



Public Employees for Environmental Responsibility

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May 30, 2018

Attorney General Jeff Sessions
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Mr. David J. Apol
Acting Director
U.S. Office of Government Ethics
1201 New York Avenue, N.W., Suite 500
Washington, DC 20005

RE: Ethical and Possible Criminal Violations Relating to Scott Pruitt Legal Defense Fund

Dear Attorney General Sessions and Acting Director Apol:

I am writing on behalf of Public Employees for Environmental Responsibility (PEER) to bring to your attention serious ethical breaches and possible criminal behavior by a senior federal official. PEER represents federal, state, and local government employees who are committed to faithful administration and enforcement of the nation's environmental protection and public health laws.

In May 16, 2018 testimony before the Senate Appropriation Subcommittee on Interior, Environment, and Related Agencies, U.S. Environmental Protection Agency Administrator Scott Pruitt stated that he had set up a "legal defense fund." While he promised not to accept donations from lobbyists or entities with business before EPA, he offered few other details about this fund. He further indicated that the identity of donors would eventually be made public but only "pursuant to the requirements of disclosures."

These actions and statements signify significant ethical violations as well as potentially illegal contributions from outside sources in violation of 18 U.S.C. § 209¹ punishable by –

¹ 18 U.S.C. § 209, the central Federal conflict of interest statute relating to the establishment of a defense fund, provides in relevant part: "(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or Whoever, whether an individual, partnership, association, corporation, or other

- Imprisonment up to one year for a knowing violation;
- Imprisonment up to five years for a willful violation; and/or
- Civil penalties of up to \$50,000 for each violation.²

Ethical Violations

a) Improper Source of Gifts

Executive Order 11222 prescribes the basic ethical standards for federal government officers and employees. It prohibits acceptance of gifts and compensation from regulated entities and those doing business with the agency.³ It also prohibits gifts from anyone who “has interests which may be substantially affected by the performance or nonperformance of ... [an employee’s] official duty.”⁴

The duties of the EPA Administrator carry much greater and wider consequences than those of the average federal employee. His actions have far reaching impacts, making the zone of persons with interests that may be affected vast in scope.

In the case of Mr. Pruitt, he is currently engaged in a broad regulatory rollback of regulations, rules and policies under the Clean Air Act, Clean Water Act, Federal Insecticide, Fungicide, and Rodenticide Act, Resource Conservation and Recovery Act, and Toxic Substances Control Act, among others. Altogether, his latest annual report touts some 66 major “deregulatory actions” affecting virtually every American.⁵

Consequently, anyone owning stock in a company benefitting from Mr. Pruitt’s actions would be a prohibited donor to his legal defense fund. Farmers, developers, even homeowners who have any connection to a federal jurisdictional wetland under the Clean Waters Act may also fall into this zone of affected interests. Also prohibited from contributing to Mr. Pruitt’s fund would be anyone whose spouse is an employee or stockholder of a company benefitting from these deregulatory actions.

In defining conflicting financial interests, the Office of Government ethics regulations look to what it defines as a “direct and predictable effect” to mean: “A particular matter will have a direct effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest.”⁶

organization pays, makes any contribution to, or in any way supplements, the salary of any such officer or employee under circumstances which would make its receipt a violation of this subsection—
Shall be subject to the penalties set forth in section 216 of this title.”

² 18 U.S.C. § 216.

³ EO 11222 provides in relevant part “Sec. 201. (a) Except in accordance with regulations issued pursuant to subsection (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which-- (1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency; (2) conducts operations or activities which are regulated by his agency; or (3) has interests which may be substantially affected by the performance or nonperformance of his official duty.”

⁴ Id.

⁵ https://www.epa.gov/sites/production/files/2018-03/documents/year_in_review_3.5.18.pdf

⁶ 5 C.F.R. Part 2635 As amended at 81 FR 81641 (effective January 1, 2017)

Applying this standard to the far-flung web of Mr. Pruitt’s responsibilities and actions, there may be very few individuals or corporations without substantially affected financial interests who are eligible to contribute to him. Moreover, each donation may require a forensic financial audit to determine the person’s ethical eligibility to give money to Mr. Pruitt.

b) Unethical Appearances and Manner

EO11222 further prohibits any employee action “which might result in, or create the appearance of...losing complete independence or impartiality of action...or affecting adversely the confidence of the public in the integrity of the Government.”⁷

First, Mr. Pruitt is eschewing an open process. Among other things, he is not –

- ✓ Contemporaneously revealing donor identities;
- ✓ Disclosing the structure of the fund;
- ✓ Identifying to whom checks will be written;
- ✓ Clarifying whether he will be at arms-length from this fund or directing it;
- ✓ Describing any process to screen out donors doing business with EPA or employed in an entity regulated, directly or indirectly, by it;
- ✓ Explaining how the funds will be used and by whom; and
- ✓ Detailing what if any ethics reviews he has received or what safeguards he is employing.

In short, Mr. Pruitt is proceeding in a manner seemingly calculated to give the appearance of taking untoward gifts that, if the identity of the donor was known, would adversely affect public confidence in EPA’s integrity and impartiality.

Second, this appearance is reinforced by his record as Oklahoma Attorney General where he reportedly and repeatedly took enforcement and regulatory steps that directly benefitted campaign contributors.⁸

Given that this high-level official is directly soliciting funds for his purported personal benefit, Mr. Pruitt needs to do far more than he is currently doing to avoid giving the inevitable appearance that official integrity and impartiality may be at risk. The longer the cloak over the functioning of this legal defense fund lingers, the deeper the shadow of public suspicion will spread.

c) Cabinet Slush Funds

The precedent set by Mr. Pruitt’s legal defense fund is troubling. PEER is aware of no pending criminal charges or civil suits that require his retention of, and compensation for, outside counsel. Instead, Mr. Pruitt is raising money to “lawyer up” in case any of the numerous controversies surrounding him, and the accompanying investigations, result in the future prospect of personal liability.

⁷ EO11222, Sec.201(c)

⁸ <https://www.nytimes.com/2017/01/14/us/scott-pruitt-trump-epa-pick.html>

Yet, while Mr. Pruitt has attracted more negative attention than most of this administration's presidential appointees, he is not unique. Virtually all Cabinet members face congressional inquiries or Inspector General investigations.

Consequently, if Mr. Pruitt's private solicitations to his legal defense fund is not halted, it will signal to every presidential appointee that he or she may also solicit private funds for the possibility that private counsel might someday be needed. Proliferation of these private funds to benefit high-level officials creates fertile ground for spawning scores of scandals. These private funds would also feed public doubts about the integrity and impartiality of top federal leaders.

Criminal Implications

Section 209 of Title 18 prohibits gifts to government officers or employees for his or her services. The policy behind this law is prevent a public servant from serving two masters, or rather, two paymasters.

The key to whether Mr. Pruitt's legal defense funds implicates the criminal sanctions of Section 209 is whether he is being compensated by outside parties for doing his job.

The last time the Office of Government Ethics issued a substantive advisory opinion on this question, it concerned a government employee who wanted to set up a legal defense fund, controlled by others, with anonymous donations, to defray legal costs in challenging an adverse action brought against him by his agency.⁹ In that matter OGE reasoned that the legal defense contributions were not compensation for his official work because:

“The work involved is the employee's defense of charges brought against him by his department. This defense is not paid for by the Government, but by the employee. The department does not exercise either supervision or control over the employee's work product during the preparation of his defense. The department is required to grant a reasonable amount of time to the employee in preparing an answer to the charges against him, and time spent on an employee's own defense does not appear to be part of the employee's Government work. [Citations omitted] The employee and the department stand in an adversarial relationship to each other. If 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.’”¹⁰

Mr. Pruitt's situation is quite different, however, in that the opposite of the above circumstances apply to him:

- EPA has brought no charges against him;
- He does not stand in an adversarial role with the agency he directs;
- He has access to EPA lawyers, ethics advisors, as well as Department of Justice attorneys;

⁹[https://oge.gov/web/OGE.nsf/Legal%20Advisories/0C4D87012885C50385257E96005FBC7B/\\$FILE/93x21.pdf?open](https://oge.gov/web/OGE.nsf/Legal%20Advisories/0C4D87012885C50385257E96005FBC7B/$FILE/93x21.pdf?open)

¹⁰ Id at 4

- He is directing the legal defense activities compensated by his fund;
- He is not responding to charges or mounting a legal defense on his own time – he is performing this legal defense work on government time; and
- Responses to Congress, the Inspector General, the General Accounting Office, and other official entities is part of his official role.

Thus, he more than arguably appears to be receiving outside compensation for activities he is already receiving a government salary to perform. If that is the case, his receipt of donations to supplement this official work would be a crime.

Conclusion

PEER is urging the two federal entities with clear jurisdiction in this matter to act to prevent further actual or potential ethical violations and/or criminal conflict of interest activities.

On its website, the OGE states that one means for accomplishing its mission is hold “the executive accountable for carrying out an effective ethics program by monitoring agency compliance with executive branch ethics program requirements; and *monitoring senior leaders’ compliance with individual ethics commitments.*”¹¹ (Emphasis added)

To that end, we urge OGE to investigate this legal defense fund and to take affirmative steps to prevent or abate further ethical violations.

Besides criminal prosecution, the U.S. Attorney General has the authority to bring a civil action in U.S. district court to enjoin and/or penalize any official who engages in conduct constituting an offense under Section 209.¹² We would request the Attorney General to immediately commence an investigation of Mr. Pruitt’s legal defense fund to determine if such civil action is warranted, as well as to determine whether criminal sanctions are appropriate.

Sincerely,

Jeff Ruch
Executive Director

¹¹ <https://oge.gov/web/oge.nsf/Mission%20and%20Responsibilities>

¹² 18 U.S.C. § 216 in pertinent part provides: “(b) The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under section 203, 204, 205, 207, 208, or 209 of this title and, upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than \$50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater. The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.

(c) If the Attorney General has reason to believe that a person is engaging in conduct constituting an offense under section 203, 204, 205, 207, 208, or 209 of this title, the Attorney General may petition an appropriate United States district court for an order prohibiting that person from engaging in such conduct.”