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## **LEGAL SERVICES CORPORATION**

### **45 CFR Parts 1606, 1618, and 1623**

#### **Termination, Limited Reductions in Funding, and Debarment Procedures; Recompetition; Enforcement; Suspension Procedures**

**AGENCY:** Legal Services Corporation

**ACTION:** Further Notice of Proposed Rulemaking

**SUMMARY:** This Further Notice of Proposed Rulemaking (FNPRM) proposes modifications to the January 31, 2012, NPRM regarding amendments to the Legal Services Corporation's regulations on termination procedures, enforcement, and suspension procedures. LSC seeks comments limited to the substantively new materials as indicated by the questions in the Supplementary Information.

**DATES:** Comments on the FNPRM are due [insert date 30 days from date of publication].

**ADDRESS:** Written comments may be submitted by mail, fax, or email to Mark Freedman, Senior Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007; 202-295-1623 (phone); 202-337-6519 (fax); [mfreedman@lsc.gov](mailto:mfreedman@lsc.gov).

**FOR FURTHER INFORMATION CONTACT:** Mark Freedman, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 3333 K Street, NW, Washington, DC 20007; 202-295-1623 (phone); 202-337-6519 (fax); [mfreedman@lsc.gov](mailto:mfreedman@lsc.gov).

**SUPPLEMENTARY INFORMATION:**

## ***Introduction***

The Legal Services Corporation (LSC) Act (the Act) provides general authority to the Corporation “to insure the compliance of recipients and their employees with the provisions of [the Act] and the rules, regulations, and guidelines promulgated pursuant to [the Act].”<sup>1</sup> On January 31, 2012, LSC published in the Federal Register at 77 Fed. Reg. 4749 a NPRM proposing changes to LSC’s enforcement mechanisms to add a lesser reduction in funding option and extend the time for suspensions from 30 to 90 days. The NPRM provided history and background that is not repeated herein.

Nineteen comments were submitted. The comments are available in the open rulemaking section of LSC’s website at [www.lsc.gov](http://www.lsc.gov).

<http://www.lsc.gov/about/regulations-rules/open-rulemaking>

On June 18, 2012, the Operations and Regulations Committee (Committee) of the LSC Board of Directors (Board) met to discuss the comments. Only the comment of the Office of Inspector General (OIG) supported the proposal as written, although the OIG recommends a rule providing for suspensions to remain in place until corrective actions are taken, and the OIG questioned whether the proposed language regarding imposing immediate special grant conditions was unduly restricted. Seventeen of the other comments opposed the proposed changes. Those comments include ones from LSC recipients, coalitions of legal aid programs, the National Legal Aid and Defender Association (NLADA), and the New York State Bar Association Committee on Legal

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<sup>1</sup> LSC Act, section 1006(b)(1)(A); 42 U.S.C. 2996e(b)(1)(A).

Aid. The American Bar Association Standing Committee on Legal Aid and Indigent Defendants (SCLAID) did not oppose the rulemaking, but joined with the other seventeen comments in recommended changes to the proposed language if LSC proceeds with rulemaking. These comments had a number of common themes. Fifteen of the comments were two or three pages. The ABA, NLADA, and Colorado Legal Services provided more extensive comments (five to seven pages). The OIG's comments in support of the rule were sixteen pages in length. This further notice of proposed rulemaking (FNPRM) provides revisions to the proposed language for further comment. The final rule will include a discussion of all of the comments received on both the NPRM and the FNPRM.

On July 27, 2012, the Committee met again to discuss the comments and LSC Management's recommendations. The Committee voted to recommend to the Board publication of these further revisions to the proposal based on consideration of the comments and recommendations of Management. On July 27, 2012, the Board voted to publish this FNPRM for public comment on the specific items identified below. In addition to this FNPRM, LSC is publishing on its website redlined versions of the regulations showing each change. Those documents are available in the Open Rulemaking section of [www.lsc.gov](http://www.lsc.gov).

<http://www.lsc.gov/about/regulations-rules/open-rulemaking>

LSC's principal regulation discussing general enforcement authority and procedures is the Enforcement Procedures regulation at 45 CFR part 1618. In accordance with the requirements of Part 1618, LSC uses a variety of enforcement tools, formal and informal, to ensure compliance. Among these are informal consultations and compliance

training, on-site Case Service Report/Case Management System reviews, the imposition of Required Corrective Actions (RCAs), and the imposition of Special Grant Conditions (SGCs) at the beginning or renewal of a grant. Several additional enforcement tools are provided for in LSC-adopted regulations and are available to the Corporation to address significant non-compliance by a recipient. In particular, LSC has adopted suspension procedures (45 CFR part 1623) and questioned-cost procedures (45 CFR part 1630). LSC has also adopted grant termination procedures (45 CFR part 1606) that provide for the termination of funding in whole or in part in cases of a recipient's substantial noncompliance with LSC statutory or regulatory requirements and other policies, instructions, or grant terms and conditions. Under the grant-termination provisions, a reduction of five percent or more of a recipient's funding is considered a termination and can be implemented only in compliance with the termination procedures.<sup>2</sup> Reductions of funding of less than five percent are not considered terminations. In order to reduce a recipient's funding by less than five percent without using the 1606 termination procedures, additional procedures have to be established by rulemaking.<sup>3</sup> LSC has not yet adopted regulations establishing such standards and procedures. LSC also has the authority under Part 1606 to debar recipients from eligibility to receive future grants.

The majority of LSC recipients are in substantial compliance with LSC requirements most of the time. When non-compliance occurs, recipients almost always work diligently and cooperatively with LSC staff to come promptly into compliance, but

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<sup>2</sup> 45 CFR 1606.2(d).

<sup>3</sup> 45 CFR 1606.2(d)(2)(v).

there have been exceptions. LSC is now considering adding enforcement tools to increase LSC's flexibility in addressing compliance issues.

In light of its experience with the existing enforcement mechanisms, discussed more fully in the NPRM, LSC is proposing to amend its regulations at 45 CFR parts 1606, 1618, and 1623 to adopt standards and procedures for limited reductions in funding, to allow for the imposition of SGCs during a grant year, and to amend the maximum suspension period from 30 to 90 days. LSC is not modifying the proposed changes to Part 1623 as set out in the NPRM; no further comments on Part 1623 are requested. The proposed changes and the modifications to those changes in this FNPRM are discussed in greater detail below.

***Amending Part 1606 to Include Standards and Procedures for Limited Reductions in Funding***

LSC proposed adding to Part 1606 a new definition for lesser reductions in funding and a new § 1606.15 to provide procedures for imposing them. The proposed procedures were based on the suspension procedures in Part 1623, which provide a significant opportunity for recipient input and due process without being unduly complex. Those proposed procedures would have permitted the recipient to request an informal conference regarding the proposed reduction in funding. There were no further avenues of appeal.

Many comments raised the concern that the proposed procedures were inadequate for lesser reductions in funding because they lacked an appeal of the informal conference and did not include review by an impartial person. Suspensions withhold funds from a recipient with the expectation that the funds will be provided when the suspension ends.

In contrast, terminations, disallowed costs, and lesser reductions in funding all involve a nonrecoverable loss of funding for the recipient. For terminations of five percent or greater, the recipient has a right to appeal a determination to an impartial hearing officer appointed by the LSC President. The hearing officer's decision is then reviewed by the LSC President, who makes the final decision.<sup>4</sup> For disallowed costs under Part 1630, the recipient has a right to appeal a disallowed cost decision to the LSC President. The President may act on the appeal only if he or she has not "had prior involvement in the consideration of the disallowed cost . . . ."<sup>5</sup> Otherwise, "the President shall designate another senior Corporation employee who has not had prior involvement to review the recipient's appeal."<sup>6</sup>

LSC agrees that some appeal is appropriate for lesser reductions. That appeal should also provide for review by someone who was not involved in the prior LSC decisions regarding the preliminary and final determinations. The proposed language below would add an appeal to the LSC President, who would decide the matter unless he or she was involved in those prior decisions. Alternately, the LSC President can appoint another LSC senior employee who was not involved in those prior decisions.

The comments also raised a number of questions regarding the proposed definitions and procedures. In reviewing the comments, LSC determined that a separate set of procedures for lesser reductions creates unnecessary confusion in the rule. This revision uses the existing Part 1606 procedures for preliminary determinations and

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<sup>4</sup> 45 CFR 1606.8–10.

<sup>5</sup> 45 CFR 1630.7(f).

<sup>6</sup> *Id.*

informal hearings. Appeals of terminations and debarments would then continue to have the existing process and rights. Appeals of lesser reductions would go directly to the LSC President.

In the proposed § 1606.15(c), the NPRM cross-referenced the § 1606.3(b) criteria for substantial violations and used those criteria for lesser reductions. The proposed language below eliminates the new § 1606.15 and moves the § 1606.3(b) criteria to a new definition of “substantial violations” for use throughout Part 1606. This approach is designed to improve the structure of the rule. No changes are made to the language, and no substantive changes are intended by this restructuring.

Some deadlines have been adjusted for uniformity in the rule.

#### *Questions on Which Comments Are Sought*

**Q1:** Comments are sought on the question whether the lesser reduction procedures are better handled as proposed in the NPRM or as proposed herein.

**Q2:** Comments are sought on the changes to the procedures affecting lesser reductions. No further comments are sought regarding the underlying question of the decision to adopt a lesser reductions option or the use of the existing § 1606.3(b) criteria for lesser reductions, which is unchanged from the NPRM. Those comments on the NPRM are already in the rulemaking record. LSC will respond fully to all comments, including those regarding the rationale for the rulemaking, in the preamble to any Final Rule, should one be published.

**Q3:** There are no substantive changes to the rules for terminations or debarments. Comments are sought on the question whether any of these proposed changes to the structure of the rule would result in substantive changes affecting terminations or

debarment. No other comments regarding the existing rules for terminations or debarments are sought.

**Q4:** There are new definitions added for clarity. Comments are sought on the new definitions but not on definitions that are moved without change from other sections of the existing regulation or from the NPRM proposed language.

**Q5:** Comments are sought on the proposed final appeal process.

### **Section-by-Section Analysis of Part 1606**

#### *Section 1606.1 Purpose*

The NPRM did not amend this section. The proposed language below amends paragraph (b) to add to the purpose of the rule lesser reductions in funding. It also states that the procedures provided are proportional to the proposed action rather than uniform for all actions. This takes the place of § 1606.15(1) in the NPRM.

#### *Section 1606.2 Definitions*

The NPRM added a definition of limited reduction in funding as a new paragraph (c). The proposed language below renumbers the following paragraphs. It also adds language from paragraph (d)(1) for terminations regarding whether a lesser reduction will affect funding beyond the current grant year. That addition makes clear that the two options function the same in this regard. No substantive changes are made to the definition.

New paragraphs (f), (g), and (h) are added to relocate definitions of violations, substantial violations, and substantial noncompliance. No substantive changes are made to these terms. They are moved from §§ 1606.3(a)(1), (b), and (c) into the definitions section so that they can be easily referenced for all of the available actions in the rule.

This eliminates the cross-reference to these terms in § 1606.15(b) of the NPRM. It also responds to some of the comments by making clear that the threshold for a substantial violation is the same for terminations and for lesser reductions.

New paragraph (i) adds a definition of the “Corporation” for purposes of taking actions under the rule, which permits elimination of the “designated employee” under § 1606.6(a). For purposes of making decisions regarding terminations, debarments, or lesser reductions, the Corporation must act through someone at the level of a deputy director or higher. This change addresses concerns expressed by comments about low-level employees making decisions to reduce funding. It also adds internal consistency to the rule instead of referring to the Corporation in some places and to the designated employee in others. This definition is a change to the NPRM and to the existing rule, although in practice LSC does not make decisions of this magnitude through anyone below the level of a deputy director.

New paragraph (j) defines when materials are considered received for purposes of this part. This is added for clarity. It is intended to make clear that physical delivery with confirmation from the delivery service is always sufficient. Alternate modes of delivery, such as e-mail or fax, are acceptable, but they require confirmation in writing by a person at the recipient. Automated “confirmations” from fax machines or e-mail systems do not guarantee that the document was in fact seen by a person at the receiving end.

New paragraph (k) defines days through reference to the rules for computing time in the Federal Rules for Civil Procedure, with an exception for excluding weekends and legal holidays for computing business days. This is added for clarity. In 2009, the

Federal rules eliminated the use of a business days rule for periods of ten days or fewer and lengthened some of the shorter deadlines accordingly. LSC is keeping this distinction here because, unlike the Federal rules, so many of the deadlines are 10 days or fewer. The revised sections of the rule specify time in calendar days or business days. References to days in other sections of the rule should be treated as calendar days, unless specified otherwise.

*§ 1606.3 Grounds for a termination or a lesser reduction in funding.*

The proposed grounds for lesser reductions in the NPRM at §§ 1606.15(a) and (b) have been moved into this section, which is renamed accordingly. The definition of a substantial violation has been moved from this section into the new definitions in § 1606.2. As discussed above, no substantive changes are intended, and this restructuring should add clarity to the rule.

*§ 1606.4 Grounds for debarment.*

There are no changes to this section and it is not reprinted in this notice. LSC considered moving the definition of “good cause” from this section to the definitions for structural consistency. LSC did not do so because the definition applies only to debarments; moving it would not add clarity and might add confusion to the rule.

*§ 1606.5 Procedures.*

This section is renamed to make it applicable to all actions under the rule, not only to terminations and debarments. The existing language is renumbered as paragraph (a). Paragraph (b) is added for situations involving lesser reductions in funding. It requires that LSC designate a senior LSC employee who will be able to meet the § 1606.10(d) requirements for handling a final review of a lesser reduction in funding.

*§ 1606.6 Preliminary determination.*

In the NPRM, § 1606.15(d) provided requirements for notices of preliminary and final determinations for lesser reductions that were worded slightly differently than this section, but they appeared to be substantively identical. The NPRM language is eliminated and merged in paragraph (a) with the existing language for preliminary determinations in this section to provide a process applicable to terminations, debarments, and lesser reductions. Specific references to procedural rights in other sections are replaced with a general reference to procedural rights. No substantive changes are intended by these changes to paragraph (a).

The reference to a “designated employee” are eliminated in favor of a definition of the Corporation for decision-making purposes in § 1606.2(i), as discussed above.

Language is added to paragraph (b) to affirmatively require LSC to provide the recipient with the final determination if there is no further review. This ensures that there is no confusion in situations in which the recipient does not respond to the preliminary determination. Paragraph (b) is also modified to state that LSC has the discretion to make the preliminary determination final when there is no request for a review. This change is intended to ensure that LSC retains the discretion to consider factors that come to light after issuing the preliminary determination. For example, a recipient might be in such turmoil that it fails to request review, but the local bar association requests that LSC forestall issuing a final determination. Under the existing rule and the NPRM, LSC might not have that discretion.

*§ 1606.7 Informal conference and review of written materials.*

The NPRM provided in § 1606.15(e), (f), and (g) procedures for an informal conference to review a proposed lesser reduction in funding. The NPRM used the language of Part 1623 as the basis for the informal conference review of a proposed lesser reduction in funding. The proposed language was substantively similar to the § 1606.7 informal conference for terminations and debarments. To simplify the rule, the proposed parallel provisions in § 1606.15 are eliminated in favor of using the existing § 1606.7 procedures.

No substantive changes are made to this section with the exception of the addition of an option of a paper review for terminations and debarments and the increase of some time limits from the existing rule and the NPRM. The current rule for terminations and debarments provides for an informal conference. Part 1623 also provides for an informal conference for review of proposed suspensions, but it adds an option of submission of written materials without a conference. The NPRM used the same language for lesser-reductions conferences. The revised language adds the option of a review of written materials for terminations and debarments as well as for lesser reductions. The NPRM provided that the informal conference would take place within five days of the recipient's request. This revision provides that LSC will notify the recipient within five business days of the time and place of the conference. This provides more scheduling flexibility.

Paragraph (b) provides the recipient with the right to request an in-person conference, but otherwise allows the conference to be held through alternative methods such as a teleconference. For an in-person meeting, some of the participants may attend through alternative methods. This is added to ensure that the recipient has the right to a

face-to-face meeting, but it also makes clear that the recipient and LSC can reduce the cost and burden of the conference through alternative methods.

Paragraph (e) provides that the final determination must provide the same type of details as the preliminary determination. This is similar to the requirements of § 1606.9(b), which apply to recommended decisions by hearing officers.

*§ 1606.8 Hearings for Terminations or Debarments.*

No substantive changes are made to this section. The title and paragraph (a) are updated to state that this section applies only to terminations and debarments. These hearings are not available for lesser reductions in funding. As discussed in the NPRM, the purpose of lesser reductions is to provide LSC with a means of taking financial action against a recipient in an amount of less than five percent, without the full hearing procedures required for terminations of five percent or greater.

*§ 1606.9 Recommended decisions for Terminations or Debarments.*

No substantive changes are made to this section. The title and paragraph (a) are updated to state that this section applies only to terminations and debarments. This section involves decisions after hearings under § 1606.8, which are not available for lesser reductions in funding.

*§ 1606.10 Final decision.*

This section is updated to add direct review by the LSC President of final determinations of lesser reductions in funding. Currently this section provides only for review by the LSC President of recommended decisions of impartial hearing officers under § 1606.9, which are not available for lesser reductions. The time limits of ten calendar days are expanded to ten business days to ensure there is sufficient time for the

recipient to draft and deliver the request for review by the President, which “shall state in detail the reasons for seeking review.”<sup>7</sup> At the end of the year, the holidays of December 25 and January 1 can reduce ten calendar days to only six business days.

Paragraph (c) adds a requirement that the recipient be able to obtain a copy of the written record on which the President based his or her decision. This requirement is based on a similar provision in § 1630.7(g) regarding disallowed costs reviews.

A new paragraph (d) is added providing for appeals of final determinations for lesser reductions in funding. The LSC President, or other senior LSC employee, will conduct the review and make a final decision regarding the proposed lesser reduction in funding. As discussed above, prior to the section-by-section analysis, the final review should be handled by someone who did not actively participate in making the decisions regarding the preliminary determination or the final determination. This requirement ensures that there is at least one level of review involving a fresh look at the situation, similar to the § 1606.8 requirements for terminations and the § 1630.7 requirements for disallowed costs.

Normally, this final review and decision would be handled by the President. LSC expects that the Vice President for Grants Management or the Director of the Office of Compliance and Enforcement will usually handle preliminary determinations, informal conferences, and final determinations for lesser reductions in funding. Nonetheless, these are significant actions that the President is likely to be kept informed about throughout the process. The President is not disqualified under paragraph (d) merely because he or

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<sup>7</sup> 45 CFR 1606.10(b).

she is briefed about the situation and options, asks questions, and did not object to the prior lesser reduction decisions and proceedings. Nor is he or she disqualified if the recipient or other parties contact him or her directly prior to a final appeal.

Paragraph (e) (renumbered) adds a requirement that a final decision reviewing a determination of a lesser reduction shall meet the specificity requirements of § 1606.6(a). This provides a parallel requirement to the existing requirement that final decisions reviewing a hearing officer's recommendation shall meet the specificity requirements of § 1606.9(b).

*§ 1606.13 Interim and termination funding; reprogramming.*

There are no changes to this section from the NPRM. They are repeated here in order to provide all of the revisions of Part 1606 proposed by both the NPRM and this FNPRM. No comments are sought on this section.

*§ 1606.15 Limited reductions of funding.*

The NPRM proposed adding a new section. As discussed above, all of the proposed provisions are now incorporated into the existing provisions of this part. There is no proposed § 1606.15 in this FNPRM.

***Amending Part 1618 to Permit the Imposition of Immediate Special Grant Conditions***

The NPRM proposed amending Part 1618 to provide clear authority to impose special grant conditions in the middle of a grant, rather than only at renewal or competition. The OIG expressed concern that the Part 1618 threshold might unduly restrict the use of these immediate special grant conditions. The proposal has been revised to specify that immediate special grant conditions are available for corrective actions after LSC has determined that a violation exists. This enables LSC to convert

corrective actions required by the Office of Compliance and Enforcement into special grant conditions immediately rather than waiting for the next grant renewal or award. This addition does not effect LSC’s existing authority to impose special grant conditions during renewal, competition, or otherwise.

Additionally, during review of Part 1618 it became apparent that the language of Part 1618 is outdated. It has not been amended since 1976. Both Part 1606—Terminations and Part 1623—Suspensions refer to compliance with “a provision of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, a Corporation rule, regulation, guideline or instruction, or the terms and conditions of the recipient's grant or contract with the Corporation.”<sup>8</sup> These rules were extensively updated in 1998. Part 1618 refers only to violations of “the Legal Services Corporation Act or the rules and regulations issued by the Corporation.”<sup>9</sup> LSC proposes amending Part 1618 to conform to the language used in the other, later adopted, regulations to conform to existing practice.

Proposed § 1618.5(b) permits LSC to impose a lesser reduction in funding after “attempts at informal resolution have been unsuccessful.” Informal resolution includes remedial actions, preventive actions, and sanctions. So, for example, if a recipient has persistently and intentionally used LSC funds for grassroots lobbying, then LSC could ultimately proceed to termination or debarment. Section 1618.5(b) requires LSC to attempt to resolve the situations informally before beginning an enforcement action.

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<sup>8</sup> 45 CFR 1606.1(a) and 1623.1(a).

<sup>9</sup> 45 CFR 1618.2.

LSC could demand that the recipient cease such activities, put in place measures to ensure that such activities do not recur, and accept a lesser reduction in funding as a sanction. If the recipient did not agree to all three actions during attempts at informal resolution, then LSC could proceed with suspension, termination, and/or a lesser reduction in funding. Furthermore, if attempts at informal resolution are unsuccessful, then LSC may proceed with actions that are more consequential than those pursued during those unsuccessful attempts. Thus, in this example, LSC could proceed with a termination of five percent or greater, even if it offered the recipient the option of resolving the matter through acceptance of a reduction in funding of less than five percent. There are no changes to the rule required for this application.

*Question on Which Comments Are Sought*

**Q6:** Comments are sought on the new proposed language for Part 1618.

**Section-by-Section Analysis of Part 1618**

*§ 1618.1 Purpose.*

Reference to the requirements of the LSC Act are updated to refer to the provisions of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, a Corporation rule, regulation, guideline, or instruction, or the terms and conditions of the recipient's grant or contract with the Corporation. This conforms Part 1618 to Part 1606 and Part 1623.

*§ 1618.2 Definitions.*

The existing definition of the term “Act” as referring to the LSC Act, rules, and regulations is removed because it was confusing and inconsistent with LSC’s current governing laws, many of which appear in appropriations statutes and not the LSC Act,

and with Part 1606 and Part 1623. A new paragraph (a) is added defining the term “LSC requirements” using the language from Part 1606 and Part 1623. A new paragraph (b) is added to make clear that a violation refers to a violation of the LSC requirements.

*§ 1618.3 Complaints.*

The reference to a violation of “the LSC Act” is replaced with reference to the new definition of a “violation.”

*§ 1618.4 Duties of Recipients.*

References to a violation of the LSC Act are replaced with references to the new definition of a violation. Paragraphs (a) and (b) are renumbered as (1) and (2) of a new paragraph (a). The former paragraph (b) is split into (a)(2) and (a)(3). These changes add clarity without substantive alternations to the rule. The new (a)(2) is amended to clarify that the recipient has the discretion to determine whether a violation by a recipient’s employee merits a sanction imposed by the recipient on the employee under the circumstances. Some violations can be fully addressed by the recipient without any sanction. This is not meant to change the substantive requirements of this paragraph. Paragraph (c) is renumbered as paragraph (b). A new paragraph (c) is added to clarify that these requirements do not, by themselves, create substantive rights for recipient employees. A failure to consult with LSC under this section does not nullify a recipient’s employment action. Rather, it is a matter between LSC and the recipient.

*§ 1618.5 Duties of the Corporation.*

References to a violation of the LSC Act are replaced with references to the new definition of a violation. Paragraph (a) is amended to make clear that the Corporation’s investigation may be limited to determining that the recipient is taking sufficient action.

This is not a substantive change. Paragraph (c) is added regarding immediate special grant conditions. As discussed above, these would be available for any violation for which LSC has determined that corrective action is necessary. Currently LSC makes those determinations through normal procedures by the Office of Compliance and Enforcement. The thresholds in paragraph (b) for further actions such as suspensions or terminations would not apply to immediate special grant conditions.

List of Subjects in 45 CFR Part 1606

Administrative practice and procedure, Grant program-law, Legal services.

List of Subjects in 45 CFR Parts 1618 and 1620

Grant programs-law, Legal services

For reasons set forth above, and under the authority of 42 U.S.C. §2996g(e), LSC proposes to amend 45 CFR chapter XVI as follows:

**PART 1606 – TERMINATION, LIMITED REDUCTION IN FUNDING, AND DEBARMENT PROCEDURES; RECOMPETITION**

1. The authority citation for Part 1606 continues to read as follows:

Authority: 42 U.S.C. 2996e(b)(1) and 2996f(a)3; Pub. L. 105-199, 111 Stat 2440, Secs. 501(b) and (c) and 504; Pub. L. 104-134, 110 Stat. 1321.

2. The heading for part 1606 is revised to read as set forth above.

3. Amend § 1606.1 by revising paragraph (b) to read as follows:

**§ 1606.1 Purpose**

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(b) Provide timely and fair due process procedures, proportional to the proposed action, when the Corporation has made a preliminary decision to terminate a recipient's

LSC grant or contract, to debar a recipient from receiving future LSC awards of financial assistance, or to impose a lesser reduction in funding; and

4. Amend § 1606.2 by redesignating paragraphs (c) and (d) as (d) and (e), revising new paragraph (e), and adding paragraphs (c ) and (f) through (k) to read as follows:

**Sec. 1606.2 Definitions**

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(c) Limited reduction in funding means a reduction in funding of less than five percent of a recipient's current annual level of financial assistance imposed by the Corporation in accordance with the procedures and requirements of this part. A limited reduction in funding will affect only the recipient's current year's funding, unless the Corporation provides otherwise in the final termination decision.

(d) Recipient means any grantee or contractor receiving financial assistance from the Corporation under section 1006(a)(1)(A) of the LSC Act.

(e) (1) Termination means that a recipient's level of financial assistance under its grant or contract with the Corporation will be reduced in whole or in part prior to the expiration of the term of a recipient's current grant or contract. A partial termination will affect only the recipient's current year's funding, unless the Corporation provides otherwise in the final termination decision.

(2) A termination does not include:

(i) A reduction of funding required by law, including a reduction in or rescission of the Corporation's appropriation that is apportioned among all recipients of the same class in proportion to their current level of funding;

(ii) A reduction or deduction of LSC support for a recipient under the Corporation's fund balance regulation at 45 CFR part 1628;

(iii) A recovery of disallowed costs under the Corporation's regulation on costs standards and procedures at 45 CFR part 1630;

(iv) A withholding of funds pursuant to the Corporation's Private Attorney Involvement rule at 45 CFR part 1614; or

(v) A limited reduction of funding as defined in this section.

(f) Substantial noncompliance means either a substantial violation, as defined in this section, or a substantial failure, as defined in this part at § 1606.3(a).

(g) Violation means a violation by the recipient of a provision of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, or a Corporation rule, regulation, guideline or instruction, or a term or condition of the recipient's grant or contract.

(h) Substantial violation means a violation that merits action under this part based on consideration of the following criteria by the Corporation:

(1) The number of restrictions or requirements violated;

(2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement;

(3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions;

(4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; and

(5) Whether the violation was knowing and willful.

(i) Corporation, when used to refer to decisions by the Legal Services Corporation, means that those decisions are made by an individual at the level of an office director, deputy director, or higher.

(j) Receipt of materials shall mean that the materials were sent to the normal address for physical mail, e-mail, or fax transmission, and there is reliable secondary confirmation of delivery. For physical delivery, confirmation may be provided through tracking information from the delivery service. For other forms of delivery, confirmation may be provided through a document such as a confirmation e-mail or a fax sent from an authorized person at the recipient. Receipt of materials by the LSC recipient is sufficient for the running of applicable time periods. Proof of receipt by the Board Chair is not necessary unless delivery to the recipient itself cannot be reasonably accomplished.

(k) Days shall mean the number of actual days as determined by the rules for computing time in the Federal Rules of Civil Procedure, Rule 6, except that computation of business days shall exclude Saturdays, Sundays, and legal holidays (as defined in those rules).

5. Amend § 1606.3 by revising the heading of that section, revising paragraph (a)(1), redesignating paragraph (b) as (c), and revising newly redesignated paragraph (c) and adding new paragraph (b) to read as follows:

**§ 1606.3 Grounds for a termination or a lesser reduction in funding.**

(a) A grant or contract may be terminated when:

(1) There has been a substantial violation by the recipient, and the violation occurred less than 5 years prior to the date the recipient receives notice of the violation pursuant to § 1606.6(a); or

(2) There has been a substantial failure by the recipient to provide high quality, economical, and effective legal assistance, as measured by generally accepted professional standards, the provisions of the LSC Act, or a rule, regulation, including 45 CFR 1634.9(a)(2), or guidance issued by the Corporation.

(b) The Corporation may impose a limited reduction of funding when the Corporation determines that there has been a substantial violation by the recipient but that termination of the recipient's grant, in whole or in part, is not warranted.

(c) A determination of whether there has been a substantial violation for the purposes of this section, and the magnitude of any termination, in whole or in part, or any lesser reduction in funding, will be based on consideration of the criteria set forth in the definition of "substantial violation" in this part.

6. Amend § 1606.5 to revise the heading of that section, revise the language and redesignate it as paragraph (a), and add a new paragraph (b) to read as follows:

**§ 1606.5 Procedures.**

(a) Before a final action is taken under this part, the recipient will be provided notice and an opportunity to be heard as set out in this part.

(b) Prior to a preliminary determination involving a lesser reduction in funding, the Corporation shall designate either the President or another senior Corporation employee to conduct any final review that is requested pursuant to § 1606.10 of this part. The Corporation shall ensure that the person so designated has had no prior involvement in

the preliminary and/or final determinations so as to meet the criterion set out in § 1606.10(d).

7. Amend § 1606.6 by revising paragraphs (a) and (b) to read as follows:

**§ 1606.6 Preliminary determination.**

(a) When the Corporation has made a preliminary determination that a recipient's grant or contract should be terminated, that a lesser reduction in funding shall be imposed, and/or that a recipient should be debarred, the Corporation shall issue a written notice to the recipient and the Chair of the recipient's governing body. The notice shall:

(1) State the grounds for the proposed action;

(2) Identify, with reasonable specificity, any facts or documents relied upon as justification for the proposed action;

(3) Inform the recipient of the proposed amount and effective date for the proposed action;

(4) Advise the recipient of its procedural rights for review of the proposed action under this part;

(5) Inform the recipient of its right to receive interim funding pursuant to § 1606.13; and

(6) Specify what, if any, corrective action the recipient can take to avoid the proposed action.

(b) If the recipient does not request review, as provided for in this part, then the preliminary determination shall become final, at LSC's discretion, after the relevant time limits have expired. The Corporation shall provide the recipient with the final decision, and no further appeal or review will be available under this part.

8. Amend § 1606.7 by revising the heading and paragraphs (a) through (e) and adding paragraph (f) to read as follows:

**§ 1606.7 Informal conference, review of written materials, and final determination.**

(a) A recipient may submit written materials in opposition to the preliminary determination and/or request an informal conference as follows:

(i) for terminations or debarments, within 30 calendar days of receipt of the preliminary determination; or

(ii) for lesser reductions in funding, within 10 business days of receipt of the preliminary determination.

(b) Within 5 business days of receipt of a request for a conference, the Corporation shall notify the recipient of the time and place the conference will be held, which shall be at the Corporation's discretion. Some or all of the participants in the conference may attend via telephone, unless the recipient requests an in-person meeting between the Corporation and at least one representative of the recipient. If the recipient requests an in-person meeting, then other participants may attend via telephone. Alternative means of participation other than the telephone are permissible at the sole discretion of LSC.

(c) The informal conference shall be conducted by the Corporation employee who issued the preliminary determination.

(d) At the informal conference, the Corporation and the recipient shall both have an opportunity to state their case, seek to narrow the issues, explore the possibilities of settlement or compromise, and submit written materials.

(e) If an informal meeting is conducted and/or written materials are submitted by the recipient, the Corporation shall consider any written materials submitted by the recipient

in opposition to the limited reduction in funding and any oral presentation or written materials submitted by the recipient at an informal meeting. Based on the written materials and/or the informal conference, the Corporation may modify, withdraw, or affirm the preliminary determination through a final determination in writing, which shall be provided to the recipient within 15 calendar days of the conclusion of the informal conference. The final determination shall conform to the requirements of § 1606.6(a).

(f) If the recipient does not request further process, as provided for in this part, then, after the relevant time limits have expired, LSC shall notify the recipient that no further appeal or review will be available under this part and may proceed to implement the final determination as a final decision.

9. Amend § 1606.8 by revising the heading and paragraph (a) to read as follows:

**§ 1606.8 Hearing for a termination or debarment.**

(a) For terminations or debarments only, the recipient may make a written request for a hearing within 30 days of its receipt of the preliminary determination or within 15 days of receipt of the written determination issued by the designated employee after the conclusion of the informal conference.

\* \* \* \* \*

10. Amend § 1606.9 by revising the heading and paragraph (a) to read as follows:

**§ 1606.9 Recommended decision for a terminations or debarment.**

(a) For termination or debarment hearings under § 1606.8, within 20 calendar days after the conclusion of the hearing, the hearing officer shall issue a written recommended decision which may:

\* \* \* \* \*

11. Amend § 1606.10 by revising the heading and paragraphs (a), (b), and (c), redesignating paragraphs (d) and (e) to (e) and (f), respectively, adding new paragraph (d) and revising newly designated paragraphs (e) and (f) to read as follows:

**§ 1606.10 Final decision for a termination, debarment, or lesser reduction.**

(a) If neither the Corporation nor the recipient requests review by the President, a final determination or a recommended decision shall become a final decision 10 business days after receipt by the recipient.

(b) The recipient or the Corporation may seek review by the President of a final determination or a recommended decision. A request shall be made in writing within 10 business days after receipt of the recommended decision by the party seeking review and shall state in detail the reasons for seeking review.

(c) The President's review shall be based solely on the information in the administrative record of the proceedings, including the appeal to the President, and any additional submissions, either oral or in writing, that the President may request. A recipient shall be given a copy of, and an opportunity to respond to, any additional submissions made to the President. All submissions and responses made to the President shall become part of the administrative record. Upon request, the Corporation shall provide a copy of the written record to the recipient.

(d) For a direct appeal of a final determination pursuant to § 1606.7, in which there is no hearing under § 1606.8, the President may not review the appeal if the President has had prior involvement in the preliminary and/or final determinations. If the President cannot review the appeal, or the President chooses not to do so, then the President shall

designate another senior Corporation employee who has not had prior involvement in the preliminary and/or final determinations.

(e) As soon as practicable after receipt of the request for review of a recommended decision, but not later than 30 days after the request for review, the President or designee may adopt, modify, or reverse the recommended decision or final determination, or direct further consideration of the matter. In the event of modification or reversal of a recommended decision pursuant to § 1606.9, this decision shall conform to the requirements of § 1606.9(b). In the event of modification or reversal of a final determination pursuant to § 1606.7, the decision shall conform to the substantive requirements of § 1606.6(a).

(f) The decision of the President or designee under this section shall become final upon receipt by the recipient.

12. Amend § 1606.13 by revising paragraphs (a), (b), and (d) to read as follows:

(a) Pending the completion of termination or limited reduction in funding proceedings under this part, the Corporation shall provide the recipient with the level of financial assistance provided for under its current grant or contract with the Corporation.

(b) After a final decision has been made to terminate a recipient's grant or contract or to impose a limited reduction in funding, the recipient loses all rights to the terminated or reduced funds.

\* \* \* \* \*

(d) Funds recovered by the Corporation pursuant to a termination or limited reduction in funding shall be used in the same service area from which they were recovered or will be reallocated by the Corporation for basic field purposes at its sole discretion.

## **PART 1618 – ENFORCEMENT PROCEDURES**

13. The authority citation for Part 1618 continues to read as follows:

Authority: Secs. 1007(a)(8); 1006(b)(6); 1006(b)(4) (42 U.S.C. 2996f(a)(8); 2996e(b)(6); 29963(b)(4)).

14. Revise § 1618.1 to read as follows:

### **§ 1618.1 Purpose.**

In order to ensure uniform and consistent interpretation and application of the provisions of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, a Corporation rule, regulation, guideline or instruction, or the terms and conditions of the recipient's grant or contract with the Corporation, and to prevent a question of whether these requirements have been violated from becoming an ancillary issue in any case undertaken by a recipient, this part establishes a systematic procedure for enforcing compliance with them.

15. Amend § 1618.2 by revising the heading and adding paragraphs (a) and (b) to read as follows:

### **§ 1618.2 Definitions.**

(a) *LSC requirements* means the provisions of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, a Corporation rule, regulation, guideline or instruction, or the terms or conditions of the recipient's grant or contract with the Corporation.

(b) *Violation* means a violation by the recipient of the LSC requirements.

16. Revise § 1618.3 to read as follows:

### **§ 1618.3 Complaints.**

A complaint of a violation by a recipient or an employee of a recipient may be made to the recipient, the State Advisory Council, or the Corporation.

17. Amend § 1618.4 by revising paragraphs (a) and (b), redesignating paragraph (c) to (b), revising new paragraph (b), and adding a new paragraph (c) to read as follows:

**§ 1618.4 Duties of Recipients.**

(a) A recipient shall:

(1) Advise its employees of their responsibilities under the LSC requirements;

(2) Establish procedures, consistent with the notice and hearing requirements of section 1011 of the LSC Act, for determining whether an employee has committed a violation and whether the violation merits a sanction based on consideration of the totality of the circumstances; and

(3) Establish a policy for determining the appropriate sanction to be imposed for a violation, including:

(i) Administrative reprimand if a violation is found to be minor and unintentional, or otherwise affected by mitigating circumstances;

(ii) Suspension and termination of employment; and

(iii) Other sanctions appropriate for enforcement of the LSC requirements.

(b) Before suspending or terminating the employment of any person for a violation, a recipient shall consult the Corporation to ensure that its interpretation of these requirements is consistent with Corporation policy.

(c) This section provides procedural requirements between the Corporation and recipients. It does not create rights for recipient employees.

18. Amend § 1618.5 by revising paragraphs (a) and (b) and adding paragraph (c) to read as follows:

**§ 1618.5 Duties of the Corporation.**

(a) Whenever the Corporation learns that there is reason to believe that a recipient or a recipient's employee may have committed a violation, the Corporation shall investigate the matter promptly and attempt to resolve it through informal consultation with the recipient. Such actions may be limited to determining if the recipient is sufficiently investigating and resolving the matter itself.

(b) Whenever there is substantial reason to believe that a recipient has persistently or intentionally violated the LSC requirements, or, after notice, has failed to take appropriate remedial or disciplinary action to ensure compliance by its employees with the LSC requirements, and attempts at informal resolution have been unsuccessful, the Corporation may proceed to suspend or terminate financial support of the recipient, or impose a lesser reduction in funding, pursuant to the procedures set forth in parts 1623 and 1606, or may take other action to enforce compliance with the LSC requirements.

(c) Whenever the Corporation determines that a recipient has committed a violation, that corrective actions by the recipient are required to remedy the violation and/or prevent recurrence of the violation, and that imposition of special grant conditions are needed prior to the next grant renewal or competition for the service area, the Corporation may immediately impose Special Grant Conditions on the recipient to require completion of those corrective actions.

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