, Oct. 12, 2018, <https://bit.ly/2DVIK9W>; Patriot Legal Expense Fund Trust, LLC, IRS Form 8872, Amended 2018 Year End Report, Jan. 31, 2019, <https://bit.ly/2PVc7hv>.

⁹⁹ Darren Samuelsohn, [Government ethics office says it will stick with ban on anonymous gifts](#), *Politico*, Sept. 15, 2017 ("The head of the U.S. Office of Government Ethics said on Friday that the agency is sticking with its long-standing stance prohibiting anonymous donations to White House legal defense funds, despite recently putting forward language that appeared to undercut that position."), <https://politi.co/2KLl4eh>; Office Gov't Ethics, OGE LA-17-10, Sept. 28, 2017 ("the discussion in OGE Informal Advisory Opinion 93x21 concerning the acceptance of donations from anonymous sources does not, and has not, reflected OGE's views since shortly after the issuance of that opinion"), <https://bit.ly/2C2ZY1a>.

¹⁰⁰ OGE LA-18-11.

¹⁰¹ The need to consult with eligible recipients who are executive branch employees about their official duties stems from the definition of prohibited source, which includes any person who has "interests that may be substantially affected by the performance or nonperformance of the employee's official duties." 5 C.F.R. § 2635.203(d)(4).

In an era when a hostile foreign power has used fake online identities in an effort to influence elections, OGE made the surprising decision to effectively bless an honor system that permits donors to self-certify online that they are not prohibited sources.¹⁰² Because the donors are submitting these certifications to the Patriot Fund, rather than to the government, they are also not subject to the federal false statements statute, which covers only communications with the government.¹⁰³ Notably, one of OGE's own attorneys initially raised a concern about this self-screening process, commenting: "We noted that we could not confirm that implementing the screening questionnaire, absent appropriate verification procedures, would ensure compliance with the ethics rules."¹⁰⁴ The attorney's concern about "verification procedures" was reasonable. Unfortunately, the LLC Agreement that OGE blessed a month later contains no mandatory verification procedures.¹⁰⁵ Any additional screening or a due diligence inquiry beyond the donor's self-certification is conducted solely "at the discretion of the Manager."¹⁰⁶

Besides the potential for dishonesty on the part of online donors, there is also a potential for inadvertent error. The automated questionnaire asks donors contributing \$1,000 or less to make the following certification: "I do not have financial interests that may be substantially affected by the performance or nonperformance of official duties by an identifiable employee in the Executive Office of the President or the Department of Justice."¹⁰⁷ Most of this language tracks a part of the definition of "prohibited source,"¹⁰⁸ but it introduces a new term: "identifiable employee." The term is undefined and indeterminate. Moreover, it would be impossible for a donor to know what assignments have been given to, for example, the more than 100,000 employees of the Department of Justice or the approximately 1,800 employees of the Executive Office of the President.¹⁰⁹ By limiting the focus to employees the Executive Office of the President or the Department of Justice, the language fails to identify all prohibited sources because an eligible recipient may work for another executive branch agency.¹¹⁰

In the case of a traditional legal expense fund structured as a trust with one beneficiary, the question would be easier to answer. The trustee could meet with the employee and the agency's ethics officials on a regular basis to assess the scope of the employee's work. The

¹⁰² See Natasha Bertrand, DOJ Says Russian Trolls Are Interfering Online With the Midterms, *The Atlantic*, Oct. 19, 2018, <https://bit.ly/2pZE2k9>; Ben Popken, Russian trolls went on attack during key election moments, *NBC News*, Dec. 20, 2017, <https://nbcnews.to/2krEN37>.

¹⁰³ 18 U.S.C. § 1001.

¹⁰⁴ See Office of Gov't Ethics, FOIA Request No. FY18-034 (2d Rolling Response), 22-24 (Sept. 18, 2018) (AIMS Entry 13761), <https://bit.ly/2xpHglg>.

¹⁰⁵ LLC Agreement, Schedule C.

¹⁰⁶ *Id.*, Schedule C, at 2 ("Conduct additional due diligence, as deemed necessary or prudent by the Manager").

¹⁰⁷ *Id.*, Schedule C, at 5.

¹⁰⁸ 5 C.F.R. § 2635.203(d)(4) (defining prohibited source to include any person who "[h]as interests that may be substantially affected by the performance or nonperformance of the employee's official duties").

¹⁰⁹ Office of Gov't Ethics, Ethics Program Review, Department of Justice, 3 (2017), <https://bit.ly/2Q5tH1p>; Gregory Korte, How many employees does the White House have, *Quora*, Apr. 11, 2016, <https://bit.ly/2RrU0iR>.

¹¹⁰ The drafters of the LLC Agreement must have understood that this language was inadequate because the questionnaire asks donors contributing more than \$1,000 about employees of *any* agency in the government: "Do you have financial interests that may be substantially affected by the performance or nonperformance of official duties by an identifiable federal executive agency employee?" LLC Agreement, Schedule C, at 9.

trustee could also interview prospective donors individually. Such prophylactic measures are not possible for a legal expense fund structured as a political organization with limitless eligible recipients.

A related problem with the LLC Agreement is that it employs an incorrect definition of the term “prohibited source.”¹¹¹ A “prohibited source” is any individual or organization that is substantially affected by the employee’s duties or that does (or seeks to do) business with the agency, conducts activities regulated by the employee’s agency, or seeks official action. 5 C.F.R. § 2635.203(d).¹¹² Strangely, the LLC Agreement expressly excludes 20 agencies from the definition of the term “Federal executive agency,” which it uses in place of “agency” in items of the donor questionnaire seeking to identify prohibited sources.¹¹³ Thus, for example, an executive branch employee serving in the White House could encourage the Federal Communications Commission to approve a company’s licensing application and, barring any explicit *quid pro quo* tied to an “official act,” the Patriot Fund could distribute gifts of cash from the company to that employee.¹¹⁴

6. *Acceptance of anonymized donations*

Though OGE recently declared that legal expense funds must not accept donations from anonymous sources, the LLC Agreement also permits the Patriot Fund to accept donations from various types of entities and organizations, whose sources of funding are unknown.¹¹⁵ As a result, foreign governments, prohibited sources, federal employees, and other sources can effectively anonymize their donations by giving them indirectly through entities and organizations.

7. *Acceptance of gifts given because of official position*

OGE’s gift rules prohibit an employee’s acceptance of any gift given “because of” the employee’s official position.¹¹⁶ Consistent with this prohibition, OGE’s template for legal expense funds provides that “contributions shall not be accepted from: . . . any donor that indicates *verbally or in writing* that such contribution is given because of the Beneficiary’s official position or because of the performance of [his/her] duties.”¹¹⁷ In contrast, the LLC

¹¹¹ 5 C.F.R. § 2635.203(d).

¹¹² *Id.*

¹¹³ LLC Agreement, Schedule C. The LLC Agreement refers to them as “independent regulatory agencies,” but the term has no relevance whatsoever to the definition of “prohibited source” at 5 C.F.R. § 2635.203.

¹¹⁴ This danger is heightened in a post-*McDonnell* world in which the term “official act” has been diluted.

¹¹⁵ OGE Inf. Adv. Op. LA-17-10, Sept. 28, 2017, <https://bit.ly/2C2ZY1a> (advising that instruments establishing legal expense funds should “include a clause stating that ‘contributions shall not be accepted from anonymous sources’”); Lee, *Washington Post*, Feb. 28, 2018 (“Even though the fund said it will not accept anonymous contributions, it will take donations from entities — which could include limited liability companies, according to experts who reviewed the Office of Government Ethics filing. Donations given through LLCs can often mask the identity of the contributors.”), <https://wapo.st/2OMtbJ2>.

¹¹⁶ 5 C.F.R. § 2635.202(a)(2), (b)(2).

¹¹⁷ OGE Template at 5 (emphasis added).

Agreement provides that the Patriot Fund will not distribute to any federal employee a donation from a “source that indicates *in writing* that the contribution is being given because of an Eligible Recipient’s official position or performance of duties.”¹¹⁸

OGE’s decision to let Patriot Fund drop “verbally” from the LLC Agreement is baffling. The online donor self-certification form includes a long list of legal declarations, including statements about “covered entities” and one affirming that the donor is not making a donation because of “any federal government employee recipient’s official position or performance of duties.”¹¹⁹ This list of statements, followed by two definitional paragraphs, appear above a button that reads simply: “DONATE.”¹²⁰ As with any online form, there is a danger that a donor might click this button without carefully considering the statements preceding it—just as software users often click the box marked “agree” below their lengthy user agreements.

Therefore, it is conceivable that a donor might later indicate verbally that a donation was given because of an employee’s official position. This could happen, for instance, if a donor were to mention that he contributed money through the Patriot Fund to ensure that a recipient could continue serving in the White House, after learning that she was thinking of quitting because the government’s gift rules were preventing her from accepting donations to cover her legal fees. It could also happen if a donor were to mention that he donated to “keep a good woman in the White House.” In that case, the LLC Agreement would allow Dr. Hayworth or any of the Trump campaign officials who help administer the Patriot Fund to ignore such a verbal admission. For their convenience, the LLC Agreement shifts the burden of compliance to the donors. But it is the American people who bear the risk of ethical failure and its effect on their government.

C. Avoiding Future Harm

CREW respectfully requests that OGE rescind its effective blessing of the Patriot Fund and exercise its authority to issue a regulation to guard against employees using the Patriot Fund as a model for future legal expense funds.¹²¹ The recommendations CREW made in the first section of this comment fall well within OGE’s regulatory authority and would strengthen the government ethics program by restoring the prior norm and going further to add new protections.¹²²

¹¹⁸ LLC Agreement, Schedule C (the first page of Schedule C, marked page “2”) (emphasis added).

¹¹⁹ LLC Agreement, Schedule C (pages marked “4” and “5”).

¹²⁰ *Id.*

¹²¹ The Patriot Fund’s bad example has already been followed on at least one occasion. On April 27, 2018, an attorney for Scott Pruitt, then Administrator of the Environmental Protection Agency, asked whether Mr. Pruitt could structure a legal expense fund as a political organization. Office of Gov’t Ethics, AIMS Entry 13931, Resolved Interaction with Cleta Mitchell, Nov. 28, 2017, records available in response to FOIA No. FY18-034, at 9-11. IRS filings show she had created one a few days before calling OGE. Kevin Bogardus, Documents: How Pruitt launched his legal defense fund, *E&E News*, Oct. 4, 2018, <https://bit.ly/2VcNldC>.

¹²² See 5 U.S.C. app. § 402(b)(1)-(2), (6).

III. Two Incidents Related to the Patriot Fund

To illustrate further that concerns over the Patriot Fund are not unfounded, CREW offers the examples of two incidents related to the Patriot Fund.

A. John Dowd's apparent attempted legal expense fund abuse

Mr. Dowd joined President Trump's legal team in June 2017 to lead the defense against Special Counsel Mueller's probe of the Russian government's interference in the 2016 election and any cooperation by the Trump campaign with these Russian efforts.¹²³ A month earlier, President Trump had fired FBI Director James Comey and admitted on national television that his motivation for the firing was the Russia probe.¹²⁴ Although Mr. Dowd initially urged cooperation with the Special Counsel, he later recounted to *CNN* that, over a period of months, he grew more aggressive in opposing the investigation before he quit in March 2018.¹²⁵

On September 21, 2018, the *Wall Street Journal* published a startling account of a February 2018 effort by Mr. Dowd to prevent a former Trump campaign aide, Rick Gates, from cooperating with investigators.¹²⁶ According to the *Wall Street Journal* article, Mr. Dowd initially tried to divert money from "the White House legal defense fund" to Mr. Gates. When that failed, Mr. Dowd tried to raise the money himself, soliciting gifts from federal employees in the White House by email and pledging to donate his own money. The article conveys a sense of urgency to Mr. Dowd's efforts:

On Feb. 22, Mr. Dowd told associates of the president in an email that Messrs. Manafort and Gates needed funds immediately, according to people familiar with the matter. He said he planned to donate \$25,000 to Mr. Manafort's legal defense fund the next day.

The next day, Mr. Gates pleaded guilty and agreed to cooperate with investigators.

According to one witness cited in the article, Mr. Dowd's goal was to "prevent Messrs. Manafort and Gates—formerly the chairman and deputy chairman, respectively, of Mr. Trump's presidential campaign—from pleading guilty and potentially cooperating against the president." Mr. Dowd's effort, however, was unsuccessful, and Mr. Gates entered into a cooperation

¹²³ See Karen Friefield, Trump adds Washington lawyer John Dowd to his legal team, *Reuters*, June 16, 2017, <https://reut.rs/2JiIjrl>; Tamara Keith, Lead Lawyer On Trump's Team Handling Special Counsel Russia Probe Resigns, *NPR*, Mar. 22, 2018, <https://n.pr/2Rgjf7k>.

¹²⁴ Andrew Prokop, Trump has now admitted he fired Comey because of the Russia investigation, *Vox*, May 11, 2017, <https://bit.ly/2pDDQVb>.

¹²⁵ Gloria Borger, How Trump's former lawyer evolved on dealing with Mueller, *CNN*, July 7, 2018, <https://cnn.it/2EMxe3E>.

¹²⁶ Rebecca Ballhaus, Ex-Trump Lawyer Tried to Help Pay Legal Fees for Manafort, Gates, *Wall Street Journal*, Sept. 21, 2018, <https://on.wsj.com/2yeY0fr>.

agreement with Special Counsel Mueller the next day. Immediately thereafter, Mr. Dowd appears to have reneged on his pledge to contribute \$25,000.¹²⁷

The *Wall Street Journal* article does not name the legal defense fund that Mr. Dowd tried to tap, referring to it generically as the “White House legal defense fund.” It is likely that this fund was the Patriot Fund, based on the article’s statement that it “had been set up specifically to aid those who faced legal fees stemming from their involvement with the president.”¹²⁸ CREW is not aware of any reporting or information suggesting the existence of any other multi-party legal defense fund for White House officials at the time.

Anonymous sources also claimed that unnamed White House ethics officials stopped Mr. Dowd from diverting the fund’s money. The article recounts that the sources provided the following explanation for the purported intervention of the ethics officials: “While the charges facing Messrs. Manafort and Gates had stemmed from Special Counsel Robert Mueller’s investigation, they pertained to activities that predated the Trump campaign, making the two aides ineligible for those funds.”¹²⁹ This explanation does not comport with the plain language of the LLC Agreement, however. The agreement permits the Patriot Fund’s manager to disburse funds in connection with “Investigations” and supplies a definition of that term that includes the following statement: “The term [Investigations] shall also include any expansion of these investigations and inquiries by the relevant investigating authority or judicial proceeding related to such investigations and inquiries.”¹³⁰

In actuality, it seems that Mr. Dowd was stopped not because the charges against Mr. Gates were out of scope but because legal steps to establish the Patriot Fund had not been completed and the fund would not receive its first contribution until March 26, 2018.¹³¹ It is far from clear that Mr. Dowd’s effort would have failed if the fund had been fully operational and funded as of February 22, 2018.

This chain of events serves as a warning. Mr. Dowd reportedly tried to funnel money to a witness to prevent cooperation with investigators. In this case, the witness was not an executive branch employee, but it is Mr. Dowd’s conduct that is instructive. Mr. Dowd’s effort to tap legal expense fund resources illustrates that the Patriot Fund’s aim may be to protect the President, rather than the eligible recipients. The White House does not appear to have bothered to revisit its incorrect determination as to Mr. Gates’ eligibility for a distribution after he began cooperating with investigators. Likewise, Mr. Dowd did not follow through on his plan to use his own money.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ LLC Agreement, at 9 (§ 5.1.1) and A-2 (“Investigations”).

¹³¹ Patriot Legal Expense Fund Trust, LLC, IRS Form 8872, 2018 1st Quarter Report, Box 4, Apr. 17, 2018 (reflecting the establishment of the fund on February 27, 2018), <https://bit.ly/2VOo8L2>.

As this incident illustrates, one critical problem with the Patriot Fund is that its structure lacks safeguards against bad intentions. There are no mechanisms to prevent the Patriot Fund from withholding distributions to punish those who cooperate with investigators and deter others from doing the same. The language of the LLC Agreement instructs the manager not to make distributions in a way intended to interfere with an investigation or reward a witness for providing “beneficial” testimony,¹³² but it ensures that she is free to ignore this instruction by shrouding her activities in secrecy,¹³³ barring her from communicating directly with eligible recipients,¹³⁴ and permitting her to coordinate with campaign officials.¹³⁵ It is also vague as to whether she can *withhold* distributions based on adverse testimony, something that would be impossible to prove anyway with respect to a multiparty legal expense fund.

Thus, the great risk of a multiparty legal expense fund is that—as nearly happened in this case—it could be used to deter cooperation with investigators or influence witness testimony through the strategic distribution and withholding of gifts of cash. This risk is mitigated when a legal expense fund is structured as a trust for one beneficiary, whose trustee owes that beneficiary a legally enforceable duty of loyalty.

B. Nan Hayworth’s apparent violation of the LLC Agreement

Patriot Fund manager Nan Hayworth appears to have violated the LLC Agreement, which prohibits her from serving as a government employee. She also appears to have violated a provision that prohibits her from holding a position with the Trump campaign.

The LLC Agreement establishes specific requirements for the Patriot Fund manager. Section 3.5 requires that the manager meet criteria established in an attachment to the agreement.¹³⁶ That attachment, Schedule B, provides that the manager “shall meet” all of several listed requirements, including a requirement that she must not be “an employee . . . of the United States Government.”¹³⁷ This requirement tracks OGE’s traditional practice. As noted above, prior to establishment of the Patriot Fund, OGE posted online a template that reflected its longstanding practice for legal defense funds.¹³⁸ The template prohibits the trustee from serving as a government employee.¹³⁹

Barring service as a government employee prevents violations of the gift rules that might result if the trustee or manager were to solicit donations from prohibited sources or executive branch employees.¹⁴⁰ OGE has emphasized that a special government employee (“SGE”) is a government employee:

¹³² LLC Agreement, at 10 (§ 5.1.5(ii)-(iii)).

¹³³ LLC Agreement, at 18 (§ 10.7).

¹³⁴ LLC Agreement, at 11 (§ 5.1.7(i)).

¹³⁵ *Id.*

¹³⁶ LLC Agreement, at 5 (§ 3.5).

¹³⁷ *Id.*, Schedule B-1.

¹³⁸ *See* OGE Template.

¹³⁹ *Id.* at 3.

¹⁴⁰ *See* 5 C.F.R. §§ 2635.202, 2635.302.

The first and perhaps most important point to emphasize is that SGEs are Government employees, for purposes of the conflict of interest laws. Specifically, an SGE is defined, in 18 U.S.C. § 202(a), as “an officer or employee . . . who is retained, designated, appointed, or employed” by the Government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days.¹⁴¹

Dr. Hayworth appears to have violated this prohibition in the LLC Agreement by accepting a position as an SGE. The Patriot Fund named her as its manager on February 27, 2018.¹⁴² Less than three months later, Dr. Hayworth accepted an appointment to the President’s Council on Sports, Fitness & Nutrition (“President’s Council”).¹⁴³ The President’s Council is a Federal Advisory Committee Act (“FACA”) committee administered by the Department of Health and Human Services (“HHS”) with an annual operating budget of approximately \$1.1 million.¹⁴⁴ Regulations of the General Services Administration (“GSA”) assign responsibility for ensuring compliance with ethics requirements, which includes assessing the employment status of FACA committee members, to the agencies that administer the committees.¹⁴⁵ Consistent with these regulations, HHS has designated all members of this FACA committee as SGEs.¹⁴⁶ On September 21, 2018, Dr. Hayworth participated in a meeting of the President’s Council in her official capacity as an SGE.¹⁴⁷ Thus, she appears to have violated the LLC Agreement’s prohibition on serving as a government employee.

The LLC Agreement’s requirements for the Patriot Fund manager also provide that the manager must not be “employed by the Trump Campaign,” and it does not limit the term “employed” to paid positions.¹⁴⁸ This prohibition might have served to put at least some degree of distance between the campaign, which has been a subject of some of the investigations, and the Patriot Fund. But Dr. Hayworth’s biography on the President’s Council’s website identifies her as a member of the “Trump Campaign Advisory Board,”¹⁴⁹ which means she may also have

¹⁴¹ Office of Gov’t Ethics, DO-00-003, Attachment, at 1, Feb. 15, 2000, <https://bit.ly/2V5FxpI>.

¹⁴² See Patriot Fund Press Release.

¹⁴³ White House, President Donald J. Trump Announces Intent to Nominate and Appoint Personnel to Key Administration Posts (May 4, 2018), <https://bit.ly/2KCqYdt>.

¹⁴⁴ See GSA, *FACA Database*, Comm. No. 1004 (2018), <https://bit.ly/2V4ViFF> (last viewed Apr. 17, 2019); HHS, *HHS Advisory Committees & Task Forces*, <https://bit.ly/2xnDKI3> (last viewed Apr. 17, 2019); HHS, President’s Council on Sports, Fitness & Nutrition, Charter, at 2 (May 11, 2018), <https://sforce.co/2OxzXCo>.

¹⁴⁵ See 41 C.F.R. § 102-3.104; see also GSA, GSA Federal Advisory Committee Management Program, GSA Order ADM 5420.40E, at 13 (Ch. 3, § 2(d)) (July 21, 2016), <https://bit.ly/2MMbSCb>.

¹⁴⁶ See HHS, President’s Council on Sports, Fitness & Nutrition, Membership Balance Plan, 1, § 4 (Mar. 12, 2018) (“The appointed public members of the Council are classified as SGEs because they are expected to provide their own best judgment on the topics to be discussed by the Council”), <https://sforce.co/2J550j4>; see also 18 U.S.C. § 202(a).

¹⁴⁷ See President’s Council on Sports, Fitness and Nutrition, annual meeting (Sept. 21, 2018), <https://bit.ly/2O8dG9p>; see also Dep’t. Health & Human Servs., Jim Worthington speaks on the President’s Council on Sports, Fitness and Nutrition, YouTube (Sept. 25, 2018), <https://bit.ly/2OygDVK>.

¹⁴⁸ LLC Agreement, Schedule B-1.

¹⁴⁹ See HHS, President’s Council on Sports, Fitness & Nutrition, Nan Hayworth, Sept. 20, 2018; see also Transcript, CNN Reports At Least 8 Other People in Trump Jr. Meeting, CNN, Apr. 14, 2017 (“Nan Hayworth... who is also a member of the Trump campaign advisory board.”).

violated the LLC Agreement's prohibition against her being "employed by the Trump Campaign."

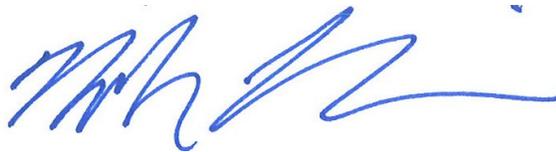
Dr. Hayworth's possible violation of the LLC Agreement so soon after OGE blessed that agreement is troubling. In departing from the executive branch's long tradition, OGE blessed a high-risk arrangement dependent entirely on her commitment to ethical compliance through adherence to the LLC Agreement. Significantly, that agreement allows Dr. Hayworth to accept money from "prohibited sources" and makes her solely responsible for scrupulously steering that money away from executive branch employees.¹⁵⁰ At the same time, the LLC Agreement drapes a veil of secrecy over her activities, with no oversight.¹⁵¹ This incident illustrates the risks of OGE's current passive approach.

Conclusion

CREW thanks you for your leadership in launching this regulatory effort. In particular, we are grateful for your decisions to collect input from the public prior to drafting a regulation and to convene a public hearing. We look forward to making an oral presentation at the hearing, though we respectfully request that you consider lifting the five-minute limit to permit a nuanced dialogue between OGE and interested parties regarding this complex issue.

For the reasons we discuss in this comment, the executive branch ethics program needs a regulation that establishes strong, uniform standards for legal expense funds that institute adequate safeguards to protect government integrity. CREW concurs with your stated goals of ensuring that, in the future, legal expense funds will be "transparent, open, and accessible to the public." We believe OGE should also be guided by two other goals that your regulatory mission statement in 5 C.F.R. part 2638 seems to dictate: prevention and oversight. The recommendations that CREW has made in this comment would achieve these goals, and we urge you to adopt them.

Sincerely,



Noah Bookbinder
Executive Director

¹⁵⁰ LLC Agreement, at 11 (§ 5.1.8).

¹⁵¹ *Id.*, at 11, 18 (§§ 5.1.7(i), 10.7).