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"Legal Expense Funds" and Contributions for Legal Expenses in the House of Representatives

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Summary

The permission to accept outside private donations, or to use campaign funds, to defray the costs of certain legal expenses for Members and employees of the House of Representatives, operates as an exception to, as well as guidance for, general statutory and congressional rules prohibiting or restricting the receipt of gifts (5 U.S.C. § 7353; House Rule 52), the use of "unofficial office accounts" (House Rule 45, 2 U.S.C. § 59e(d)(1)), and the use of campaign funds and contributions (House Rule 43(6), 2 U.S.C. § 439a).

Guidance from the House Committee on Standards of Official Conduct, as well as regulations from the Federal Election Commission (F.E.C.), indicates that Members and staff may establish "Legal Expense Funds" to receive private donations of funds (including funds from a campaign committee), under specific regulations and limitations, for use to defend against or to engage in certain legal actions connected with official duties; that a Member may accept *pro bono* legal assistance to challenge the validity of any federal law or regulation; and that the use by a Member of the House of campaign funds for legal expenses *connected* to one's official duties, and not of a personal nature (such as divorce, legal fees for real estate transactions, fees for defending charges of driving under the influence, *etc.*), is permitted under federal election campaign laws and regulations, and may be permitted under House Rules and regulations.

Regulations of the House Committee on Standards

Legal Expense Fund Regulations, adopted by the House Committee on Standards of Official Conduct on June 10, 1996, require a Member or employee of the House to receive prior written permission from the Committee on Standards to establish a Legal Expense Fund. The gist of the regulations is that a Legal Expense Fund may *not* be established to pay for merely *personal* legal expenses of a Member or employee, *e.g.*, expenses for a matter "primarily personal in nature (*e.g.* matrimonial action)"; but that a Member, officer or employee of the House may establish such a Fund for legal expenses which arise in connection with one's official duties and status, *e.g.*, a Member's "candidacy for or election

to federal office; the individual's official duties or position in Congress (including a matter before the Committee on Standards of Official Conduct); a criminal prosecution; or a civil matter bearing on the individual's reputation or fitness for office."¹ In addition to contributions for legal defense and other officially related matters, Members may also accept pro bono legal assistance "without limitation" to file an amicus brief in a Member's official capacity, or for "a civil action by a Member challenging the validity of a law or federal regulation."²

A Legal Expense Fund must be set up as a trust, with an independent trustee (who does not have a family, employment or business relationship to the beneficiary) who is to "oversee fund raising." The trust document must be filed with the Legislative Resource Center within a week of the Committee's approval of the trust document, and quarterly reports and disclosures must be publicly made by the beneficiary of the trust, that is, the Member or the employee, detailing any contribution from corporations or labor unions; all contributions from any single source over \$250 in a calendar year; and all expenditures made exceeding \$250 in a calendar year. The Legal Expense Fund may accept up to \$5,000 per year from an individual or an organization (including corporations, labor unions and PACs), but may *not* accept funds from a registered lobbyist or agent of a foreign principal.

Use of Campaign Contributions: House Rules

In addition to the acceptance of *pro bono* legal assistance to challenge any federal law or regulation, and/or the establishment of a Legal Expense Fund to accept private monetary contributions for such purposes subject to the requirements and regulations of the House Committee on Standards of Official Conduct, a Member of the House, under federal campaign laws, appropriations provisions, and House Rules, may also use campaign contributions to pay for certain expenses which are not "personal," and which are not strictly "official," but which may arise in connection with one's position in Congress and may be categorized in a broad classification as "political."

The Rules of the House at House Rule 43(6), Rule 45 (the unofficial office account Rule), and what has been characterized by the House Committee on Standards of Official Conduct as the statutory codification of Rule 45 in 1990,³ prohibit the use of private funds or services, including campaign contributions, for "official" congressional expenses or for

¹ House Committee on Standards of Official Conduct, "Legal Expense Fund Regulations," Memorandum to All Members, Officers, and Employees, June 10, 1996, at 1, 2.

² Legal Expense Fund Regulations, *supra* at ¶ 4. Since these regulations expressly provide that a "Member, officer or employee" may accept pro bono legal assistance for challenging the validity of a federal law or regulation, as opposed to providing that a "Legal Expense Fund" may accept such services, as in other paragraphs of the regulations, the inference established is that Members may accept such pro bono legal assistance in civil actions challenging federal regulations even absent a Legal Expense Fund; and that the acceptance of such services by a Member is not subject to the regulation's requirements and restrictions. The regulations note, however, that "[p]ro bono legal assistance for other purposes" (such as, for example, legal defense of a Member or employee), "shall be deemed a contribution subject to these restrictions." *Id.*

³ 2 U.S.C. § 59e(d)(1); see House Ethics Manual, 102 Congress, 2d Session, at 274-275 (April 1992).

"personal" expenses, but allow the use of campaign funds for either "campaign or political purposes."⁴ As noted by the House Committee on Standards of Official Conduct, there is no express or exhaustive definition of an "official" expense, nor of what is a permitted "political" use of campaign funds, and that "a Member has wide discretion in designating a particular expenditure as political or official."⁵

The House Committee on Standards of Official Conduct has stated that Members may use campaign funds "to defend legal actions arising out of their campaign[s], election[s] or the performance of their official duties,"⁶ and may use campaign funds for such matters connected to one's official representational duties as "town meetings," as long as official and "political"/campaign funds are not mixed in an event.⁷ Under the House Committee on Standards of Official Conduct regulations it is also expressly set out that campaign funds from a political committee (subject of course to campaign laws), may be contributed to a Legal Expense Fund, as the House regulations expressly provide that such a Fund could accept donations from "any organization," including specifically a political action committee.⁸ Under such regulations and use guidelines, it appears that the uses of political campaign contributions for those matters permitted within the Legal Expense Fund guidelines are not to be considered prohibited "personal" or prohibited "official" uses.⁹

Campaign Contributions: Federal Law and Federal Election Commission Regulations

As to the campaign laws cited to by the House Committee on Standards of Official Conduct, the federal campaign laws prohibit the use of campaign funds for "personal" purposes, but allow Members of Congress to use campaign funds to pay an "ordinary and necessary expense incurred *in connection with* the duties of a holder of Federal office." 2 U.S.C. § 439a. (Emphasis added) The Federal Election Commission under its statutory authority has issued regulations concerning impermissible "personal" uses of campaign funds. The Federal Election Commission has noted in regulations that a prohibited "personal use" of campaign funds, under 2 U.S.C. § 439a, is a use for an expense or obligation "that would exist irrespective of the candidate's campaign or duties as a Federal officeholder" such as, for example, household food items or supplies, funeral expenses, tuition payments, mortgages or rent on personal residences, or clothing (other than for campaign slogan T-shirts or caps or the like).¹⁰ However, a Member of Congress or other

⁴ House Rule 43, ¶ 6.

⁵ House Ethics Manual, *supra* at 275; see House Committee on Standards, Advisory Opinion No. 6.

⁶ Legal Expense Fund Regulations, *supra*.

⁷ House Ethics Manual, *supra* at 275, 296; Advisory Opinion No. 6.

⁸ Legal Expense Fund Regulations, *supra* at 2, ¶ 10.

⁹ As noted, the Legal Expense Fund regulations operate in effect as exemptions to both the "gift" rule, as well as the Rule on unofficial office accounts (House Rule 45, 2 U.S.C. § 59e(d)).

¹⁰ See 11 C.F.R. § 113.1(g)(1)(i), as added at 60 F.R. 7874, February 9, 1995.

individual may use campaign funds to pay an "ordinary and necessary expense incurred in connection with the duties of a holder of Federal office."¹¹

Concerning legal expenses specifically, the F.E.C. has noted that it would determine on a "case by case basis" whether the use of campaign funds for legal expenses is "personal," or is related to the campaign, or is in connection with one's official duties.¹² In an earlier explanation the F.E.C. noted that "personal" legal expenses would be expenses such as those for "a divorce or charges of driving under the influence of alcohol."¹³ The use of campaign funds for legal matters arising out of circumstances which are not ones of a similarly "personal" nature as the examples given by the F.E.C., but rather are connected with and related specifically to, or have arisen by virtue of, one's position as a federal officeholder, thus appear to be permissible both under House Rules and the Federal Election Commission regulations. The F.E.C. has noted that although it has independent statutory authority to rule whether an expenditure from campaign accounts is an improper "personal" use, as opposed to a proper campaign or officeholder related use under 2 U.S.C. § 439a, "the Commission anticipates that, in most circumstances ... officially connected expenses will be considered ordinary and necessary expenses incurred in connection with the duties of a Federal officeholder, as that term is used under the FECA," and that therefore the Commission does not expect significant conflicts in interpreting permissible "political" or "officially connected" expenses from the interpretations of permitted expenditures from campaign accounts by the House and Senate ethics committees.¹⁴ All expenditures and dispositions of campaign funds over a minimum amount must be accounted for and publicly reported under federal campaign law. 2 U.S.C. § 434.

¹¹ 2 U.S.C. § 439a, see also 11 C.F.R. 113.1(g)(5), 60 F.R. 7875, *supra*.

¹² 11 C.F.R. § 113.1(g)(1)(ii)(A).

¹³ See 60 F.R. 7868, *supra*.

¹⁴ See 60 F.R. 7871, February 9, 1995.

Appendix

Memorandum to All Members, Officers, and Employees

From: **Committee on Standards of Official Conduct**
 Nancy L. Johnson, Chairman
 Jim McDermott, Ranking Democratic Member

Subject: Legal Expense Fund Regulations

Date: June 10, 1996

The new gift rule exempts "a contribution or other payment to a legal expense fund established for the benefit of a Member, officer, or employee that is otherwise lawfully made in accordance with the restrictions and disclosure requirements of the Committee on Standards of Official Conduct," as long as the contribution is not from a registered lobbyist or an agent of a foreign principal (House Rule 52, clause 1(c)(5)). In light of this new rule, and pursuant to its authority thereunder, the Committee hereby issues regulations explaining its "restrictions and disclosure requirements" for legal expense funds. The regulations set forth below supersede the Committee's prior policies under the old gift rule 1 and take effect as of July 1, 1996. The prior policies remain in effect until that date.

Legal Expense Fund Regulations

1. A Member, officer, or employee who wishes to solicit and/or receive donations, in cash or in kind, to pay legal expenses shall obtain the prior written permission of the Committee on Standards of Official Conduct.²
2. The Committee shall grant permission to establish a Legal Expense Fund only where the legal expenses arise in connection with: the individual's candidacy for or election to federal office; the individual's official duties or position in Congress (including legal expenses incurred in connection with an amicus brief filed in a Member's official capacity, a civil action by a Member challenging the validity of a law or federal regulation, or a matter before the Committee on Standards of Official Conduct); a criminal prosecution; or a civil matter bearing on the individual's reputation or fitness for office.
3. The Committee shall not grant permission to establish a Legal Expense Fund where the legal expenses arise in connection with a matter that is primarily personal in nature (e.g., a matrimonial action).
4. A Member, officer, or employee may accept pro bono legal assistance without limit to file an amicus brief in his or her capacity as a Member of Congress or to bring a civil action challenging the validity of any federal law or regulation. Pro bono legal assistance for other purposes shall be deemed a contribution subject to the restrictions of these regulations.
5. A Legal Expense Fund shall be set up as a trust, administered by an independent trustee, who shall oversee fund raising.
6. The trustee shall not have any family, business, or employment relationship with the trust's beneficiary.

1. See *House Ethics Manual*, 102d Cong., 2d Sess. 49-50 (1992).

2. Permission is not required to solicit and/or receive a donation in any amount from a relative or a donation of up to \$250 from a personal friend.

7. Trust funds shall be used only for legal expenses (and expenses incurred in soliciting for and administering the trust), except that any excess funds shall be returned to contributors. Under no circumstances may the beneficiary of a Legal Expense Fund convert the funds to any other purpose.
8. A Legal Expense Fund shall not accept more than \$5,000 in a calendar year from any individual or organization.
9. A Legal Expense Fund shall not accept any contribution from a registered lobbyist or an agent of a foreign principal.
10. Other than as specifically barred by law or regulation, a Legal Expense Fund may accept contributions from any individual or organization, including a corporation, labor union, or political action committee (PAC).
11. No contribution shall be solicited for or accepted by a Legal Expense Fund prior to the Committee's written approval of the completed trust document (including the name of the trustee).
12. Within one week of the Committee's approval of the trust document, the beneficiary shall file a copy of the trust document with the Legislative Resource Center (1036 Longworth House Office Building) for public disclosure.
13. The beneficiary of a Legal Expense Fund shall report to the Committee on a quarterly basis, with a copy filed for public disclosure at the Legislative Resource Center:
 - a) any donation to the Fund from a corporation or labor union;
 - b) any contribution (or group of contributions) exceeding \$250 in a calendar year from any other single source; and
 - c) any expenditure from the Fund exceeding \$250 in a calendar year.

Beginning October 30, 1996, these reports shall be due as follows:

| <u>Reporting Period</u> | <u>Due Date</u> |
|--------------------------|-----------------|
| January 1 -- March 31 | April 30 |
| April 1 -- June 30 | July 30 |
| July 1 -- September 30 | October 30 |
| October 1 -- December 31 | January 30 |

14. Any Member or employee who established a Legal Expense Fund prior to July 1, 1996 shall make any necessary modifications to the trust document to bring it into compliance with these regulations and shall disclose the trust document with his or her first quarterly report of the 105th Congress on January 30, 1997. Reports of receipts and expenditures shall be due beginning October 30, 1996, as stated in paragraph 13, above.

Use of Campaign Funds for Legal Expenses

This Committee has stated (in the 1992 *Ethics Manual*) that Members may use campaign funds to defend legal actions arising out of their campaign, election, or the performance of their official duties. More recently, however, the Federal Election Commission (FEC) issued regulations defining impermissible personal uses of campaign funds, including using campaign funds for certain legal expenses. Any Member contemplating the use of campaign funds for the direct payment of legal expenses or for contribution to a legal expense fund should first contact the FEC.

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