

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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April 2, 2018

Mr. David Apol
Acting Director
Office of Government Ethics
1201 New York Avenue, N.W.
Washington, D.C. 20005

Dear Acting Director Apol:

We are writing to request information about the legal defense fund established to allow private individuals to donate money to reimburse the legal fees of White House staff, Trump Administration Transition Team, and Trump campaign staff. The structure of the Fund appears to allow secret donations to these individuals, and it raises serious concerns about whether it complies with ethics, tax, and elections laws, as well as OGE guidance. A draft agreement released by your office appears to permit lobbyists and other individuals seeking official action from the Trump Administration to donate money to the Fund.

Background on Establishment of Defense Fund

The “Patriot Legal Expense Fund Trust, LLC” was established on February 27, 2018, as a limited liability company in Delaware and registered with the Internal Revenue Service (IRS) as a political organization.¹

The draft agreement released by your office states that it was set up to pay legal fees for any individual, other than President Donald Trump or his family members, who served as “an employee, consultant, fundraiser or volunteer” to the Trump campaign, the Trump Administration Transition, the Trump Administration, or “otherwise.”²

¹ *Legal Defense Fund for Trump Aides Launches Amid Questions About Donor Transparency*, Washington Post (Feb. 28, 2018) (online at www.washingtonpost.com/politics/legal-defense-fund-for-trump-aides-launches-amid-questions-about-donor-transparency/2018/02/28/ea7a8c92-1a6d-11e8-9de1-147dd2df3829_story.html?utm_term=.756aa209463a).

² Draft Limited Liability Company Agreement of Patriot Legal Expense Fund Trust, LLC (Jan. 29, 2018) (online at [www.oge.gov/web/OGE.nsf/0/C84BE191420FD2A585258227004EFCC2/\\$FILE/Patriot%20Legal%20Expense%20Fund%20Trust,%20LLC.pdf](http://www.oge.gov/web/OGE.nsf/0/C84BE191420FD2A585258227004EFCC2/$FILE/Patriot%20Legal%20Expense%20Fund%20Trust,%20LLC.pdf)).

The draft agreement states that the purpose of the Fund is to “provide assistance paying legal expenses for persons involved in the investigations by special counsel Robert Mueller III,” as well as “the inquiries by the U.S. Senate Select Committee on Intelligence and the U.S. House of Representatives Permanent Select Committee on Intelligence regarding Russian interference in the 2016 U.S. election and related matters,” and “any inquiries by other Committees of the U.S. Senate or House of Representatives.”³

The agreement states that the Fund would be made up of a Manager and an unspecified number of Members. It is not clear who the Members of the Fund would be but the agreement states that the Members shall not be employees of the Trump Campaign or the Trump Organization.

White House Staff Could Receive Secret Funds

According to the former Director of the Office of Government Ethics, Walter Shaub, legal defense funds set up under previous administrations were set up for individual employees with explicit protections against abuse.⁴ However, the Patriot Legal Expense Fund takes a different approach and, according to the draft agreement, has the authority to pay money to an unlimited number of individuals, with limited disclosure requirements.

As a political organization, the Fund is required to disclose to the IRS the identity of donors who give \$200 or more.⁵ The draft agreement acknowledges this requirement, but does not include a prohibition on donors giving money to the Fund on behalf of other undisclosed donors.

The IRS requires political organizations to disclose expenditures for an “exempt function” of \$500 or more.⁶ The Fund’s agreement includes no acknowledgment of this requirement and includes no requirement that the Manager or Fund Members publicly disclose which White House staff, campaign officials, or transition workers receive payments from the Fund.

Members of the Fund are actually prohibited under the draft agreement from publicly discussing anything about the Fund. The draft agreement states: “Fund information shall not become publicly available as a result of such Member’s rights to access or receive such Fund information.”⁷

³ *Id.*

⁴ Walter Shaub, *Trump’s Ethics Office Has Blessed an Unethical Legal Defense Fund for the President’s Associates*, Los Angeles Times (Feb. 9, 2018) (online at www.latimes.com/opinion/op-ed/la-oe-shaub-patriot-fund-20180209-story.html).

⁵ 26 U.S.C. § 527.

⁶ *Id.*

⁷ Draft Limited Liability Company Agreement of Patriot Legal Expense Fund Trust, LLC (Jan. 29, 2018) (online at [www.oge.gov/web/OGE.nsf/0/C84BE191420FD2A585258227004EFCC2/\\$FILE/Patriot%20Legal%20Expense%2](http://www.oge.gov/web/OGE.nsf/0/C84BE191420FD2A585258227004EFCC2/$FILE/Patriot%20Legal%20Expense%2)).

It is not clear that if the Fund reports expenditures, that the reporting will include the identities of the individuals benefitting from the payments rather than the identity of the attorney or law firm representing the individual.

Inadequate Protections Against Donations From Prohibited Sources

Federal employees are prohibited from accepting a gift if “the timing of the gift creates the appearance that the donor is seeking to influence an official action” or if “the gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee’s official duties.”⁸

The draft agreement permits donations from prohibited sources. It states that beneficiaries would be divided into two categories: those who work in the Executive Branch, and those who do not. This structure would allow the Manager to direct funds from sources that are prohibited from donating to a federal employee to beneficiaries outside government. Mr. Shaub raised concerns with this structure:

This is a shell game. For legal purposes, any bad money taints the whole fund because money is fungible: Every dollar the fund accepts from a questionable source and pays to a nongovernmental beneficiary frees up a dollar for those who do work for the government. All the book-cooking in the world can’t remove the taint.⁹

OGE has a template on its website for legal expense funds.¹⁰ OGE’s template differs significantly from the draft agreement for the Patriot Legal Expense Fund Trust. One major difference is that under OGE’s template, a prohibited source may not donate to the fund at all. The draft agreement states that a donor would be prohibited from giving to an executive branch employee if the source “indicates in writing that the contribution is being given because of an Eligible Recipient’s official position or performance of duties.”¹¹

OGE’s template would prohibit a source if they said “verbally or in writing” that the donation was because of the official’s position. The draft agreement appears to allow a potential donor to tell a potential beneficiary orally that the donor plans to give money in exchange for an official act.

0Fund%20Trust,%20LLC.pdf).

⁸ 5 C.F.R. 2635.201.

⁹ Walter Shaub, *Trump’s Ethics Office Has Blessed an Unethical Legal Defense Fund for the President’s Associates*, Los Angeles Times (Feb. 9, 2018) (online at www.latimes.com/opinion/op-ed/la-oe-shaub-patriot-fund-20180209-story.html).

¹⁰ Office of Government Ethics, *Legal Expense Fund Template* (Aug. 15, 2017) (online at [https://oge.gov/Web/OGE.nsf/0/2ED2E79D06B31810852581EE0060D92E/\\$FILE/Draft%20Fund%20Template.pdf](https://oge.gov/Web/OGE.nsf/0/2ED2E79D06B31810852581EE0060D92E/$FILE/Draft%20Fund%20Template.pdf)).

¹¹ Draft Limited Liability Company Agreement of Patriot Legal Expense Fund Trust, LLC (Jan. 29, 2018) (online at [www.oge.gov/web/OGE.nsf/0/C84BE191420FD2A585258227004EFCC2/\\$FILE/Patriot%20Legal%20Expense%20Fund%20Trust,%20LLC.pdf](http://www.oge.gov/web/OGE.nsf/0/C84BE191420FD2A585258227004EFCC2/$FILE/Patriot%20Legal%20Expense%20Fund%20Trust,%20LLC.pdf)).

Screening questions for donors are included with the draft agreement that ask a donor to certify that “the donating entity and its controlled subsidiaries” are not currently doing business with or “seeking official action by or involved in a proceeding with a federal executive agency.” The draft agreement, however, notes that 20 agencies are not included in this prohibition, including the FCC, FDIC, NRC, and the SEC, among others.¹²

This would mean that a White House employee who deals regularly with these agencies could receive help for legal expenses from a donor that has business at, or is under investigation by, one of these agencies.

Limited Accountability for Management of the Fund

The Fund is structured to give the Manager “complete and exclusive control of management of the Fund’s affairs.”¹³ It states that Members “shall have no right to participate in the management or the conduct of the fund’s business and affairs nor have any power or authority to act for or on behalf of the Fund in any respect whatsoever.”¹⁴ This means the Manager could choose who receives money from the Fund.

The draft fund agreement states that “for the avoidance of doubt” in whether the Manager has complete and exclusive control, “a Member may also serve as the Manager.”¹⁵ The agreement does not specify the number of Members required to participate in the Fund, so it appears that one person could be the Manager and the only Member.

The process by which the Manager and Members are chosen is not designated in the draft agreement, other than to state who they *may not* be, such as a prohibited source. The agreement specifies that the Manager may not be a foreign person or entity, but nothing in the document prevents Members of the Fund from being foreign. Nor would that be prohibited under Delaware law for LLCs.

The Manager is required to file books and records of ongoing activities, but those documents are accessible only to Members of the Fund. The draft agreement gives the Manager the ability to hide information even from the Members.

¹² *Id.*; see also Schedule A, Definitions, “Federal Executive Agency.”

¹³ Draft Limited Liability Company Agreement of Patriot Legal Expense Fund Trust, LLC, subsection 3.1.1 (Jan.29, 2018) (online at [www.oge.gov/web/OGE.nsf/0/C84BE191420FD2A585258227004EFCC2/\\$FILE/Patriot%20Legal%20Expense%20Fund%20Trust,%20LLC.pdf](http://www.oge.gov/web/OGE.nsf/0/C84BE191420FD2A585258227004EFCC2/$FILE/Patriot%20Legal%20Expense%20Fund%20Trust,%20LLC.pdf)).

¹⁴ *Id.*

¹⁵ *Id.*

The agreement states:

The Manager shall have the right to keep confidential from the Members (and their respective agents and attorneys) for such period of time as the Manager deems reasonable, any information (i) that the manager believes to be in the nature of trade secrets, (ii) other information, the disclosure of which the Manager believes is not in the best interest of the Fund or could damage the Fund or its deliberations, (iii) which the Fund ... is required by law or by agreement with a third party to keep confidential.¹⁶

The draft agreement provides that the Manager must provide a Member “upon reasonable request” with information required to comply with the law or requests from a “Governmental Authority” with jurisdiction over the Member. OGE’s template for legal expense funds includes language allowing a donor or an agent of a donor to inspect the records of the trust. The draft agreement for the Patriot Expense Fund Trust does not include a similar provision. It also does not provide for beneficiaries of the fund to access its records.

Fund Could Be Used to Influence Witnesses

The draft agreement forbids the Manager to speak with eligible recipients, but would allow the Manager to communicate with the Trump Campaign. The agreement states that “nothing in the foregoing paragraph shall prohibit the Manager from communications with a person affiliated with the Campaign, even though the Campaign is an Eligible Recipient.”¹⁷

This loophole would allow the Campaign to influence which individuals receive disbursements from the fund. It also would allow the Campaign to serve as an intermediary for communications between the Manager of the Fund and potential recipients. The draft agreement states that distributions shall not be made “based on whether or not the substance of an Eligible Recipient’s involvement in the Investigations was beneficial to President Donald J. Trump, the Administration, the Campaign or the Transition,” but the agreement does not address the potential for pressure to be placed on potential recipients before they testify.¹⁸ The agreement also does not prohibit communications between the Manager of the Fund and Campaign representatives who are themselves under investigation.

Fund Deviates from OGE Template in Other Ways

The draft agreement differs from OGE’s legal defense fund template in a number of additional ways. The Fund agreement does not include a termination deadline. OGE’s template includes a definition dissolution date of six months after the final legal action has taken place.

¹⁶ *Id.*

¹⁷ Draft Limited Liability Company Agreement of Patriot Legal Expense Fund Trust, LLC (Jan.29, 2018) (online at [www.oge.gov/web/OGE.nsf/0/C84BE191420FD2A585258227004EFCC2/\\$FILE/Patriot%20Legal%20Expense%20Fund%20Trust,%20LLC.pdf](http://www.oge.gov/web/OGE.nsf/0/C84BE191420FD2A585258227004EFCC2/$FILE/Patriot%20Legal%20Expense%20Fund%20Trust,%20LLC.pdf)).

¹⁸ *Id.*

An email from OGE to the attorneys who drafted the agreement stated that OGE “does not approve or disapprove of specific legal defense funds.” However, it indicated:

[I]f the Fund is established and administered in accordance with the terms set out in the attached agreement, both the managers and employee recipients will be in compliance with 18 U.S.C. § 209. Similarly, adherence to the terms of the agreement should ensure that the employee recipients do not violate any provision of 5 U.S.C. §§7351 and 7353.¹⁹

According to the documents released by your office, the draft agreement was reviewed by your office in just 31 minutes. It is unclear whether OGE reviewed previous versions and if so, why those versions were not released.

Request for Documents

For all of these reasons, we ask that you provide the following documents and information by April 12, 2018:

- (1) all documents and communications between OGE and Wiley Rein, LLP referring or relating to the Patriot Expense Fund Trust;
- (2) all documents and communications between OGE and the Trump Campaign referring or relating to the Patriot Expense Fund Trust;
- (3) all documents and communications between OGE and any White House employee referring or relating to the Patriot Expense Fund Trust;
- (4) all documents and communications between OGE and the Federal Election Commission regarding the provision in the Fund agreement that allows distributions to the Trump Campaign;
- (5) all documents and communications referring or relating to OGE’s decision either to recommend or not to recommend that Wiley Rein follow OGE guidance or OGE’s template for legal trust funds;
- (6) all documents and communications referring or relating to any concerns raised by OGE staff or others about differences in the draft agreement and OGE’s guidance on legal trust funds or OGE’s template for legal trust funds including the treatment of prohibited sources and the failure to clarify that a donation would be prohibited if the donor verbally communicated that a donation would be made because of an official’s position;

¹⁹ Email from Seth Jaffe, Chief, Ethics Law and Policy Branch, Office of Government Ethics, to Robert Walker, Robert Benton, and Michael Toner, Wiley Rein LLP (Jan. 29, 2018) (online at [www.oge.gov/web/OGEnsf/0/C84BE191420FD2A585258227004EFCC2/\\$FILE/Patriot%20Legal%20Expense%20Fund%20Trust,%20LLC.pdf](http://www.oge.gov/web/OGEnsf/0/C84BE191420FD2A585258227004EFCC2/$FILE/Patriot%20Legal%20Expense%20Fund%20Trust,%20LLC.pdf)).

- (7) all documents and communications to show how OGE was able to complete its review of the draft agreement for the Patriot Expense Fund Trust in 31 minutes;
- (8) all documents and communications referring or relating to whether the Manager for the Patriot Expense Fund Trust is required to consult with ethics officials to ensure that any federal employee beneficiaries do not receive funds from a prohibited source;
- (9) documents sufficient to show whether the Patriot Expense Fund Trust is required or was advised to have a deadline for dissolving the Fund and returning its assets to donors or donating them to charities;
- (10) all documents and communications referring or relating to protections in place to ensure that distributions from the Patriot Expense Fund Trust are not made based on whether an individual will testify favorably for President Trump or the Administration; and
- (11) all documents and communications referring or relating to whether the Patriot Expense Fund Trust is prohibited from making distributions from prohibited sources to federal employees, including White House staff and whether the structure of the fund could allow such a distribution.

We also request that you or your designee provide a briefing to Committee staff by April 13, 2018. If you have any questions about these requests, please contact Krista Boyd with Committee staff at (202) 225-9493. Thank you for prompt consideration of this request.

Sincerely,

Eljida E. Tunig

Caralyn B. Holmes

Wm. Larry Clay

Ann E. Conway

Steph S. Lyman

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Stacy E. Baskett

Janie Raskin

Brian Watson Gilman

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Matthew A. Coughlin

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J. Lopez

cc: The Honorable Trey Gowdy, Chairman
Committee on Oversight and Government Reform