From: Jeffrey Harper
To: USOGE
Subject: Proposed Rule: Legal Expense Fund Regulation' (RIN 3209–AA50)
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Comments on the proposed Office of Government Ethics (OGE) Legal Expense Fund (LEF) rule (RIN 3209-AA50):

The solicitation of donations to an LEF will inherently involve reference to the employee's official position, since § 2635.1002 limits the use of LEFs to matters arising out of an employee's official duties. Section 2635.1002 & Part 2635 Subpart G should explicitly state that references to an employee's official position in a solicitation for an LEF contribution does not constitute misuse of position if the solicitation otherwise complies with Subpart J.

For clarity and consistency, the definition of "covered relationship" in 2635.502(b)(1) should be amended to add subparagraphs (vi) and (vii) to include the relationships described in § 2635.1002(c)(2):
2635.502(b)(1)(vi) The trustee and donors to a legal expense fund established under Part 2635, Subpart J, and
2635.502(b)(1)(vii) The provider of any pro bono legal services to the employees

Insofar as filing the "legal expense fund document in accordance with paragraph (f) of this section" is a condition precedent to the approval of a legal expense fund per § 2635.1004(g)(1), § 2635.1004(e)(1) is superfluous and should be deleted.

§ 2635.1004(g)(2)(ii)(D) provides that OGE will provide a "second review" of legal expense fund trust documents for DAEO beneficiaries. Since DAEOs may not review trust fund documents of which they are beneficiaries due to the patent § 208 conflict of interest and because only DAEOs are identified in (g)(1) as providing the initial review, there is an ambiguity whether trust documents for DAEO beneficiaries are subject to an initial level review prior to secondary review by OGE, and, if so, who the reviewer would be. A similar issue exists with regards to review of reports filed under § 2635.1007. It's also unclear whether the provisions for review of a DAEOs LEF trust documents are intended to apply only to DAEOs appointed per § 2638.104(a), or if those review provisions should also be construed to apply to ADEAOs (§ 2638.104(d)) or other subordinate ethics officials (§ 2638.104(e)).

No provision is made in § 2635.1004(g)(3) for independent review/appeal of denial in situations where OGE conduct the initial or secondary review as the case may be. Presumably § 2635.1004(g)(3) is proposed because of the desirability of such an independent review/appeal being available, in which case provisions for appeals of cases where where OGE is the entity denying approval of the LEF should be made

There is an inherent conflict between the requirement of § 2635.1007(h)(1) to return a donation from an impermissible donor with the asserted justification in the preamble for the § 2635.1008 requirement that excess funds be donated to a 501(c)(3), "because of the difficulties inherent in returning funds to donors (i.e., locating donors and ensuring timely return of funds)." Donation to a 501(c)(3) should only be entertained if a donor cannot be located—which seems relatively unlikely, since the reporting requirement of § 2635.1007 requires identification of each donor's name, employer, date of contribution, and contribution amount. If donation to a 501(c)(3) is to be considered an acceptable approach to disposition of excess funds, either as the primary means, or a secondary mechanism for when particular donors cannot be found, the 501(c)(3) in question should either be identified in the trust document or, at a minimum, identified in any solicitation of contributions, so that donors have full knowledge of the possible uses to which their donation may be put when deciding whether to donate to the LEF or not.

The scope of acceptable donors to an LEF under § 1001.1006(b) differs from that of acceptable donors of pro bono legal services under § 1001.1009(a). Whether a donation is provided in the form of a monetary payment or in the form of in-kind services should not make a difference to the acceptable scope of parties

from whom a donation may be accepted (acknowledging the difficulties of providing pro bono services anonymously).