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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
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SUBJECT: Clarification of Past Legal Defense Fund Guidance Provided in OGE Informal Advisory Opinion 93x21

This Legal Advisory is being issued by the U.S. Office of Government Ethics (OGE) to clarify OGE’s advice concerning legal defense funds established to provide for the legal expenses of executive branch employees. Specifically, this Legal Advisory makes clear that the discussion in OGE Informal Advisory Opinion 93x21 concerning the acceptance of donations from anonymous sources does not, and has not, reflected OGE’s views since shortly after the issuance of that opinion. Although there is no statutory or regulatory framework providing for the manner in which a legal defense fund may be established for an employee, such a fund must be operated consistent with the ethics rules. This includes rules regarding the acceptance of gifts from outside sources and from other employees found in the Standards of Conduct for Employees of the Executive Branch at 5 C.F.R. Part 2635, Subparts B and C; the criminal conflict of interest statutes at 18 U.S.C. §§ 201-209; the public financial disclosure requirements in the Ethics in Government Act of 1978, 5 U.S.C. app. § 101 *et seq.*; and the lobbyist gift ban in Executive Order 13770, sec. 1, para. 5. Accordingly, OGE has been advising, and is continuing to advise, that the instruments establishing legal defense funds include a clause stating that “contributions shall not be accepted from anonymous sources.”

OGE previously issued two informal advisory opinions addressing whether particular legal defense funds would violate the prohibition against supplementation of salary in 18 U.S.C. § 209. *See* OGE Inf. Adv. Op. 85x19 (1985); OGE Inf. Adv. Op. 93x21 (1993). In OGE Informal Advisory Opinion 85x19, OGE concluded that section 209 may be implicated by payments made to an employee’s legal defense fund. Eight years later, OGE revisited this issue in light of *Crandon v. United States*, 494 U.S. 152 (1990). In OGE Informal Advisory Opinion 93x21, OGE significantly narrowed the circumstances under which a payment to a legal defense fund may implicate section 209. Specifically, OGE found that section 209 was not violated in the particular situation presented, concluding, “[i]f the employee’s defense is not part of his work, then



accepting contributions from a legal defense fund would not be ‘as compensation for services’” prohibited by section 209. OGE Inf. Adv. Op. 93x21. This conclusion has not changed.¹

At the same time, OGE Informal Advisory Opinion 93x21 also discussed the idea that the identity of the donors “should” be concealed from the beneficiary of the fund, though not required, because the employee will be unable to favor the anonymous donors. *Id.* Shortly after this guidance was issued, however, OGE recognized that donor anonymity may be difficult to enforce in practice because there is nothing to prevent a donor disclosing to the employee that he or she contributed to the employee’s legal defense fund. *See OGE Authorization Act of 1994: Hearing Before the Subcomm. on Admin. Law and Gov’t Rel. of the Comm. on the Judiciary, 103rd Cong. 20-22 (1994)* (statement of Stephen J. Potts, Director, Office of Government Ethics). Moreover, OGE also recognized that many of the concerns raised in OGE Informal Advisory Opinion 93x21 about donors currying favors with employees benefiting from the donations are negated by the fact that solicitation and acceptance of contributions from prohibited sources are barred under the gift rules at 5 C.F.R. Part 2635, Subpart B, unless an exception applies. Accordingly, OGE has been advising, and is continuing to advise, that the instruments establishing legal defense funds include a clause stating that “contributions shall not be accepted from anonymous sources.”

Because of these and other ethics considerations, individuals should consult with an agency ethics official or OGE before establishing a legal defense fund.

¹ Similarly, in *United States v. Project on Government Oversight*, the D.C. Circuit stated that a payor must have actual intent to compensate a government employee for his official duties for section 209 to be implicated. 616 F.3d 544, 558-60 (D.C. Cir. 2010).