

# Rules and Regulations

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## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Parts 2634 and 2635

RIN 3209-AA50

#### Legal Expense Fund Regulation

**AGENCY:** Office of Government Ethics.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Government Ethics (OGE) is adding a new subpart to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards). The new subpart contains the standards for an employee's acceptance of payments for legal expenses through a legal expense fund and an employee's acceptance of *pro bono* legal services for a matter arising in connection with the employee's official position, the employee's prior position on a campaign of a candidate for President or Vice President, or the employee's prior position on a Presidential Transition Team. OGE is also making related amendments to the portions of the Standards that govern the solicitation and acceptance of gifts from outside sources and the portions of the Executive Branch Financial Disclosure regulation that govern confidential financial disclosure reports.

**DATES:** This rule is effective November 21, 2023.

**FOR FURTHER INFORMATION CONTACT:** Maura Leary, Associate Counsel, or Heather Jones, Senior Counsel for Financial Disclosure, General Counsel and Legal Policy Division, Office of Government Ethics, Suite 500, 1201 New York Avenue NW, Washington, DC 20005-3917; Telephone: (202) 482-9300; TTY: (800) 877-8339; FAX: (202) 482-9237.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The U.S. Office of Government Ethics (OGE) published a proposed rule in the *Federal Register*, 87 FR 23769 (Apr. 21,

2022), proposing to amend both 5 CFR part 2634, Executive Branch, Financial Disclosure, Qualified Trusts, and Certificates of Divestiture, and 5 CFR part 2635, Standards of Ethical Conduct for Employees of the Executive Branch, to establish a framework to govern an executive branch employee's acceptance of both payments for legal expenses through a Legal Expense Fund (LEF) and *pro bono* legal services for matters arising in connection with the employee's past or current official position, the employee's prior position on a campaign of a candidate for President or Vice President, or the employee's prior position on a Presidential Transition Team.

Before proposing the Legal Expense Fund rule, OGE sought public input through an advance notice of proposed rulemaking (ANPRM), *see* Notice and Request for Comments: Legal Expense Fund Regulation, 84 FR 15146 (Apr. 15, 2019), and at two public meetings, *see* Announcement of Public Meeting: Legal Expense Fund Regulation, 84 FR 50791 (Sept. 26, 2019). In addition to seeking public input, OGE consulted with executive branch ethics officials and with the Department of Justice and the Office of Personnel Management pursuant to section 201(a) of Executive Order 12674, as modified by Executive Order 12731, and the authorities contained in 5 U.S.C. 13122.

The proposed rule provided a 60-day comment period, which ended on June 21, 2022. OGE received 6,916 timely and responsive comments, which were submitted by six organizations and 6,910 individuals. After carefully considering the comments and the input provided before and in response to the proposed rule's publication, and making appropriate modifications, OGE is publishing this final rule. The rationale for the rule can be found in the preamble to the proposed rule at: <https://www.govinfo.gov/content/pkg/FR-2022-04-21/pdf/2022-08130.pdf>.

This rule will be effective 180 days after publication to allow OGE to implement procedures, provide training, and publish guidance regarding this new ethics program. It will also allow agencies to consider staffing needs and their own internal procedures.

##### II. Comments

OGE received nearly 7,000 comments from both organizations and individuals. The comments are

publicly posted on OGE's website and can be found at this address: <https://www.oge.gov/web/OGE.nsf/All+docs+By+Cat/417908CAB842A8128525887E004D262C>. Many of the commenters provided feedback on several different sections of the proposed rule. OGE has reviewed and considered each comment submitted; comments are discussed below in the context of the particular subparts or sections to which they pertain. OGE is not discussing comments that were either generally supportive of the regulation or generally critical of the regulation; however, OGE weighed both support and criticism when considering any possible changes in response to other comments. In addition, OGE does not specifically discuss comments that address issues outside the scope of the regulation.

OGE received 6,907 comments from individuals that all asked OGE to take the following actions: (1) make compliance with the regulation mandatory; (2) require employee beneficiaries to recuse from particular matters involving donors to their legal expense funds for five years; (3) remove a particular example; and (4) allow nonprofits to hire outside *pro bono* counsel. OGE addresses each of these comments below in the applicable section, and portions of the regulation were revised to address the concerns raised.

In the proposed rule, OGE specifically solicited comments on: (1) whether multi-beneficiary trusts should be permitted; (2) whether 501(c)(3) and 501(c)(4) organizations should be permitted to make donations to legal expense funds; and (3) whether 501(c)(3) and 501(c)(4) organizations may hire attorneys outside their organization to provide free or reduced cost legal services for employees. The weight of the comments supported single-beneficiary trusts and opposed allowing 501(c)(4) organizations to donate to legal expense funds or pay for outside legal representation. Although commenters were more divided on the question of allowing 501(c)(3) organizations to donate to legal expense funds and to pay for outside legal representation, the weight of the comments favored allowing such organizations to do both. As discussed in more detail in the relevant sections below, the rule has been revised to

permit 501(c)(3) organizations to donate to legal expense funds and pay for outside legal services.

Finally, OGE, in adopting this final rule, has corrected a few typographical errors and made a few other minor clarifying revisions to the rule as proposed.

#### *General Comments*

Several comments from individuals encouraged OGE to expand the regulation to cover employees of the legislative and judicial branches. Pursuant to 5 U.S.C. 13122(b)(1), OGE only is permitted to draft regulations that apply to executive branch employees. The Ethics in Government Act designated a supervising ethics office for each branch of government and, within the legislative branch, separate offices for the House and Senate. *See* 5 U.S.C. 13101(18). Each supervising ethics office is responsible for promulgating ethics rules that apply to the employees of that branch or congressional body.

One commenter asked that OGE amend the definition of “covered relationship” in § 2635.502(b)(1) to include the trustee and donors of a legal expense fund established under subpart J of part 2635 and the provider of any *pro bono* legal services to employees. OGE first notes that the relationship between an employee beneficiary and their trustee is a “contractual . . . relationship that involves other than a routine consumer transaction” and thus would already be covered by § 2635.502(b)(1)(i). Second, OGE has amended the regulation to reflect that the legal expense fund recusal is not a “covered relationship” recusal under § 2635.502. Instead, OGE is requiring employee beneficiaries to abide by a mandatory two-year recusal from matters affecting any trustee, donor of legal expense payments, or provider of *pro bono* services. OGE does not want to create confusion as to whether the § 2635.502 recusals or the more stringent legal expense fund recusals apply, so OGE is electing not to include these relationships as covered relationships under § 2635.502.

Several individual commenters suggested that OGE ban all legal expense funds. OGE has determined that this approach would significantly limit access to legal services for all but the wealthiest executive branch employees. While OGE historically has provided guidance to help ensure that executive branch employees who may receive distributions from an LEF are in compliance with existing ethics laws and rules, OGE believes that the proposed regulation, which creates

much more robust limitations on the acceptance of payments for legal expenses and imposes significant transparency requirements, is the preferred and appropriate course.

Two organizations commented that the rule was vague about which funds must be routed through a legal expense fund and suggested that items such as pre-paid legal service plans, credit cards, or “private borrowing from family members and close friends” are covered by subpart J. OGE first notes that routine market arrangements, such as a pre-paid service plan or the use of a credit card, are not gifts as defined in subpart B and therefore would not be required to be routed through a legal expense fund. Second, OGE notes that if, for example, an employee received a below market rate loan from a family member or close friend, it would qualify under the personal relationship exception at § 2635.204(b), and the employee could accept the loan under that subpart B exception rather than subpart J. OGE included the provision at § 2635.1002(b) specifically to address circumstances such as “private borrowing from family members or close friends,” as raised by the commenter. Accordingly, OGE believes the regulation is sufficiently clear about which legal expense payments must be accepted using subpart J.

Several individual commenters suggested making contributions from legal expense funds taxable income. The Internal Revenue Service makes determinations about what income is taxable, and such a determination is outside of OGE’s jurisdiction.

Several commenters asked that OGE address the political pressure that can be applied by withholding funds from employee witnesses. In response to OGE’s ANPRM, numerous organizations and individuals expressed the desire for legal expense funds to be structured only as trusts with single beneficiaries to guard against such pressure. *See* May 22, 2019 Public Hearing Transcript, [https://www.oge.gov/web/OGEnsf/0/DB24D09F28472B82852585B6005A2206/\\$FILE/Transcript.pdf](https://www.oge.gov/web/OGEnsf/0/DB24D09F28472B82852585B6005A2206/$FILE/Transcript.pdf); Written Comments to ANPRM, [https://www.oge.gov/web/OGEnsf/0/FE8D43CE6A038852852585B6005A2293/\\$FILE/ANPRM%20Legal%20Expense%20Fund%20Regulation%20-%20Written%20Comments.pdf](https://www.oge.gov/web/OGEnsf/0/FE8D43CE6A038852852585B6005A2293/$FILE/ANPRM%20Legal%20Expense%20Fund%20Regulation%20-%20Written%20Comments.pdf). The commenters noted that, unlike legal expense funds with multiple beneficiaries, trustees of single-beneficiary trusts have a fiduciary duty to the sole beneficiary. The structure of trusts with single beneficiaries, in the words of one commenter, “provides the best protection for public servants, who

can be certain that distributions will not be withheld or disbursed according to political pressures.” Accordingly, OGE is electing to require that legal expense funds be trusts with a single beneficiary.

OGE received one comment from an organization in support of the existing penalties in the regulation, including the penalties for impermissible donations. Several comments from individuals requested stricter penalties, including imprisonment, for noncompliance with the regulation. OGE believes the remedies in the regulation strike the appropriate balance for noncompliance. Section 1007(h) requires the fund to return impermissible donations and requires the beneficiary to forfeit the ability to accept donations and make distributions if a quarterly report is late. In addition, OGE has reserved both the right to prohibit the fund from either accepting donations or making distributions and the right to terminate the trust if there is significant noncompliance. Finally, while violation of the substantive requirements of a regulation cannot be criminal, the criminal penalties for knowingly making a false statement to the government will apply to the documents and reports filed pursuant to this regulation.

#### *A. Subpart J of the Standards*

##### *Section 2635.1002: Applicability and Related Considerations*

One commenter asked that § 2635.1002 explicitly state that referring to an employee’s official position in a legal expense fund solicitation does not violate subpart G. OGE did not adopt this suggestion, because an employee could reference their position in a way that would violate subpart G—in fact, § 2635.1002(c)(3) specifically requires that employees comply with subpart G in soliciting donations. However, OGE is adding language to § 2635.1002(c)(3) to clarify that the mere reference of the employee’s official position in a solicitation does not in itself violate subpart G.

Two organizations objected to the regulation’s scope being restricted to those legal matters arising in connection with the employee’s past or current official position, calling it a disparate burden on employment law litigation. Payments for legal services that arise out of an executive branch employee’s federal employment or service on a campaign raise more significant appearance and misuse concerns than payments for purely personal legal services. Numerous stakeholders, from public interest organizations to U.S.

Senators, have noted that legal expense funds previously established to defray the costs of legal expenses connected to government service have created heightened concern. Specifically, stakeholders have expressed concerns about the potential for donors to influence employees' official actions or witness statements, the difficulty of screening for prohibited donors, and the lack of transparency for legal expense donations to those in federal service. OGE has addressed this heightened appearance concern by specifically regulating payments for legal expenses arising out of an employee's past or current official position, limiting who may donate to employee legal expense funds, and requiring public disclosure of such donations.

Moreover, OGE is specifically directed by E.O. 12674 (as modified by E.O. 12731) to promulgate regulations addressing fundamental ethics principles such as prohibiting the use of public office for private gain and avoiding actions that create the appearance of a violation of a law or regulation. This directive supports regulating only legal expense payments connected to government service, as receipt of such payments for legal expenses could be viewed as using a public position for personal gain or creating the appearance of violating a law or regulation.

One organization commented that the regulation as drafted would not address the concerns about potential corruption raised by Senators in their letter to the Director (Letter from Senator Margaret Hassan *et. al.*, Aug. 2, 2018, <https://www.hassan.senate.gov/imo/media/doc/RoundsPatriotFundLetterSIGNED.180802.pdf>). In that letter, the Senators specifically raised concerns about transparency and funds with multiple beneficiaries, which make screening donations difficult and could allow the trustee to prioritize certain employee beneficiaries.

When drafting the proposed regulation, OGE addressed the Senators' concerns about multiple beneficiaries by prohibiting executive branch employees from accepting payments for legal expenses from an LEF that has multiple beneficiaries. In addition, to promote transparency, the proposed regulation requires both that the trust document be made publicly available, and that all payments of \$250 or more be reported quarterly and posted publicly on OGE's website. The proposed regulation also limits the amount a single donor can donate and prohibits donations from businesses and lobbyists. Finally, the proposed rule requires that any existing legal expense fund not structured as

required by subpart J come into compliance within 90 calendar days of the rule going into effect, or use of the fund to pay legal expenses will violate the Standards of Conduct.

Two organizations and 6,907 commenters objected to the language in § 2635.1002(b)(2), stating that legal expense fund payments and *pro bono* services that otherwise qualify for a subpart B gift exception or exclusion are not covered by this subpart (and thus are not subject to the trust, quarterly reporting, and transparency requirements). Many commenters stated that this language made the regulation optional, and the two organizations requested that subpart J be the exclusive means for accepting legal expense fund payments. One organization characterized the provision as "allow[ing] executive branch officials to continue relying on the gift rule exclusions and exceptions they have historically cited to justify legal expense funds."

Compliance with the requirements of subpart J is mandatory. Importantly, this regulation specifically clarifies that payments for legal expenses arising from an employee's past or current official position are given because of the employee's official position, and thus may not be accepted unless the employee complies with the gift rules. Accordingly, any gift of legal expenses or *pro bono* services arising out of an employee's past or current official position must comply with all the requirements of subpart J or conform to a narrow, pre-existing subpart B exception. Executive branch officials will not be able to rely on the historical interpretation that legal expenses could be excluded from the gift regulations under subpart B by determining that such expenses are not given because of their official position.

The only two subpart B exceptions likely to be used in practice are § 2635.204(b), which requires a determination that the donation is clearly motivated by a family relationship or personal friendship; and § 2635.204(c), which allows employees to accept free or discounted legal services from an established employee organization, such as a union or an employee welfare organization. Maintaining these two narrow exceptions would allow less well-connected employees to accept help with legal expenses from, for example, their spouse, their parents, or their union.

Several individuals requested that the regulation cap donations from family and friends at the same amount as everyone else. Such donations—which,

by definition, must be given under circumstances that make clear that the gift is motivated by a family relationship or close personal friendship—are much less likely to raise appearance concerns. Accordingly, OGE is declining to make this change.

One organization and 6,907 individuals commented that the requirement that employees recuse from particular matters affecting donors for one year was too short, and requested that employees recuse from such matters for five years instead. A second organization asked for the recusal period to apply through the lifetime of the legal expense fund, and then recommended instituting different lengths of time for the recusal depending on the amount of money donated (*e.g.*, one-year recusal for under \$5,000, four-year recusal for over \$5,000). Individual commenters suggested recusal periods ranging from two to ten years. One organization also objected to use of the § 2635.502 impartiality standard because it relies on the reasonable person standard and because an agency can authorize an employee to participate notwithstanding impartiality concerns. In response to these comments, OGE is revising the regulation as follows: Employee beneficiaries will have a two-year recusal for donors donating \$250 or more in a calendar year, starting from the time of each donor's most recent donation. Further, this recusal will be mandatory, with no written authorization option.

Two organizations also asked for the recusal to apply to both particular matters involving specific parties and particular matters of general applicability. OGE declines to adopt this proposal; recusals will be required only for particular matters involving specific parties. If recusals were extended to particular matters of general applicability, as proposed by the commenters, it would make legal expense funds unworkable for employees at the many agencies whose missions affect large and diverse sectors of the public. In addition, identifying which particular matter of general applicability would affect each donor to a trust would be extremely difficult.

OGE further notes that donors are limited to individuals, political parties, and 501(c)(3) organizations; for these donors, OGE believes that particular matters involving specific parties present the primary impartiality risk. Although 501(c)(3) organizations often work on policy issues that would be considered particular matters of general applicability, they typically do not have a financial interest in those particular

matters of general applicability (see OGE DAEOgram DO-06-002 (Jan. 19, 2006), discussing OLC's conclusion that a nonprofit organization does not have a financial interest in a particular matter on which it spends funds to advocate its policy position solely because of those expenditures). As a result, OGE does not believe a mandatory recusal for particular matters of general applicability is appropriate.

One commenter recommended that OGE require employee beneficiaries to certify in writing that they have notified their *pro bono* attorney of their financial reporting obligations, if any, and that the attorney has agreed to provide them with documentation of any services provided each year so that they may properly report any gifts. In response, OGE notes that § 2635.1009 explicitly reminds financial disclosure filers that *pro bono* services must be reported as gifts on their financial disclosure forms and, per § 2634.602(a), filers must certify that the financial disclosure reports are true and correct. Requiring further certification would create inconsistency and unnecessary redundancy in the gift reporting requirement for financial disclosure filers, and therefore OGE is not requiring such certification.

#### Section 2635.1003: Definitions

OGE received one comment that OGE should modify § 2635.1003 to emphasize that "arising in connection with an employee's past or current official position" does not cover assisting individuals with presidential nominations for Senate-confirmed positions. Because the concept of "official position" is regularly employed throughout the Standards, OGE does not believe such a change to the regulation is necessary. For example, if an executive branch employee assisted a nominee in the course of their official duties or in the course of their duties on the Presidential Transition Team, and a legal issue arose as a result of their official work or work for the transition team, that employee could establish a legal expense fund pursuant to subpart J. If, however, before an individual's executive branch employment, that individual assisted a nominee in the individual's personal capacity, then the legal issues would not arise from the individual's official position and the individual could not utilize subpart J to establish a legal expense fund. In addition, executive branch employees in Senate-confirmed positions would not be permitted to establish legal expense funds to defray the costs associated with the nomination and confirmation process, because those costs are

expenses that do not arise from that employee's official executive branch position.

One organization also requested that OGE treat contingency fee arrangements like *pro bono* arrangements, requiring pre-approval by agency ethics officials. The organization was primarily concerned with contingency fees being paid by third parties. Although OGE understands the concern, OGE does not believe that differentiating between contingency fees and other fee structures is appropriate, as OGE considers a contingency fee structure to be a regular market arrangement and not a gift. Payments by third parties for any legal services arrangement—contingency fees or any other fee structure—must comply with subpart J or an applicable exception or exclusion in subpart B.

One organization and 6,907 individuals commented that the example to the definition of "arising in connection with the employee's past or current official position," was offensive. The example illustrates that a military officer accused of sexual harassment off duty would be required to follow the subpart J requirements should that officer wish to accept payments for legal expenses from anyone other than family, close friends, or qualifying employee organizations, because the officer's after-work conduct is subject to the Uniform Code of Military Justice and thus arises out of the officer's official position. Several other individual commenters expressed opposition to the idea that employees accused of bad behavior would be able to fundraise for their defense. OGE has revised the example in the final rule. OGE would like to highlight, however, that nothing in this regulation should be construed as restricting an employee's access to a legal defense based on the nature of the allegations giving rise to the need for a defense fund.

Two organizations objected to the definition of "*pro bono* legal services" in proposed § 2635.1003 as too vague, specifically noting that there is ambiguity about whether the definition is limited to direct, representational legal services (not extending to, for example, amicus briefs). OGE intends the regulatory definition of *pro bono* legal services to mean direct, representational services. OGE will provide further guidance on this issue as needed.

OGE received several comments asking to broaden the definition of "whistleblower" beyond employees making protected reports or disclosures under the Whistleblower Protection Act (5 U.S.C. 2302(b)(8)) and the listed

related statutes. OGE believes that a clear, objective definition of the term "whistleblower" is appropriate. In addition, OGE does not want the definition to be overbroad because of the public interest in transparency in this area and thus declines to broaden the definition of "whistleblower."

#### Section 2635.1004: Establishment

Two organizations objected to the requirement for a trust structure as unduly burdensome for public employees. Three organizations commented that they strongly supported the trust structure as drafted. OGE weighed these comments, as well as prior comments on this issue, in choosing to require the use of single-beneficiary trusts in drafting the final regulation. In addition, one organization commented that OGE was not taking into account the burden of seeking approval for every *pro bono* representation, and that the overall administrative burden of the regulation would outweigh any plausible benefit to employees.

OGE understands the concerns of the commenters objecting to the trust structure, and weighed the additional burden of establishing a trust on employees when drafting the proposed rule. However, a number of factors support a trust requirement. First, trusts offer the benefit of having a fiduciary act on behalf of a single employee and therefore in that employee's interest. Second, requiring a trust is consistent with the Legal Expense Fund regulations governing House and Senate employees. Third, the trust requirement creates a uniform system for approval for every executive branch employee, which ensures that each employee is treated equally and also eases the review burden for agency ethics officials. Finally, the feedback OGE received in interagency consultations, as well as the majority of the comments received in the public comment period and in the public hearings and meetings held by OGE in advance of drafting the proposed regulation, strongly support the trust structure being mandatory for legal expense funds.

Furthermore, in order to address the concerns raised by those objecting to the trust requirement and to reduce the burden on employee beneficiaries, OGE intends to issue guidance on, and provide sample trust clauses that would meet, the requirements of the regulation. In addition, OGE has provided other means for less wealthy or well-connected employees to access legal services. For example, the new § 2635.204(c)(2)(iv) creates a specific gift exception for assistance offered by pre-

existing employee organizations, which would permit employees to accept assistance with legal fees from organizations such as unions. OGE also notes that the requirements for accepting *pro bono* services under subpart J are significantly less burdensome than setting up a trust.

One commenter asked that the prohibitions on the trustee position be expanded to include prohibited sources (as defined in § 2635.203(d)), employees of lobbyists, all relatives of the beneficiary, and an employee or agent of the beneficiary or any other person prohibited by this section. OGE believes that the proposed additions are overly broad. First, OGE does not believe that a blanket prohibition on any individual already serving as employee or agent of the beneficiary (e.g., an employee's personal attorney) is needed to adequately guard against potential conflicts of interest. OGE further notes that the proposed term "relative" is broad; instead, OGE specifically prohibited spouses, parents, and children for clarity. In addition, OGE notes that agency ethics officials emphasized in listening sessions following the ANPRM that in large agencies, almost all companies (and correspondingly, their employees) are considered prohibited sources. Furthermore, the proposed restrictions would prohibit an attorney working at any law firm where other attorneys perform lobbying work from serving as a trustee. Adding the proposed restrictions would greatly limit the pool of people available to serve as trustees, which could create additional barriers to access for lower-level employees. Accordingly, OGE is not going to adopt the proposed restrictions.

One commenter commended OGE's careful consideration of anonymous whistleblowers and the particular risks they face within the proposed structure. One organization raised concerns that anonymous whistleblowers working for intelligence agencies may risk having their identities revealed if OGE contacts the agency to establish procedures for handling classified documents. OGE has coordinated with intelligence agencies and has confirmed that existing policies at these agencies can be adapted to handle any LEF documents with classified information. All classified information will remain at the agency. Moreover, anonymous whistleblower LEF documents likely will not contain any classified information since the employee's name and position will not be included. In the unlikely event OGE would need to review a document with classified information, an OGE employee with a security clearance will

review the document in secure agency spaces, consistent with the current practice for other ethics documents containing classified information.

OGE received several comments from individuals objecting to "self-reporting" of legal expense funds. OGE understands the concern, but notes that because OGE only has the authority to regulate executive branch employees, it is necessarily the employee beneficiary's responsibility to properly report a legal expense fund.

OGE received one comment that § 2635.1004(e)(1) is superfluous and should be deleted in light of § 2635.1004(f) because both provisions discuss the requirement that an employee beneficiary file their legal expense trust fund document with their agency. Section 2635.1004(e)(1) outlines the steps employees must take after accepting contributions to their legal expense fund, which include filing the legal expense fund trust document with their agency and receiving approval. Section 2635.1004(f) specifies which employees need to file with their agency and which need to file with OGE. Because paragraph (e) identifies which actions an employee must take to accept contributions and paragraph (f) specifies where the employee must file, OGE disagrees that § 2635.1004(e)(1) is superfluous and declines to change the regulation.

One organization proposed mandating that additional documents be sent to reviewing officials for approval, specifically: the trust agreement, written procedures for compliance with applicable ethics requirements, and a certification that the trustee meets the eligibility requirements, which would include the trustee's name, business address, employer, and relationship to beneficiary. The organization further proposed that there be no redactions of the documents other than fee schedules and sensitive personal information such as personal addresses, the names of minor children, and account numbers.

OGE notes that providing the trust agreement to the reviewing official is already mandated by § 2635.1004(f). Further, § 2635.1004(g) indicates that the reviewing official should review "information regarding the trustee" along with the trust document, in order to ascertain that the trustee meets the requirements of § 2635.1003. Accordingly, OGE does not believe a separate trustee certification is needed. In addition, OGE is electing not to adopt the proposal as OGE believes that "written procedures for compliance with applicable ethics requirements" is vague and could cause confusion—agency ethics officials can advise on

compliance with legal expense fund requirements just as they do with other ethics requirements. Finally, OGE is adding a note in this section clarifying that only sensitive personal information such as fee schedules, personal addresses, and account numbers will be redacted.

Two organizations objected to agency officials serving as the approval authority for employee legal expense funds on the grounds that the agency is often a party opponent in federal employment litigation, which would create an incentive to withhold or delay approval. OGE understands this concern, and notes that all employees seeking legal expense funds may appeal agency denials to OGE. To more fully address this issue, OGE has broadened the existing legal expense fund appeal process to include an appeal right if the legal expense fund is not approved within the required 30-day timeline. However, OGE notes that given the need for conflicts screening, agencies should still be the initial review authority for most legal expense funds due to their knowledge of agency-specific conflicts.

In addition, one commenter proposed expanding the list of employees for whom OGE would conduct a second-level review of legal expense funds to include agency heads and leaders of certain component entities whose financial disclosure reports OGE does not review. OGE believes that uniformity across the executive branch ethics program is appropriate in this case and defers to the authority in 5 U.S.C. 13103 in identifying which senior positions require an elevated level of review. Accordingly, OGE declines to adopt the commenter's proposal.

One commenter noted that the proposed regulation did not clearly indicate the process for review for a Designated Agency Ethics Official's (DAEO) legal expense fund or specify the process for subordinate ethics officials. OGE has amended the regulation to clarify that OGE would conduct the initial review of a DAEO's legal expense fund. Legal expense funds of subordinate ethics officials will follow the same process as other employees and be reviewed by the DAEO.

One organization commented that whistleblowers should have access to a standardized trust document to use rather than having to seek an individualized prior approval of their trust. State trust laws vary and are subject to change. Therefore, OGE cannot create a standardized trust document that would reliably satisfy all states' trust laws. It is the responsibility

of the beneficiary and trustee to ensure the trust complies with applicable state law. However, OGE will issue guidance that provides trust clauses that will comply with subpart J.

One organization asked that the legal expense fund documents be available on OGE's website as "searchable, sortable, and downloadable." OGE intends to have the records sortable by name of employee beneficiary, agency, position, and type of document. This is similar to the search capability for financial disclosure reports, which are also publicly available on OGE's website. In addition, OGE anticipates that the number of legal expense trust funds will be relatively low. Accordingly, anyone seeking information about legal expense fund donations should be able to quickly locate the information they need using the search capability available.

One organization requested more specific requirements for donors and the trustee when screening donations. Specifically, the organization requested that each donor supply their employer and state of residence, confirm they meet the eligibility requirements, and acknowledge that the information the donor submits is subject to 18 U.S.C. 1001. They asked that the trustee consult with the beneficiary and agency ethics official during the review and that the trustee interview every donor giving more than \$1,000.

Although § 2635.1005 does not specifically address the information the trustee is required to collect from donors, it does state the trustee must provide the beneficiary with the information to complete their quarterly reports and public financial disclosure statements. As a result, the trustee is required to collect the name and employer for every donor and if the beneficiary is a public financial disclosure filer, the donor's city and state of residence. To create reporting consistency for all beneficiaries, OGE is revising § 2635.1007(a)(1) to require the reporting of the donor's city and state of residence. Because the donor information is being provided to the trust, rather than the government directly, OGE is not requiring an acknowledgement that 18 U.S.C. 1001 applies. The trustee is a fiduciary and as a result, OGE believes a trustee's duty of care will require them to consult with the beneficiary and agency ethics officials, as necessary, to determine if a donation is permissible. Finally, OGE believes an interview requirement is too great an administrative and cost burden to place on the trust as the trustee should be able to ascertain whether or not the donation is prohibited without interviewing the donor.

#### Section 2635.1005: Administration

OGE received no comments regarding this section.

#### Section 2635.1006: Contributions and Use of Funds

One individual commenter noted that the scope of acceptable donors to legal expense funds is different from the scope of individuals and entities that can provide *pro bono* legal services and suggested both have the same restrictions. OGE created more specific requirements for donors of in-kind *pro bono* services because of the nature of legal service providers. Many *pro bono* donors are law firms or legal service organizations, which are not individuals and would thus be precluded from donating *pro bono* legal services if the requirements were identical. Instead, only solo legal practitioners would be able to provide *pro bono* legal services, severely limiting employees' access to such services. For these reasons, OGE is electing to provide executive branch employees the opportunity to access *pro bono* legal services within the existing limitations of the regulation. These limitations include, importantly, prohibiting *pro bono* donations from attorneys or organizations substantially affected by the performance or nonperformance of an employee's official duties.

OGE requested comments regarding whether 501(c)(3) and 501(c)(4) organizations should be permitted to donate to legal expense funds. OGE received three comments from organizations expressing opposition to allowing 501(c)(4) organizations to donate. OGE also received comments from two organizations expressing opposition to allowing 501(c)(3) organizations to donate, with one allowing for the possibility of permitting donations with certain restrictions on the type of 501(c)(3) organizations that can donate.

OGE believes it is appropriate to allow 501(c)(3) organizations to donate to legal expense funds and has revised the regulation to permit such donations. 501(c)(3) organizations are tax-exempt charitable organizations that are restricted from lobbying activities and have other safeguards built into the requirements of the Internal Revenue Code. OGE is further requiring that the donating 501(c)(3) organization be established for two years before the donation in order to prevent donations from entities created specifically to circumvent these regulations. 501(c)(4) organizations may participate in lobbying activities, and as a result, OGE believes these organizations pose a

greater risk of impartiality concerns. Accordingly, OGE is electing not to allow 501(c)(4) organizations to donate. In addition, OGE notes that an employee beneficiary will have a mandatory recusal from particular matters involving specific parties for any 501(c)(3) organization making a donation (*see* § 2635.1002) to protect against impartiality concerns.

OGE received many comments arguing for a lower cap on donations, including comments suggesting the cap match the campaign finance donation limit. One organization commented that there should be no cap on donations. The \$10,000 proposed donation cap in the regulation is consistent with the donation cap for U.S. Senate legal expense funds. The cap in the regulation also balances the high cost of legal services with preventing employees from relying on a single source or small number of sources to fund the employee's legal expenses.

OGE received several comments from individuals asking OGE to prohibit donations from foreign governments and corporations. The regulation prohibits foreign governments from donating, and OGE has, in addition, amended the regulation to prohibit foreign nationals from donating to legal expense funds, serving as trustees, and providing *pro bono* legal services. The regulation also prohibits donations from any entities that are not registered 501(c)(3) organizations or political parties. For the purposes of this regulation, "political parties" include the distinct legal entities within national parties and party committees.

#### Section 2635.1007: Reporting Requirements

Two organizations commented that they oppose the requirement to disclose the terms of representation and funding sources for most employees in quarterly reports, stating that the information is privileged and confidential, that it would require employees to report confidential billing statements with attorney work product, and that the proposed rule, as written, improperly invades the privileged attorney-client relationship. One of the two organizations argued in the alternative that the vagueness of the reporting requirements would "trick" unwary clients into disclosing privileged and confidential information. This organization further stated that the reporting would be onerous and strategically disadvantage federal employees who need legal representation. In contrast, a separate organization strongly supported the quarterly reporting model as drafted.

OGE also received many comments from individuals supporting the idea of transparency generally and the specific public reporting requirements in the proposed regulation. Several individual commenters requested additional disclosures including: disclosing all donations, disclosing the relationship between the donor and beneficiary, and disclosing whether the donor does business with the beneficiary's agency. OGE weighed this strong support for transparency when considering any possible changes in response to commenters seeking less transparency.

OGE believes that the required quarterly reporting is necessary for transparency and does not impede on attorney-client privilege or unduly discourage representation of federal employees. The regulation requires that the beneficiary report distributions of \$250 or more from the fund. Section 2635.1007 requires that the employee beneficiary disclose the payee, date of distribution, amount, and "purpose" of the distribution. The required purpose can be as broad as "legal services" and the employee beneficiary is in no way compelled to, and in fact should not, report confidential attorney-client information. OGE notes specifically that the beneficiary is not required to report the terms of the representation or the billing rates of the staff involved. Moreover, OGE intends to provide more specific guidance regarding quarterly reporting requirements. Although OGE acknowledges that there may be some strategic disadvantages to any disclosure requirements, OGE is balancing that concern with the need for transparency, which most commenters emphasized was crucial to this process.

OGE also is balancing the privacy interests of the donors and beneficiaries with the need for transparency. OGE believes the additional information requested by some individual commenters, such as the relationship between the beneficiary and donor, encroaches too much on the privacy of the donors and the beneficiary. In addition, the information required aligns with the disclosure requirements for U.S. House of Representatives legal expense funds.

One of the organizations also commented that the proposed reporting system would deter attorneys from representing federal employees. As noted above, OGE believes that the reporting requirements are very general and not unduly onerous.

Two organizations commented that placing the quarterly reporting information into a searchable, sortable database makes that information available to attorneys of party

opponents, and stated that the information is privileged. OGE reiterates that no privileged information is required to be disclosed under § 2635.1007, and information such as whether the client is on a flat or fixed rate or the numbers of hours worked is not required by the form. Any hypothetical strategic disadvantage to the employee beneficiary is outweighed by the employee beneficiary being able to access funds for legal services.

One organization requested that the trustee disclose violations of the regulations (which OGE takes to mean impermissible donors or expense payments) and the corrective action taken, or in the alternative, declare that there have been no known violations. OGE does not have the statutory authority to require reporting by the trustee; all required reporting is from the employee beneficiary. In addition, the regulation contemplates the identification and return of impermissible donations as part of the proper functioning of the regulation, not as a per se violation. The beneficiary reports all donations received of \$250 or more and all distributions of \$250 or more on quarterly reports. These reports will be reviewed by agency ethics officials, and in some cases OGE, to ensure compliance with the regulation. It is possible that a trustee or beneficiary may not promptly identify an impermissible donation: this is the reason for agency review. In those cases, the agency ethics official will direct the employee to return the donation. OGE believes agency review of the quarterly reports and the fiduciary duty owed to the beneficiary are sufficient incentives for the trustee to act with care in carrying out their responsibilities.

One organization commented that they were concerned that the information required in quarterly reports about donors could provide clues as to the identity of an anonymous whistleblower and asked that anonymous whistleblowers be permitted to file reports a year after the normal deadline. OGE understands this concern, which is why reports filed by anonymous whistleblowers are not publicly posted like other reports. However, OGE believes the quarterly reporting requirements are important to ensure compliance with the regulation and to provide the information necessary for the employee and OGE to manage any required recusals. OGE believes the regulation strikes the proper balance between the risk to the whistleblower and OGE's required oversight of the ethics program. As a result, the regulation's quarterly

reporting requirements apply to all beneficiaries of legal expense funds.

#### Section 2635.1008: Termination of a Legal Expense Fund

OGE requested comments regarding how and when the 501(c)(3) organization to which excess funds are donated should be designated. OGE received two comments from organizations supporting the idea that the trustee designate the organization, with one in favor of designating the organization at the time of termination of the trust. One individual commenter asked that the designation of the organization be at the time of formation to provide more information to donors to the fund. The commenter also objected to not returning the unspent donations to the donors. In addition, one organizational commenter requested that the 501(c)(3) organization not have ties to the trustee.

OGE has revised § 2635.1008 to exclude 501(c)(3) organizations that have ties to the trustee, but is not changing the time of designation. The regulation's timing in designating the 501(c)(3) organization is similar to that for legal expense funds established pursuant to the U.S. House of Representatives legal expense fund regulations, and the small number of comments weigh in favor of not changing the time of designation. The individual commenter was dubious of the difficulty in returning unspent funds to individual donors, given that the regulation requires the return of impermissible donations. In practice, however, it is challenging to return unspent donations to individual donors at the end of the life of a fund because the trustee would have to apportion the remaining funds among all of the donors to the fund, which could result in returning insignificant amounts to many individual donors. OGE believes a donation of the remaining amount to an approved 501(c)(3) organization reduces the administrative burden on the trust and does not create additional conflicts issues. However, OGE has amended the regulation to allow the return of unspent funds to individual donors if practicable.

OGE received one comment requesting mandatory termination of legal expense funds to prevent beneficiaries from having legal expense funds that continue to spend funds after the legal matter has ended, *i.e.*, "zombie funds." OGE has revised the rule and adopted a mandatory termination within 90 days of conclusion of the legal matter or within 90 days of the last expenditure made in relation to the

legal matter for which it was created, whichever is later.

#### Section § 2635.1009: Pro Bono Legal Services

OGE received three comments from organizations regarding the restrictions on individuals and entities that provide *pro bono* legal services. One organization supported this section of the proposed regulation as drafted, stating that it contained adequate protections against conflicts of interest. One organization suggested that OGE adopt the definition of prohibited source found in § 2635.203(d) and disallow all prohibited sources from providing *pro bono* legal services. One organization suggested that OGE revise the language of the rule to more clearly state that any individuals providing *pro bono* legal services may not be substantially affected by the performance or nonperformance of an employee's official duties.

OGE declines to adopt the suggestion to bar the acceptance of *pro bono* services from prohibited sources as defined in § 2635.203(d). In preparing to draft the proposed rule, OGE solicited input from agency ethics officials. Several agency ethics officials from large agencies told OGE that if the traditional "prohibited source" definition was applied to *pro bono* services, the employees at their agencies would likely never be able to accept *pro bono* assistance with legal expenses because of the breadth of the agency portfolio.

OGE also notes that barring acceptance of *pro bono* services from firms registered as lobbyists and foreign agents would make it very difficult for employees to retain law firm services at all; this is particularly true for employees who live and work in the Washington, DC Metro Area. Accordingly, OGE has elected to permit employees to accept *pro bono* services from individual attorneys who are not lobbyists, foreign nationals, or foreign agents, and from organizations (law firms and other legal entities) that do not have interests that may be substantially affected by the performance or nonperformance of an employee's official duties. OGE recognizes the concerns related to lobbyists and registered foreign agents providing gifts, which is why individual attorneys providing *pro bono* services cannot be lobbyists, foreign nationals, or foreign agents.

In addition, OGE has revised the regulation to more clearly address the two-step *pro bono* donor analysis. First, the individual attorney providing legal services cannot be a lobbyist, foreign

agent, or foreign national, nor have interests substantially affected by the performance or nonperformance of the employee's official duties. Second, the organization or entity employing the attorney (e.g., a law firm, legal services organization, or 501(c)(3) hiring outside counsel) may not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties. OGE believes the regulation as written strikes the proper balance between conflicts of interest concerns and allowing access to *pro bono* services in practice for all federal employees.

OGE solicited comments regarding whether 501(c)(3) and 501(c)(4) organizations should be permitted to pay for legal services for an executive branch employee. OGE received a comment from 6,905 individuals that nonprofit charities should be on equal footing with law firms in the ability to provide legal services. OGE also received comments from three organizations that supported the idea that 501(c)(3) organizations should be able to pay for outside counsel to provide legal services to executive branch employees, with some limitations. The limitations proposed include: (1) that the organization not have conflicting interests; (2) that the organization be in operation for at least two or three years; and (3) that the organization's focus be on government integrity, whistleblower protections, federal employment law, or fraud, waste, and abuse in the government. OGE received one comment from an organization objecting to the idea that both 501(c)(3) organizations and 501(c)(4) organizations could be able to pay for outside counsel to provide legal services. OGE received two comments from organizations objecting to, and no comments in support of, allowing 501(c)(4) organizations to provide *pro bono* legal services or pay for legal services for executive branch employees.

OGE notes that § 2635.1009(a)(2) of the proposed regulation had allowed both law firms and 501(c)(3) organizations to provide in kind *pro bono* legal services to an employee, so long as the entity providing services did not "have interests that may be substantially affected by the performance or nonperformance of an employee's official duties." This provision allowed a 501(c)(3) organization to provide legal services using the organization's own employees, but it did not permit any entity to hire an outside lawyer or law firm to provide those services.

Following the review of the comments, OGE also believes it is appropriate to allow 501(c)(3) organizations to pay an outside lawyer or law firm to provide an employee legal services. As discussed above, 501(c)(3)s are tax-exempt charitable organizations that are restricted from lobbying activities and have other safeguards due to the requirements of the Internal Revenue Code. Because 501(c)(4) organizations do not have similar safeguards in place and do not have the same restrictions on lobbying activity, OGE is declining to allow 501(c)(4) organizations to pay an outside lawyer or law firm to provide an employee legal services.

OGE has revised the regulation to include a provision permitting 501(c)(3) organizations to hire outside counsel to represent executive branch employees for legal matters arising in connection with the employee's past or current official position, the employee's prior position on a campaign, or the employee's prior position on a Presidential Transition Team. Any 501(c)(3) organization seeking to hire outside counsel will be required to have been established for two years before paying for an employee's legal services to protect against the creation of an entity in order to circumvent these regulations. The 501(c)(3) organization will also need to meet the requirements of § 2635.1009(a).

There is heightened concern about impartiality in *pro bono* legal arrangements and in any circumstance when a third party is paying for an employee's legal fees. As a result, the employee will have a mandatory recusal from particular matters involving specific parties involving the attorney(s) and legal services organization representing the employee in a legal matter. The employee will also have a mandatory recusal from particular matters involving specific parties involving any 501(c)(3) organization paying for the employee's legal fees during the representation and for two years after the representation has concluded.

OGE received comments from two organizations concerned that seeking approval from the agency for receipt of *pro bono* service when the agency is the opposing party in the legal matter would deter some employees from seeking *pro bono* legal services. The ethics system in the executive branch is decentralized; thus, the agencies are in the best position to know which individuals, 501(c)(3) organizations, and law firms have business before the agency and could create a conflict of interest. As a result, the review process

rests with agencies. To address the concern expressed by the commenters, however, OGE has revised the regulation to permit employees engaged in legal matters when the agency is the opposing party to appeal to OGE when an agency determines that a *pro bono* service provider is prohibited, or when an agency fails to make such a determination within 30 days. OGE believes this change strikes a balance between ensuring prohibited donors are not providing legal services to employees while ensuring every employee entitled to assistance with legal services can access those services.

OGE received a comment from an organization that is concerned that legal services providers could be paid by third parties for legal services and the employee and/or the legal services provider would then characterize those services as *pro bono*. The commenter requested an amendment to the regulation requiring a certification by the legal services provider and the employee that no third party is paying for the legal services. In response to the commenter’s concern, OGE is adding a certification to the quarterly report where the employee will attest that the information is true, complete, and correct to the best of their knowledge. In addition, any employee who files an OGE Form 278e or 450 financial disclosure statement must disclose the receipt of *pro bono* services or legal services paid for by a non-relative third party as a gift on their annual financial disclosure report, which the employee must similarly certify is true, complete, and correct to the best of their knowledge. Both disclosure statements are subject to the civil and criminal penalties for either failure to disclose or false disclosure.

*B. Comments on Subpart B of the Standards*

Two organizations requested clarification on whether contingency fees are provided for less than “market value” as that term is defined in § 2635.203(c). OGE considers contingency fees to be a regular market arrangement, and does not consider a contingency fee arrangement on its face to be less than the cost a member of the general public would reasonably expect to incur. Accordingly, contingency fee

arrangements are not *pro bono* legal services as defined in § 2635.1003.

OGE received no comments regarding § 2635.204(n); Exception for Legal Expense Funds and Pro Bono Legal Services and § 2635.204(c); Discounts and Similar Benefits in subpart B.

OGE is implementing a new exception at 5 CFR 2635.204(c)(2)(iv) to clarify that employees may properly accept opportunities and benefits offered by a previously established employee organization, when eligibility is based on the employee’s status as an agency employee. As discussed in the preamble to the proposed rule (*see* 87 FR 23773), the proposed exception is limited to “established” employee organizations, such as employee welfare groups for Federal employees, because the purpose of this exception is to allow employees to accept opportunities and benefits from pre-existing employee organizations with a general mission of providing assistance to agency employees, rather than from organizations established as a response to a specific investigation or established to help a specific employee. As the preamble to the proposed rule clarifies, the word “established” does not mean an employee organization must be established before this regulation goes into effect; rather, it means that the organization should have been established before the need for assistance arises—in the case of an LEF, before a legal matter arises.

*C. Regulatory Amendments to Confidential Financial Disclosure Reporting Requirements*

OGE received no comments regarding § 2634.907: Report contents.

**III. Matters of Regulatory Procedure**

*Regulatory Flexibility Act*

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this final rule will not have a significant economic impact on a substantial number of small entities because it primarily affects current Federal executive branch employees.

*Paperwork Reduction Act*

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies because this regulation creates information collection

requirements that require approval of the Office of Management and Budget. The information collection requirements imposed by the proposed regulation are directed at beneficiaries of legal expense funds, who are current executive branch employees. Although the requirements are directed at employee beneficiaries, OGE anticipates that the legal expense fund trustees will prepare most or all of the fund documentation and reporting.

In fulfilling the regulatory requirements, employee beneficiaries must first submit a trust document for approval by their employing agency, and in some cases by OGE. Employee beneficiaries must also submit quarterly and termination reports regarding the funds collected and disbursed by the legal expense fund. The employee beneficiaries will in turn collect information from (1) donors who contribute to the legal expense fund for the payment of legal expenses and (2) payees who receive payments distributed from the legal expense fund. Together, this information collection is titled “OGE Legal Expense Fund Information Collection.”

OGE plans to seek Paperwork Reduction Act approval of this new information collection. The purposes of the OGE Legal Expense Fund Information Collection include, but are not limited to, obtaining information relevant to a conflict-of-interest determination and disclosing on the OGE website information submitted pursuant to 5 CFR part 2635, subpart J. The authority for this information collection is addressed in the **SUPPLEMENTARY INFORMATION** section.

OGE estimates that there will be approximately three new legal expense funds filed each year. It is anticipated that there may be an average of five legal expense fund trusts in existence each year. Each trust is anticipated to have approximately 20 donors, whose reporting requirements are tied to the frequency with which they donate, and approximately two payees, who will submit information each time they receive a distribution.

The following table estimates the total annual burden resulting from the OGE Legal Expense Fund Information Collection will be approximately 129.2 hours.

Instrument	Time per response	Number of annual responses	Total burden (hours)
Trust Document .....	20 hours .....	3	60
Quarterly and Termination Reports (beneficiary burden) .....	2 hours .....	20	60
Quarterly and Termination Reports (donor and payee burden) .....	5 minutes .....	110	9.2

Instrument	Time per response	Number of annual responses	Total burden (hours)
Total .....	.....	.....	129.2

These estimates are based in part on OGE’s knowledge of several legal expense funds that have been established for Executive branch employees, as well as OGE’s consultation with the U.S. House of Representatives and the U.S. Senate regarding the legal expense funds that they oversee.

Shortly after publication of this rule, OGE plans to submit this new information collection to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act. OMB is required to make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. Public comments can be submitted on OMB’s website: [Reginfo.gov](http://Reginfo.gov).

*Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this final rule will not significantly or uniquely affect small businesses and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

*Executive Order 13563 and Executive Order 12866*

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select the regulatory approaches that maximize net benefits (including economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been designated as a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this rule has been reviewed by the Office of Management and Budget.

Currently, executive branch employees may accept gifts to pay for

legal expenses from others directly and can also establish funds to accept donations for such expenses, as long as the employee remains in compliance with the gift restrictions in subparts B and C of the Standards of Conduct and the criminal conflict of interest statutes. *See, e.g.,* OGE Legal Advisory LA–18–11 (Sept. 12, 2018); OGE Legal Advisory LA–17–10 (Sept. 28, 2017). In other words, there are currently costs for employees who establish an LEF in order to ensure compliance with ethics rules even in the absence of OGE’s new framework in subpart J, but compliance can be difficult and confusing as the current rules do not address these types of gifts specifically. OGE’s role is currently limited to providing a legal expense fund trust template or to providing technical assistance to help ensure that executive branch employees who may receive distributions from an LEF will be in compliance with existing ethics laws and rules.

Based on OGE’s current experience under the status quo, it is estimated that approximately five executive branch employees may seek to establish or maintain an LEF annually. The new framework will consist of the following activities: establishment of the LEF trust; submission of trust documentation for agency review and approval; review and approval by OGE (when applicable); LEF trustee soliciting and accepting donations; LEF trustee screening donations to ensure the donor is permissible; LEF trustee overseeing distributions from the trust for the employee’s legal expenses; preparing quarterly reports of contributions to and distributions from the LEF; submission of quarterly reports for agency review; review by OGE (when applicable); preparation of trust termination reports and/or employment termination reports; submission of those reports for agency review and OGE review (when applicable); and communications regarding all of the above. OGE estimates that the annual time burden for all of the above is 100 hours. Using an estimated rate \$340 per hour for the services of a professional trust administrator or private representative, the estimated annual cost burden is \$34,000. *See* Clio, Legal Trends Report 65 (2021), <https://www.clio.com/resources/legal-trends/2021-report/read-online/> (calculating an average hourly rate of \$332 for trust lawyers

nationally). However, OGE estimates that the annual time burden under the status quo, if an employee establishes a legal expense fund that needs to comply with existing ethics rules, is 75 hours with an annual cost burden of \$25,500. Thus, the net increase from the status quo is approximately \$8,500 per fund. The estimate of 75 hours is based, in part, on the estimated time burden for OGE’s qualified trust program. *See* 84 FR 67743. That number was reduced because the status quo does not require review and approval of trusts or submission of reports to agencies and OGE. Under the status quo, a significant time burden exists because the lack of a detailed framework requires additional research by employee representatives, consultation with agency ethics officials and OGE, and a more detailed review of each legal expense fund donor in the absence of an enumerated list of permissible donors. The additional 25-hour estimate is based on the specific submissions required by 5 CFR part 2635, subpart J. Specifically, submission of documents establishing an LEF trust, quarterly reports, and termination reports; review by agencies and OGE of those submissions; and corresponding communications will increase the cost burden in comparison to the status quo. The burden on legal expense fund donors specifically is unchanged because they would need to provide the same level of information under the status quo.

The benefits from implementing this new regulatory structure are significant. Employees’ acceptance of payments for legal expenses relating to their official duties has triggered concern from outside groups, Congress, and the media regarding appearance of corruption, corruption issues, and a desire for transparency. Creating this regulation will provide a framework for screening for conflicts of interest and transparency, which will serve to protect both the agency and the employee. Further, the regulation will provide clarity to executive branch employees by articulating the process for establishing an LEF and the requirements for maintaining one, including: donation caps, the process for review and approval of LEF trust documents, the definition of prohibited donors, and the submission of quarterly, publicly available reports. As a result of

these requirements, as well as the increased public reporting requirements, the public will have increased confidence in the decision-making of executive branch employees who accept gifts of legal expenses consistent with the new proposed subpart J.

*Executive Order 12988*

As Director of the Office of Government Ethics, I have reviewed this final rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

*Executive Order 13175*

The Office of Government Ethics has evaluated this final rule under the criteria set forth in Executive Order 13175 and determined that tribal consultation is not required as this proposed rule has no substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

**List of Subjects**

*5 CFR Part 2634*

Certificates of divestiture, Conflict of interests, Financial disclosure, Government employees, Penalties, Privacy, Reporting and recordkeeping requirements, Trusts and trustees.

*5 CFR Part 2635*

Conflict of interests, Executive branch standards of ethical conduct, Government employees.

Approved: May 10, 2023.

**Emory Rounds,**

*Director, U.S. Office of Government Ethics.*

For the reasons set forth in the preamble, the U.S. Office of Government Ethics amends 5 CFR parts 2634 and 2635 as follows:

**PART 2634—EXECUTIVE BRANCH FINANCIAL DISCLOSURE, QUALIFIED TRUSTS, AND CERTIFICATES OF DIVESTITURE**

■ 1. The authority citation for part 2634 is revised to read as follows:

**Authority:** 5 U.S.C. 13101 *et. seq.*; 26 U.S.C. 1043; Pub. L. 101–410, 104 Stat. 890, 28 U.S.C. 2461 note, as amended by Sec. 31001, Pub. L. 104–134, 110 Stat. 1321 and Sec. 701, Pub. L. 114–74; Pub. L. 112–105, 126 Stat. 291; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

■ 2. Amend § 2634.907 by:

- a. Revising paragraph (g)(5); and
- b. Designating the example following paragraph (g)(5) as Example 1 to paragraph (g).

The revision reads as follows:

**§ 2634.907 Report contents.**

\* \* \* \* \*

(g) \* \* \*

(5) *Exceptions.* Reports need not contain any information about:

(i) Gifts and travel reimbursements received from relatives (see § 2634.105(o)).

(ii) Gifts and travel reimbursements received during a period in which the filer was not an officer or employee of the Federal Government.

(iii) Any food, lodging, or entertainment received as “personal hospitality of any individual,” as defined in § 2634.105(k).

(iv) Any payments for legal expenses from a legal expense fund or the provision of *pro bono* legal services, as defined in subpart J of part 2635 of this chapter, or any payments for legal expenses or the provision of *pro bono* legal services that otherwise qualify for a gift exclusion or gift exception in subpart B of part 2635 of this chapter, if the confidential filer is an anonymous whistleblower as defined by § 2635.1003 of this chapter.

(v) Any exclusions specified in the definitions of “gift” and “reimbursement” at § 2634.105(h) and (n).

\* \* \* \* \*

**PART 2635—STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH**

■ 3. The authority citation for part 2635 is revised to read as follows:

**Authority:** 5 U.S.C. 7301, 7351, 7353; 5 U.S.C. 13101 *et. seq.*; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

■ 4. Amend § 2635.203 by adding paragraphs (h) and (i) to read as follows:

**§ 2635.203 Definitions.**

\* \* \* \* \*

(h) *Legal expense fund* has the meaning set forth in § 2635.1003.

(i) *Pro bono legal services* has the meaning set forth in § 2635.1003.

■ 5. Amend § 2635.204 by:

■ a. Removing the word “or” at the end of paragraph (c)(2)(ii);

■ b. Removing the period at the end of paragraph (c)(2)(iii) and adding “; or” in its place; and

■ c. Adding paragraph (c)(2)(iv), Example 4 to paragraph (c)(2), and paragraph (n).

The additions read as follows:

**§ 2635.204 Exceptions to the prohibition for acceptance of certain gifts.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(iv) Offered to employees by an established employee organization, such as an association composed of Federal employees or a nonprofit employee welfare organization, because of the employees’ Government employment, so long as the employee is part of the class of individuals eligible for assistance from the employee organization as set forth in the organization’s governing documents.

\* \* \* \* \*

*Example 4 to paragraph (c)(2):* A nonprofit military relief society provides access to financial counseling services, loans, and grants to all sailors and Marines. A service member may accept financial benefits from the relief society, including to cover legal expenses, because the benefits are offered by an employee organization that was established before the legal matter arose, and because the benefits are being offered because of the employees’ Government employment, as set forth in the relief society’s governing documents.

\* \* \* \* \*

(n) *Legal expense funds and pro bono legal services.* An employee who seeks legal representation for a matter arising in connection with the employee’s past or current official position, the employee’s prior position on a campaign of a candidate for President or Vice President, or the employee’s prior position on a Presidential Transition Team may accept:

(1) Payments for legal expenses paid out of a legal expense fund that is established and operated in accordance with subpart J of this part; and

(2) *Pro bono* legal services provided in accordance with subpart J of this part.

■ 6. Add subpart J to read as follows:

**Subpart J—Legal Expense Funds**

- Sec. 2635.1001 Overview.
- 2635.1002 Applicability and related considerations.
- 2635.1003 Definitions.
- 2635.1004 Establishment.
- 2635.1005 Administration.
- 2635.1006 Contributions and use of funds.
- 2635.1007 Reporting requirements.
- 2635.1008 Termination of a legal expense fund.
- 2635.1009 *Pro bono* legal services.

**§ 2635.1001 Overview.**

This subpart contains standards for an employee’s acceptance of payments for

legal expenses through a legal expense fund and an employee's acceptance of *pro bono* legal services. Legal expenses covered by this subpart are those for a matter arising in connection with the employee's past or current official position, the employee's prior position on a campaign of a candidate for President or Vice President, or the employee's prior position on a Presidential Transition Team.

**§ 2635.1002 Applicability and related considerations.**

(a) *Applicability.* This subpart applies to an employee who seeks to accept payments for legal expenses from a legal expense fund or the provision of *pro bono* legal services. The legal expenses or the provision of *pro bono* legal services must be for a matter arising in connection with the employee's past or current official position, the employee's prior position on a campaign of a candidate for President or Vice President, or the employee's prior position on a Presidential Transition Team.

(b) *Not covered by this subpart.* The following types of payments for legal expenses or *pro bono* legal services are not covered by this subpart:

(1) *Personal matters.* Payments for legal expenses or the provision of *pro bono* legal services related to matters that do not arise in connection with the employee's past or current official position, the employee's prior position on a campaign of a candidate for President or Vice President, or the employee's prior position on a Presidential Transition Team, such as a matter that is primarily personal in nature, are not covered by this subpart. Personal matters include, but are not limited to, tax planning, personal injury litigation, protection of property rights, family law matters, and estate planning or probate matters.

*Example 1 to paragraph (b)(1):* A Department of Homeland Security employee wants to set up a legal expense fund in connection with the employee's divorce and custody proceeding. This is a personal matter and the employee may not establish a legal expense fund under this subpart, but may use other gift exceptions and exclusions in accordance with subparts B and C of this part as appropriate.

(2) *Gifts acceptable according to a gift exclusion or exception.* Payments for legal expenses or the provision of *pro bono* legal services that otherwise qualify for a gift exclusion or exception other than § 2635.204(n) are not covered by this subpart.

*Example 1 to paragraph (b)(2):* A Central Intelligence Agency employee is

facing administrative disciplinary action due to an issue with the employee's security clearance and would like to seek financial assistance to pay for an attorney. Even though this matter arose in connection with their official position, if the employee's parents offer to cover the legal expenses, that donation is not subject to this subpart, as it would be subject to the gift exception at § 2635.204(b).

**Note 1 to paragraph (b):** Acceptance of legal expense payments or *pro bono* legal services not covered by this subpart must be analyzed under subparts B and C of this part.

(c) *Related considerations—(1) Gifts between employees.* Acceptance of legal expense payments or the provision of *pro bono* legal services from another employee must be analyzed under 18 U.S.C. 205 and subpart C of this part.

(2) *Impartiality.* (i) An employee beneficiary may not knowingly participate in a particular matter involving specific parties, consistent with the periods of disqualification detailed in paragraph (c)(2)(ii) of this section, if any person described below is a party or represents a party:

(A) The trustee;

(B) An individual, entity, or organization donating *pro bono* legal services pursuant to § 2635.1009 (*pro bono* legal services provider); or

(C) An individual or entity that made a donation of \$250 or more in a calendar year to the legal expense fund.

(ii) The employee beneficiary's period of disqualification from particular matters involving specific parties involving the trustee runs from the assumption of the trustee position until two years after the trustee's resignation, if the trustee resigns, or two years after the termination of the trust. The employee's period of disqualification from particular matters involving specific parties involving each *pro bono* legal services provider runs from the commencement of *pro bono* legal services until two years after the last date *pro bono* services were provided. The period of disqualification for each donor begins to run on the date the most recent legal expense fund donation is received from that donor until two years after the donation.

*Example 1 to paragraph (c)(2):* A donor contributed to a Social Security Administration (SSA) employee's legal expense fund. Three months after this contribution was made, the donor submitted a disability claim. The employee may not participate in evaluating the disability claim because the claim falls within the two-year mandatory recusal period.

(3) *Misuse of position.* Legal expense fund payments must be solicited and accepted consistent with the provisions in subpart G of this part relating to the use of public office for private gain, use of nonpublic information, use of Government property, and use of Government time. The mere reference to the employee's official position in a solicitation would generally not violate subpart G of this part.

*Example 1 to paragraph (c)(3):* A Transportation Security Administration (TSA) employee retains legal counsel due to an investigation into inappropriate behavior in their department, and the employee establishes a legal expense fund in accordance with this subpart. Neither the employee nor the legal expense fund's trustee may use the TSA agency seal in materials or otherwise imply the Government endorses the legal expense fund, or use nonpublic details of the investigation to solicit contributions to the legal expense fund. Agency seals frequently are protected by law or require licensing for use. Further, the employee may not task subordinates with any work relating to administration of the legal expense fund. However, the employee may note in a solicitation that they are an employee of TSA, and that the matter arose in the course of their official duties.

(4) *Financial disclosure.* In addition to the legal expense fund reporting requirements outlined in § 2635.1007, an employee beneficiary who is a public or confidential filer, other than a confidential filer who is an anonymous whistleblower, under part 2634 of this chapter must report gifts of legal expense payments accepted from sources other than the United States Government, including gifts of *pro bono* services, on the employee's financial disclosure report, subject to applicable thresholds and exclusions.

**§ 2635.1003 Definitions.**

For purposes of this subpart:

*Anonymous whistleblower* means an employee who makes or intends to make a disclosure or report, or who engages in an activity protected under 5 U.S.C. 2302(b)(8), 5 U.S.C. 2302(b)(9), 5 U.S.C. 416, 50 U.S.C. 3517, 50 U.S.C. 3033, or 28 CFR 27.1, and who seeks to remain anonymous.

*Arising in connection with the employee's past or current official position* means the employee's involvement in the legal matter would not have arisen had the employee not held the status, authority, or duties associated with the employee's past or current Federal position.

*Example 1 to the definition of “arising in connection with the employee’s past or current official position”:* A

Department of Transportation employee is being investigated by the Inspector General for potential misuse of Government resources while on official travel. The Internal Revenue Service (IRS) is separately investigating the employee for misreporting household income on the employee’s personal taxes. The employee may use this subpart to establish a legal expense fund concerning the Inspector General investigation because the legal matter arose in connection with their official position. However, this subpart would not apply to the unrelated IRS investigation because that legal matter did not arise in connection with the employee’s official position.

*Example 2 to the definition of “arising in connection with the employee’s past or current official position”:* A junior employee at the Environmental Protection Agency is challenging their proposed termination due to misuse of Government property. All of the employee’s alleged misconduct occurred outside official duty hours. Because the employee would not be subject to the Standards of Conduct had the employee not held their official position, the employee may establish a legal expense fund in accordance with this subpart.

*Arising in connection with the employee’s prior position on a campaign* means the employee’s involvement in the legal matter would not have arisen had the employee not held the status, authority, or duties associated with the employee’s prior position on a campaign of a candidate for President or Vice President.

*Arising in connection with the employee’s prior position on a Presidential Transition Team* means the employee’s involvement in the legal matter would not have arisen had the employee not held the status, authority, or duties associated with the employee’s prior position as a member of the staff of a Presidential Transition Team.

*Employee beneficiary* means an employee as defined by § 2635.102(h) for whose benefit a legal expense fund is established under this subpart.

*Legal expense fund* means a fund established to receive contributions and to make distributions of legal expense payments.

*Legal expense payment or payment for legal expenses* means anything of value received by an employee under circumstances that make it clear that the payment is intended to defray costs associated with representation in a

legal, congressional, or administrative proceeding.

*Pro bono legal services* means legal services provided without charge or for less than market value as defined in § 2635.203(c) to an employee who seeks legal representation for a matter arising in connection with the employee’s past or current official position, the employee’s prior position on a campaign of a candidate for President or Vice President, or the employee’s prior position on a Presidential Transition Team.

#### **§ 2635.1004 Establishment.**

(a) *Structure.* A legal expense fund must be established as a trust that conforms to the requirements of this part and applicable state law. To the extent the requirements of this part and applicable state law are incompatible, the Director of the Office of Government Ethics may permit such deviations from this part as necessary to ensure compatibility with applicable state law.

(b) *Grantor.* The legal expense fund must be established by the employee beneficiary.

(c) *Trustee.* A legal expense fund must be administered by a trustee who is not:

(1) The employee beneficiary;

(2) A spouse, parent, or child of the employee beneficiary;

(3) Any other employee of the Federal executive, legislative, or judicial branches;

(4) An agent of a foreign government as defined in 5 U.S.C. 7342(a)(2);

(5) A foreign national;

(6) A lobbyist as defined by 2 U.S.C. 1602(10) who is currently registered pursuant to 2 U.S.C. 1603(a); or

(7) A person who has interests that may be substantially affected by the performance or nonperformance of the employee beneficiary’s official duties.

(d) *Employee beneficiary.* (1) Except as provided in paragraph (d)(2) of this section, a legal expense fund must be established for the benefit of a single, named employee beneficiary.

(2) A legal expense fund for the benefit of an anonymous whistleblower may be established without disclosing the identity of the anonymous whistleblower to anyone other than the trustee so long as the legal expense fund is created for the purpose of funding expenses in connection with the whistleblowing activity or the facts that underlie that activity.

(e) *Filing and approval of legal expense fund trust document required.* An employee beneficiary may not solicit or accept contributions or make distributions through a legal expense fund before:

(1) Filing the legal expense fund document in accordance with paragraph (f) of this section; and

(2) Receiving approval for the legal expense fund in accordance with paragraph (g)(1) or (g)(3) of this section.

(f) *Filing of legal expense fund trust document.* (1) The employee beneficiary, or the trustee or representative of the employee beneficiary, must file the legal expense fund trust document with the designated agency ethics official at the agency where the employee beneficiary is employed.

(2) An employee beneficiary who is an anonymous whistleblower may choose to file a legal expense fund trust document anonymously through the employee beneficiary’s trustee or representative with the Office of Government Ethics only. The Office of Government Ethics will not receive reports containing classified material; if needed, an OGE employee with a security clearance will review any classified documents in a secure agency space, consistent with the current practice for other ethics documents containing classified material.

(g) *Approval of legal expense fund trust document.* (1) *Designated agency ethics official approval.* The designated agency ethics official must determine, based on the submitted trust document and information regarding the trustee, whether to approve a legal expense fund trust document filed by an employee beneficiary, other than an anonymous whistleblower choosing to file with the Office of Government Ethics, within 30 calendar days of filing.

(i) *Standard for approval.* The designated agency ethics official must approve a legal expense fund that is, based on the submitted trust document and information regarding the trustee, in compliance with this subpart.

(ii) *Transmission of trust documents to the Office of Government Ethics.* Following approval, the signed legal expense fund trust document must be forwarded to the Office of Government Ethics within seven calendar days.

(iii) *Exception for anonymous whistleblowers.* The Office of Government Ethics will serve as the approving authority for anonymous whistleblowers who choose to file a legal expense fund trust document anonymously with the Office of Government Ethics only.

(2) *Office of Government Ethics review.* Following approval by the designated agency ethics official, the Office of Government Ethics will conduct a secondary review of the legal expense fund trust documents of the employee beneficiaries listed in

paragraph (g)(2)(ii) of this section within 30 calendar days of receipt.

(i) *Standard for review.* The Office of Government Ethics will review the legal expense fund trust document to determine whether it conforms to the requirements established by this subpart. If defects are ascertained, the Office of Government Ethics will bring them to the attention of the approving agency and the employee beneficiary or the employee beneficiary's trustee or representative, who will have 30 calendar days to take necessary corrective action.

(ii) *Employee beneficiaries requiring secondary Office of Government Ethics review.* The Office of Government Ethics will review the legal expense fund trust documents of the following employee beneficiaries:

(A) The Postmaster General;  
 (B) The Deputy Postmaster General;  
 (C) The Governors of the Board of Governors of the United States Postal Service;  
 (D) Employees of the White House Office and the Office of the Vice President; and

(E) Officers and employees in offices and positions which require confirmation by the Senate, other than members of the uniformed services and Foreign Service Officers below the rank of Ambassador.

(3) *Review for designated agency ethics officials.* When the employee beneficiary is a designated agency ethics official, the Office of Government Ethics will conduct the sole review and approval. The Office of Government Ethics will review the legal expense fund trust document to determine whether it conforms to the requirements established by this subpart.

(4) *Right to Appeal.* If the approval of a legal expense fund has been denied, or an employee's legal expense fund request has not been acted upon within 30 days, the requester may appeal by mail or email to the Director of the U.S. Office of Government Ethics. Requests sent by mail should be addressed to the address for the Office of Government Ethics that can be found at [www.oge.gov](http://www.oge.gov). The envelope containing the request and the letter itself should both clearly indicate that the subject is a legal expense fund appeal. Email requests should be sent to [LEF@oge.gov](mailto:LEF@oge.gov) and should indicate in the subject line that the message contains a legal expense fund appeal. Appeals should be submitted within 60 days of denial by the designated agency ethics official or 90 days of submission to the designated agency ethics official, in the case of a request that has not been acted upon. In the case of legal expense funds for

anonymous whistleblowers and designated agency ethics officials, OGE staff will conduct the initial review, and the Director will serve as the appeal authority.

(h) *Amendments.* The trust document may only be amended if the trustee and employee beneficiary file the amended legal expense fund trust document in accordance with paragraph (f) of this section and seek approval in accordance with paragraph (g) of this section.

(i) *One legal expense fund.* No employee beneficiary may establish or maintain more than one legal expense fund at any one time. An employee may not later establish a second legal expense fund for the same legal matter.

(j) *Conforming existing legal expense funds.* In order for an employee beneficiary who has an existing legal expense fund to receive legal expense payments from the existing legal expense fund, the employee beneficiary must comply with §§ 2635.1005(b), 2635.1006, and 2635.1007 by February 20, 2024.

(k) *Public access.* Approved legal expense fund trust documents will be made available by the Office of Government Ethics to the public on its website within 30 calendar days of receipt. The trust fund documents will be sortable by employee beneficiary's name, agency, and position, as well as type of document and document date. Legal expense fund trust documents filed by anonymous whistleblowers will not be made available to the public. Legal expense fund trust documents that are made available to the public will not include any information that would identify individuals whose names or identities are otherwise protected from public disclosure by law. Only sensitive personal information such as fee schedules, personal addresses, and account numbers will be redacted.

#### § 2635.1005 Administration.

(a) *Trustee's duties and powers.* A trustee of a legal expense fund is responsible for:

(1) Operating the legal expense fund trust consistent with this part and applicable state law;

(2) Operating as a fiduciary for the employee beneficiary in relation to the legal expense fund property and the legal expense fund purpose;

(3) Providing information to the employee beneficiary as necessary to comply with the Ethics in Government Act, 5 U.S.C. 13104(a)(2), part 2634 of this chapter, and this part; and

(4) Notifying donors and payees whose contributions and distributions, respectively, are reportable that their

names will be disclosed on the OGE website.

(b) *Limitation on role of the employee beneficiary.* An employee beneficiary may not exercise control over the legal expense fund property.

#### § 2635.1006 Contributions and use of funds.

(a) *Contributions.* A legal expense fund may only accept contributions of payments for legal expenses from permissible donors listed in paragraph (b) of this section.

(b) *Permissible donors.* A permissible donor includes:

(1) An individual who is not:

(i) An agent of a foreign government as defined in 5 U.S.C. 7342(a)(2);

(ii) A foreign national;

(iii) A lobbyist as defined by 2 U.S.C. 1602(10) who is currently registered pursuant to 2 U.S.C. 1603(a);

(iv) Acting on behalf of, or at the direction of, another individual or entity in making a donation;

(v) Donating anonymously;

(vi) Seeking official action by the employee beneficiary's agency;

(vii) Doing business or seeking to do business with the employee beneficiary's agency;

(viii) Conducting activities regulated by the employee beneficiary's agency other than regulations or actions affecting the interests of a large and diverse group of persons;

*Example 1 to paragraph (b)(1)(viii):* A donor contributed to a Department of State employee's legal expense fund. The donor has recently applied to renew their United States Passport. Because the Department of State's passport renewal office affects the interests of a large and diverse group of people, the donation is permissible under paragraph (b)(1)(viii) of this section.

(ix) Substantially affected by the performance or nonperformance of the employee beneficiary's official duties; or

(x) An officer or director of an entity that is substantially affected by the performance or nonperformance of the employee beneficiary's official duties.

(2) A national committee of a political party as defined by 52 U.S.C. 30101(14) and (16) or, for former members of a campaign of a candidate for President or Vice President, the campaign, provided that the donation is not otherwise prohibited by law and the entity is not substantially affected by the performance or nonperformance of an employee beneficiary's official duties; or

(3) An organization, established for more than two years, that is:

(i) Described in section 501(c)(3) of the Internal Revenue Code and exempt from taxation under section 501(a) of the Internal Revenue Code, and

(ii) not substantially affected by the performance or nonperformance of an employee beneficiary's official duties.

**Note 1 to paragraph (b):** Acceptance of a legal expense payment from another employee must be analyzed under subpart C of this part.

(c) *Contribution limits.* A legal expense fund may not accept more than \$10,000 from any single permissible donor per calendar year.

**Note 2 to paragraph (c):** As discussed in § 2635.1002(b)(2), payments for legal expenses or the provision of *pro bono* legal services that otherwise qualify for a gift exclusion or exception other than § 2635.204(n) in subpart B of this part are not covered by this subpart.

(d) *Use of funds.* Legal expense fund payments must be used only for the following purposes:

(1) An employee beneficiary's expenses related to those legal proceedings arising in connection with the employee's past or current official position, the employee's prior position on a campaign of a candidate for President or Vice President, or the employee's prior position on a Presidential Transition Team;

(2) Expenses incurred in soliciting for and administering the fund; and

(3) Expenses for the discharge of Federal, state, and local tax liabilities that are incurred as a result of the creation, operation, or administration of the fund.

*Example 1 to paragraph (d):* An employee beneficiary's attorney determines it is necessary to employ an expert witness related to a legal proceeding arising in connection with the employee beneficiary's official position. Funds may be distributed from the legal expense fund to pay fees and expenses for the expert witness.

#### **§ 2635.1007 Reporting requirements.**

(a) *Quarterly reports.* An employee beneficiary must file quarterly reports that include the following information until the trust is terminated or an employment termination report is filed as set forth in paragraph (d) of this section.

(1) *Contributions.* For contributions of \$250 or more during the quarterly reporting period, an employee beneficiary must report the donor's name, city and state of residence, employer, date(s) of contribution, and contribution amount. For the report due January 30, an employee beneficiary must also disclose contributions from a single donor of \$250 or more for the prior calendar year unless the contributions have been disclosed on a prior quarterly report.

(2) *Distributions.* For distributions of \$250 or more during the quarterly reporting period, an employee beneficiary must report the payee's name, date(s) of distribution, amount, and purpose of the distribution. For the report due January 30, an employee beneficiary must also disclose distributions to a single source of \$250 or more for the prior calendar year unless the distributions have been disclosed on a prior quarterly report.

(b) *Filing of reports.* (1) The employee beneficiary must file all reports required in this section with the designated agency ethics official at the agency where the employee beneficiary is employed. The trustee or a representative of the employee beneficiary may file a report on behalf of the employee beneficiary.

(2) An employee beneficiary who is an anonymous whistleblower may choose to file reports anonymously through the employee beneficiary's trustee or representative with the Office of Government Ethics. The Office of Government Ethics will not receive reports containing classified material; if needed, an OGE employee with a security clearance will review any classified documents in a secure agency space, consistent with the current practice for other ethics documents containing classified material.

(c) *Reporting periods and due dates.* Quarterly reports must cover the following reporting periods and comply with the following due dates:

(1) January 1 to March 31, with the report due on April 30.

(2) April 1 to June 30, with the report due on July 30.

(3) July 1 to September 30, with the report due on October 30.

(4) October 1 to December 31, with the report due on January 30 of the following year.

(5) If the scheduled due date falls on a Saturday, Sunday or Federal Holiday, the report will instead be due the next business day.

(d) *Employment termination report.* If the employee beneficiary is leaving executive branch employment, the employee beneficiary must file an employment termination report no later than their last day of employment. No contributions may be accepted for or distributions paid by the legal expense fund between the date of the filing and the employee beneficiary's termination date. The report must include the following:

(1) A report of contributions received and distributions made as required by paragraph (a) of this section between the end of the last quarterly reporting period and the date of the report; and

(2) A statement as to whether the trust will be terminated or remain in force after the employee beneficiary terminates their executive branch employment.

(e) *Extensions.* For each quarterly report, a single extension of 30 calendar days may be granted by the employee beneficiary's designated agency ethics official, or the Director of the Office of Government Ethics if filing with the Office of Government Ethics, for good cause upon written request by the employee beneficiary or the trustee.

(f) *Review of reports.* (1) *Designated agency ethics official review.* The designated agency ethics official must review reports within 30 calendar days of filing.

(i) *Standard for review.* The designated agency ethics official will review the report to determine that:

(A) The information required under paragraph (a) of this section is reported for each contribution and distribution; and

(B) Contributions to and distributions from the trust are in compliance with § 2635.1006.

(ii) *Transmission of reports to the Office of Government Ethics.* Following review, all reports must be forwarded in unclassified format to the Office of Government Ethics within seven calendar days.

(iii) *Office of Government Ethics review for anonymous whistleblowers.* The Office of Government Ethics will serve as the reviewing authority for anonymous whistleblowers who choose to file reports anonymously with the Office of Government Ethics only.

(2) *Office of Government Ethics review.* Following review by the designated agency ethics official, the Office of Government Ethics will conduct a secondary review of the reports of the employee beneficiaries listed in paragraph (f)(2)(ii) of this section within 30 calendar days of receipt.

(i) *Standard for review.* The Office of Government Ethics will review the report to determine whether it conforms to the requirements established by this subpart. If defects are ascertained, the Office of Government Ethics will bring them to the attention of the reviewing agency and the employee beneficiary or the employee beneficiary's trustee or representative, who will have 30 calendar days to take necessary corrective action.

(ii) *Employee beneficiaries requiring secondary Office of Government Ethics review.* The Office of Government Ethics will review the reports of the following employee beneficiaries:

(A) The Postmaster General;

(B) The Deputy Postmaster General;  
(C) The Governors of the Board of Governors of the United States Postal Service;

(D) Employees of the White House Office and the Office of the Vice President; and

(E) Officers and employees in offices and positions which require confirmation by the Senate, other than members of the uniformed services and Foreign Service Officers below the rank of Ambassador.

(3) *Review for designated agency ethics official.* When the employee beneficiary is a designated agency ethics official, the Office of Government Ethics will conduct the sole review. OGE will review the report to determine that:

(i) The information required under paragraph (a) of this section is reported for each contribution and distribution; and

(ii) Contributions to and distributions from the trust are in compliance with § 2635.1006.

(g) *Public access.* Quarterly and employment termination reports will be made available by the Office of Government Ethics to the public on its website within 30 calendar days of receipt. The reports will be sortable by employee beneficiary's name, agency, and position, as well as type of document and document date. Quarterly and employment termination reports that are made available to the public by the Office of Government Ethics will not include any information that would identify individuals whose names or identities are otherwise protected from public disclosure by law. The reports filed by anonymous whistleblowers will not be made available to the public.

(h) *Noncompliance.* (1) *Receipt of impermissible contributions.* If the legal expense fund receives a contribution that is not permissible under § 2635.1006, the contribution must be returned to the donor as soon as practicable but no later than the next reporting due date as described in paragraph (c) of this section. If the donation cannot be returned to the donor due to the donor's death or the trustee's inability to locate the donor, then the contribution must be donated to a 501(c)(3) organization meeting the requirements in § 2635.1008(c).

(2) *Late filing of required documents and reports.* If a report or other required document is filed after the due date, the employee beneficiary forfeits the ability to accept contributions or make distributions through the trust until the report or other required document is filed.

*Example 1 to paragraph (h)(2):* A Department of Labor employee

establishes a legal expense fund in accordance with this subpart. Because the employee filed the trust document on February 15, the first quarterly report is due on April 30. However, the employee did not submit the first quarterly report until May 15. The employee is prohibited from accepting contributions or making distributions through the trust from May 1 until May 15. Once the employee files the quarterly report, the employee may resume accepting contributions and making distributions.

(3) *Continuing or other significant noncompliance.* In addition to the remedies in paragraphs (h)(1) and (2) of this section, the Office of Government Ethics has the authority to determine that an employee beneficiary may not accept contributions and make distributions through the trust or terminate the trust if there is continuing or other significant noncompliance with this subpart.

#### **§ 2635.1008 Termination of a legal expense fund.**

(a) *Voluntary termination.* A legal expense fund may be voluntarily terminated only for the following reasons:

(1) The purpose of the trust is fulfilled or no longer exists; or

(2) At the direction of the employee beneficiary.

(b) *Mandatory termination.* An employee's legal expense fund must be terminated within 90 days of the resolution of the legal matter for which the legal expense fund was created or within 90 days of the last expenditure made in relation to the legal matter for which it was created, whichever is later.

(c) *Excess funds.* Within 90 calendar days of termination of the legal expense fund, the trustee must distribute any excess funds to an organization or organizations described in section 501(c)(3) of the Internal Revenue Code and exempt from taxation under section 501(a) of the Internal Revenue Code. Funds from the legal expense fund may not be donated to an organization that was established by the trustee or the employee beneficiary, an organization in which the trustee or the employee beneficiary, their spouse, or their child is an officer, director, or employee, or an organization with which the employee has a covered relationship within the meaning of § 2635.502(b)(1). The trustee has sole discretion to select the 501(c)(3) organization. If practicable, the trustee may return the excess funds to the donors on a pro-rata basis rather than donating the funds to a 501(c)(3) organization.

(d) *Trust termination report.* After the trust is terminated, the employee beneficiary must file a trust termination report that contains the information required by § 2635.1007(d)(1) for the period of the last quarter report through the trust termination date. The report also must indicate the organization to which the excess funds were donated or if the excess funds were returned to donors. The report is due 30 calendar days following the termination date of the trust. Trust termination reports should be filed in accordance with the procedures outlined in § 2635.1007(b).

(e) *Exception for anonymous whistleblowers.* An employee beneficiary who is an anonymous whistleblower may choose to file the trust termination report anonymously through the employee beneficiary's trustee or representative with the Office of Government Ethics.

#### **§ 2635.1009 Pro bono legal services.**

(a) *Acceptance of permissible pro bono legal services.* An employee may solicit or accept the provision of *pro bono* legal services for legal matters arising in connection with the employee's past or current official position, the employee's prior position on a campaign of a candidate for President or Vice President, or the employee's prior position on a Presidential Transition Team from:

(1) Any individual who:

(i) Is not an agent of a foreign government as defined in 5 U.S.C. 7342(a)(2);

(ii) Is not a foreign national;

(iii) Is not a lobbyist as defined by 2 U.S.C. 1602(10) who is currently registered pursuant to 2 U.S.C. 1603(a); and

(iv) Does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties; and

(2) An organization or entity that does not have interests that may be substantially affected by the performance or nonperformance of an employee's official duties.

**Note 1 to paragraph (a):** Pursuant to § 2634.907(g) of this chapter, an employee who is a public or confidential filer under part 2634 of this chapter must report gifts of *pro bono* legal services on the employee's financial disclosure report, subject to applicable thresholds and exclusions.

(b) *Provision of outside legal services.* An employee may solicit or accept payment for legal services for legal matters arising in connection with the employee's past or current official position, the employee's prior position on a campaign of a candidate for

President or Vice President, or the employee's prior position on a Presidential Transition Team from an organization, established for more than two years, that is described in section 501(c)(3) of the Internal Revenue Code and exempt from taxation under section 501(a) of the Internal Revenue Code. The organization, the legal services provider that the organization pays for legal services, and the individual attorney providing legal services must meet the requirements described in paragraph (a) of this section. The term "pro bono services" includes the provision of outside legal services as described in this section.

(c) *Role of designated agency ethics official.* The designated agency ethics official must determine whether the organization, the legal services provider that the organization pays for legal services, and the individual attorney providing legal services meet the requirements described in paragraph (a) of this section.

*Example 1 to paragraph (c):* A Department of Justice employee is an eyewitness in an Inspector General investigation and is called to testify before Congress. A local law firm offers to represent the employee at no cost. The employee consults with an agency ethics official, who determines that the attorney who would represent the employee is neither an agent of a foreign government nor a lobbyist. However, the law firm is representing a party in a case to which the employee is assigned. The ethics official determines that the law firm is a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. Accordingly, the employee may not accept the offer of pro bono legal services from the law firm.

*Example 2 to paragraph (c):* A Securities and Exchange Commission employee is harassed by a supervisor and files a complaint. A nonprofit legal aid organization focusing on harassment cases offers pro bono legal services to the employee at no cost. The employee consults with an agency ethics official, who determines that the attorney who would represent the employee is neither an agent of a foreign government nor a lobbyist, and neither the attorney nor the nonprofit legal aid organization has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. Accordingly, the employee may accept the offer of pro bono legal services from the nonprofit legal aid organization.

*Example 3 to paragraph (c):* A registered 501(c)(3) organization whose

mission focuses on assisting those experiencing workplace harassment offers to pay for legal services for the Securities and Exchange Commission employee from the preceding example. The legal services themselves are performed by attorneys outside the organization. The employee confers with an agency ethics official who determines that the 501(c)(3) organization has been in operation for more than two years, neither the organization nor the attorneys performing legal services have interests that may be substantially affected by the performance or nonperformance of the employee's official duties, and the attorneys performing the legal services are neither agents of foreign governments nor lobbyists. Accordingly, the employee may accept the legal services even though they are provided by attorneys outside of the 501(c)(3) organization.

*Example 4 to paragraph (c):* A Department of State employee is asked to testify in a legal proceeding relating to a prior position at the Department of Justice. An attorney at a large national law firm offers pro bono services to the employee. The employee confers with an agency ethics official who determines that although the attorney offering representation is neither an agent of a foreign government nor a lobbyist, the law firm is currently registered pursuant to 2 U.S.C. 1603(a), some members of the firm are registered lobbyists, and the firm has business before other parts of the Department of State. However, neither the attorney nor the law firm has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. Accordingly, the employee may accept the offer of pro bono legal services.

(d) *Appeal process.* An employee may appeal to the Office of Government Ethics in matters when the agency is the party opponent in the legal action. An employee may appeal the designated agency ethics official's determination that the pro bono legal services are prohibited; or a failure by the designated agency ethics official to provide a determination regarding whether the pro bono legal services are prohibited within 30 days. Appeals should be submitted within 60 days of denial by the designated agency ethics official, or within 90 days of submission to the designated agency ethics official, in the case of a request that has not been acted upon.

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 205

[Doc. No. AMS-NOP-19-0106; NOP-19-03]

RIN 0581-AD98

#### National Organic Program; National List of Allowed and Prohibited Substances (2022 Sunset); Correction

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Correcting amendment.

**SUMMARY:** On February 28, 2022, the Agricultural Marketing Service (AMS) published a rule removing sixteen substances from the National List of Allowed and Prohibited Substances (National List). That document accidentally omitted nonorganic whey protein concentrate from the amendatory instructions. This document corrects the amendatory language, removing nonorganic whey protein concentrate from the National List, as intended in the previous document.

**DATES:**

*Effective:* May 25, 2023.

*Compliance:* Use of nonorganic whey protein concentrate in organic products is prohibited after March 15, 2024.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** A final rule published in the **Federal Register** on February 28, 2022 (87 FR 10930) removed substances from the National List following the procedures detailed in the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501-6524). Removing these substances implements recommendations from the National Organic Standards Board and effectively prohibits their use in organic production.

One change discussed in the final rule was removing nonorganic whey protein concentrate from the National List. While the rule discussed this change and the justification, the rule's instructions for changing the regulation did not include the removal. This document corrects this by removing the entry for whey protein concentrate at 7 CFR 205.606(x). As discussed in the final rule, use of nonorganic whey protein concentrate in organic products is prohibited after March 15, 2024.