

Federal Ethics Update: House Ethics Issues Advisory Memos on Fundraising for Nonprofits and on Non-Commercial Air Travel; OGE Invites Comments on Potential Legal Expense Fund Regulations

May 2019

The Committee on Ethics of the U.S. House of Representatives recently issued two new advisory memoranda – or “Pink Sheets” – on topics of longtime and ongoing interest to the House community and to individuals and organizations interacting with that community. On May 2, 2019, the Committee issued an advisory memorandum on “Member, Officer, and Employee Participation in Fundraising Activities,” focusing on fundraising for charities and other nonprofit organizations. With this memorandum, the Committee also introduced “a simplified form for requesting [Committee] permission to assist with fundraising activities.” On April 10, 2019, the Committee issued an advisory memo on “Non-Commercial Aircraft Travel,” to remind House Members and staff of the relevant – and somewhat complex – statutes, House rules, and Committee guidance.

On April 15, 2019, the Executive branch Office of Government Ethics (OGE) issued an “advance notice of proposed rulemaking and notice of public hearing” inviting comments for consideration in developing a regulatory framework for the establishment of legal expense funds by or for the benefit of Executive branch officials and employees.

House Ethics Advisory Memos

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Fundraising Activities. For the most part, the substantive guidance provided in the May 2, 2019 House Ethics advisory memo on participation in fundraising activities is not new. The memo reminds House Members and staff of key points about, and limits on, their fundraising activities, including:

- The Anti-Solicitation Statute (5 U.S.C. 7353) – which generally prohibits fundraising solicitations by House Members and staff unless the Committee on Ethics has provided a specific exception – does not apply to solicitations for political campaigns and other political entities.
- Without prior Committee permission, Members and staff may also fundraise for organizations recognized under Internal Revenue Code (IRC) 170(c), such as charities recognized under IRC § 501(c)(3) (unless the organization was established or is controlled by current House Members or staff, in which case prior written Committee permission is required).
- Member and staff participation in fundraising activities for other nonprofit organizations – for example, organizations qualified under IRC § 501(c)(4) or (c)(6) – must be approved by the Committee in writing in advance.
- No personal benefit may result to the soliciting Member or staffer; no official resources (for example, staff time, official space or equipment) may be used in connection with the solicitation; no official House endorsement of the solicitation may be stated or implied (although Members may use such personal titles as “Member of Congress,” “Representative,” “Congresswoman” or “Congressman,” or “The Honorable”); no suggestion should be made that donors will receive favorable consideration in official matters; no direct personal benefit may result to the soliciting Member or staffer; no employee of a lobbying firm and no lobbyist at any organization should be targeted in a solicitation (although non-lobbyist employees of a company or association that employs or retains lobbyists on its own behalf may be targeted).

The May 2 advisory memo does elaborate on previous Committee-published guidance to make clear that “fundraising activities” is a “broad term” that includes such varied activities as: asking for money or for in-kind contributions or memberships; using a Member’s or staffer’s name in any way for a fundraising event, such as on an invitation, on social media, on letterhead, or in a letter; and in-person or telephonic “appearances” asking for donations. The May 2 memo also provides very helpful answers to eight “Frequently Asked Questions.” But the primary innovation accomplished through the Committee’s May 2 advisory memo on fundraising is the issuance of a new “Solicitation Waiver Request” form to streamline the process of requesting Committee permission to assist with fundraising activities in connection with non-political organizations and organizations not recognized under IRC § 170(c).

The Committee on Ethics’ advisory memo on fundraising may be found on the Committee’s website at <https://ethics.house.gov/sites/ethics.house.gov/files/Solicitation%20Pink%20Sheet%20FINAL.pdf>.

Non-Commercial Aircraft Travel. The House Committee on Ethics’ April 10 advisory memo addresses the rules and guidance on acceptance and use by House Members and staff of travel on non-commercial or private aircraft. The memo addresses a central tension in the rules and statute applicable to such travel: Under

certain specified circumstances, a House Member or staffer “may use personal, official, or campaign funds to pay for or reimburse the cost of a flight on a non-commercial aircraft”; however, the Honest Leadership and Open Government Act of 2007 (HLOGA) “generally prohibits candidates for the House from using campaign funds to pay for campaign-related travel on non-commercial aircraft.”

In its April 10 memo, the Committee describes the following circumstances under which – consistent with House Rule 23, clause 15 – a Member may pay for or reimburse the cost of a flight on non-commercial aircraft using, personal, official, or campaign funds:

- The travel is on aircraft operated by a carrier or operator with a proper, government-issued license (for example, a chartered airline);
- The flight is offered to the Member in his or her personal capacity, by a personal friend or by another Member; the aircraft is operated by a domestic government entity, federal, state, or local;
- The aircraft is owned or leased by a Member or a family member of a Member; **or**,
- The owner or operator of the aircraft is paid a pro rata share of the fair-market value of the normal and usual charter fare or rental charge for a comparable aircraft “as determined by dividing such cost by the number of Members, Delegates, or the Resident Commissioner, officers, or employees of Congress on the flight.” The Committee provides this example of how this “pro rata” valuation formulation is to be applied:

[I]f a non-commercial aircraft flight costs \$25,000 and only one Member is on the flight, the Member’s pro rata share of the flight is \$25,000, regardless of the number of non-congressional participants.

The April 10 advisory memo also summarizes those circumstances under which travel on a non-commercial aircraft may be accepted without the requirement to reimburse, that is, as a gift. These circumstances, as described by the Committee on Ethics, include when the travel is provided:

- By a unit of federal, state, or local government;
- By a relative;
- On the basis of personal friendship, and all the requirements of the relevant gift rule exception are met;
- By another Member or employee of the House or Senate (except, generally, from a staffer to his or her supervising Member or supervising staffer);
- “[F]rom Point A to Point A,” for example, when the flight is for observational purposes only and takes off from and returns to the same location; **or**,
- In connection with outside business, employment, or other activities, when such travel is customarily provided to others in similar circumstances and the mode of travel was not enhanced because of the traveler’s official position.

As to use of campaign funds to pay for travel on non-commercial aircraft, as pointed out above, the Committee on Ethics' April 10 advisory notes: "Members generally may not use campaign funds to pay for travel on a non-commercial aircraft if the travel is for campaign purposes." The advisory also states, however, that "Members may use campaign funds for officially-connected travel in connection with their duties as officeholders." The Committee advisory memo takes a similarly dichotomous approach in explaining when travel in connection with campaign activity may be accepted without reimbursement: The Committee notes first that "House candidates and those traveling on behalf of a House candidate are generally prohibited from flying on private aircraft," under any circumstances; but the Committee then goes on to note that House Members and staff "who are not acting in their capacities as candidates for the House, or in support of a House candidate, may accept travel on a non-commercial aircraft if offered by a political organization in connection with a fundraiser or campaign event sponsored by that political organization."

The guidance by the Committee on Ethics as to when the HLOGA-imposed restrictions on use by incumbent House candidates of non-commercial aircraft apply, and when they do not, is consistent with guidance by the FEC on this question:

Candidates are only considered campaign travelers when they are traveling in connection with an election for federal office. This term does not include Members of Congress when they engage in personal travel or any other travel that is not in connection with an election for federal office. <https://www.fec.gov/help-candidates-and-committees/making-disbursements/travel-behalf-campaigns/>

But, particularly when multipurpose trips are involved, determining when an incumbent House Member is traveling in a campaign capacity, as opposed to in an officially related capacity, can involve making some careful distinctions. In light of the very fact-specific nature of the questions of when campaign funds may be used to pay for non-commercial air travel and when such travel may be accepted for a campaign purpose, the most important line in the Committee on Ethics' April 10 advisory may be this: In such situations, Members and staff "are highly encouraged to consult with the Committee and the FEC before accepting travel."

The House Ethics advisory on non-commercial air travel includes 10 helpful, illustrative examples and may be found on the Committee's website at: <https://ethics.house.gov/sites/ethics.house.gov/files/Private%20Plane%20pinksheet%20FINAL.pdf>.

Office of Government Ethics Request for Comments

In its April 15 "Notice and Request for Comments: Legal Expense Fund Regulation," OGE notes that, in contrast to the situation in both the House and the Senate, "[t]here is currently no statutory or regulatory framework in the executive branch for establishing a legal expense fund" for the benefit of executive branch employees. OGE notes that, historically, it has fulfilled the limited role of "providing guidance to help ensure that executive branch employees" who may receive distributions from such a fund "will be in compliance with the ethics laws and rules [for example, the gift regulations]" in so doing. But, OGE further notes, because this approach does not "fully address potential appearance concerns with the creation and operation of legal expense funds," it is seeking "stakeholder input" on such issues related to legal expense funds as:

- Limitations on the types of donors to legal expense funds;
- Contribution limits;
- Donation of pro bono legal services;
- Limits on permissible beneficiaries, on the number of beneficiaries to a fund, and on the use of donated funds;
- Transparency of legal expense funds, including reporting requirements; **and**,
- Establishment, management, and termination of legal expense funds, including oversight authority over such funds.

Comments must be received by OGE by June 14, 2019. In addition to inviting and accepting written comments, OGE has scheduled a virtual public hearing on potential legal expense fund regulations for May 22, 2019. Persons wishing to present comments at the public hearing, or to listen to the hearing, must register by May 17, 2019. The Notice and Request for Comments may be accessed at <https://www.federalregister.gov/documents/2019/04/15/2019-07390/notice-and-request-for-comments-legal-expense-fund-regulation>.