



## **LEGAL SERVICES CORPORATION**

### **45 CFR Parts 1610 and 1630**

#### **Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity; Cost Standards and Procedures**

**AGENCY:** Legal Services Corporation.

**ACTION:** Further notice of proposed rulemaking.

**SUMMARY:** This further notice of proposed rulemaking provides public notice for comment about one substantive change to the Legal Services Corporation's (LSC or Corporation) regulation regarding cost standards at 45 CFR part 1630 that would permit LSC to question and disallow costs in addition to other, already available remedial measures when a recipient uses non-LSC funds in violation of the LSC restrictions that apply to non-LSC funds. This notice is in addition to the notice of proposed rulemaking for 45 CFR part 1610 and 1630 published on August 12, 2019.

**DATES:** Comments must be received by [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by any of the following methods:

- *Federal Rulemaking Portal:* Follow the instructions for submitting comments.
- *Email:* [lscrulemaking@lsc.gov](mailto:lscrulemaking@lsc.gov). Include "Part 1630 Rulemaking" in the subject line of the message.
- *Fax:* (202) 337-6519.
- *Mail:* Mark Freedman, Senior Associate General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Part 1630 Rulemaking.

- *Hand Delivery/Courier:* Mark Freedman, Senior Associate General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Part 1630 Rulemaking.

*Instructions:* LSC prefers electronic submissions via email with attachments in Acrobat PDF format. LSC will not consider written comments sent to any other address or received after the end of the comment period.

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

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

On August 12, 2019, the Legal Services Corporation (LSC or Corporation) published a Notice of Proposed Rulemaking (NPRM or Proposed Rule) at 84 FR 39787 proposing changes to 45 CFR part 1610—Use of Non-LSC Funds and to a related provision of 45 CFR part 1630—Cost Standards and Procedures. LSC stated that the Proposed Rule did not contain any substantive changes to either rule. Rather, LSC proposed updates to part 1610 to improve clarity and updates to § 1630.16 to better reference the substantive terms of part 1610. LSC received two comments during the 60-day comment period and one late comment. Generally, the comments supported the proposed rule. LSC will respond to the comments in the Final Rule. These notices and the comments are published on LSC’s website at [www.lsc.gov/rulemaking](http://www.lsc.gov/rulemaking).

Some of the comments stated that the proposed rule would make one substantive change in § 1630.16. LSC agrees. LSC is publishing this Further Notice of Proposed Rulemaking to provide

clear notice of that change and an opportunity for public comment. The proposed language for § 1630.16 has not changed from the NPRM.

Additionally, on January 10, 2020, the National Association of IOLTA Programs wrote to LSC noting the same substantive change in § 1630.16 and requesting that LSC repost the proposed substantive changes for comments.

## **II. General Background**

### **A. LSC Restrictions on Non-LSC Funds**

The Legal Services Corporation Act (LSC Act or Act), 42 U.S.C. 2996–2996l, and, since 1996, LSC's annual appropriation, impose restrictions and requirements on the use of LSC and non-LSC funds by recipients of grants from LSC for the delivery of civil legal aid. See, e.g., Public Law 116-93 (2019) (appropriating funds to LSC subject to restrictions set out in prior appropriations). LSC implemented the application of those restrictions and requirements to recipients' use of non-LSC funds through part 1610 of title 45 of the Code of Federal Regulations.

The current rule describes two categories of restrictions on the use of non-LSC funds: (1) restrictions established in the LSC Act (LSC Act Restrictions) and (2) restrictions established in LSC's annual appropriation (Appropriations Restrictions). The rule then discusses how those restrictions apply to three different categories of non-LSC funds used by recipients: (a) private funds (such as individual donations), (b) public funds (such as government grants), and (c) tribal funds (such as grants from Native American tribes).

All uses of private funds by recipients are subject to both the LSC Act Restrictions and the Appropriations Restrictions. Additionally, all uses of public funds by recipients are subject to the Appropriations Restrictions.

By contrast, the LSC Act Restrictions do not apply to the use of public funds so long as the recipient uses those funds consistent with “the purposes for which they are provided” by the other funding source (authorized use). 42 U.S.C. § 2996i(c). If, instead, the recipient uses public funds contrary to the purposes for which they were provided (unauthorized use), then those uses of public funds are subject to the LSC Act Restrictions. For example, the State of Michigan provides public funds to many LSC recipients for “indigent civil legal assistance.” MCL § 600.151a. The LSC Act does not apply its restrictions to those public funds so long as they are used for purposes authorized by the State of Michigan and consistent with the terms of the grant awarding them. Michigan law prohibits using those funds “to provide legal services in relation to any criminal case or proceeding . . . .” MCL § 600.1485(10). Thus, any use of those Michigan public funds by an LSC recipient for a criminal case would violate the purposes for which they were provided and therefore subject those unauthorized uses of the funds to the LSC Act restrictions.

Lastly, both the LSC Act Restrictions and the Appropriations Restrictions do not normally apply to authorized uses of tribal funds. 42 U.S.C. 2996i(c) and Public Law 104-134, § 504(d)(2)(A) (1996) (as incorporated by reference in LSC’s current appropriation).

#### **B. Disallowed Costs for Restricted Uses of Non-LSC Funds**

When a recipient violates an LSC restriction, LSC has a range of available remedial options to both correct the violation and prevent future recurrences of that violation. Generally, LSC works closely with the recipient on identifying the problem, including misunderstandings or recordkeeping and documentation defects, and developing workable long-term solutions. LSC may also prevent the recipient from charging to the LSC grant any expenses associated with the

violation through questioned and disallowed costs. 45 CFR part 1630 (rules and procedures for questioning and disallowing costs). Ordinarily, that combination of solutions and disallowed costs is sufficient. Nonetheless, in cases involving persistent or intentional violations, or a failure to take remedial actions, LSC may also suspend funding, impose sanctions, or terminate a grant. 45 C.F.R. § 1618.5 (referencing suspensions in part 1623 and sanctions or terminations in part 1606).

The LSC cost standards rule appears at 45 CFR part 1630 and sets rules for when “[e]xpenditures are allowable under an LSC grant . . . .” 45 CFR § 1630.5(a). If a recipient engages in an LSC-restricted activity with LSC funds, then LSC can question and disallow those costs as not “in compliance with the Act, applicable appropriations law, LSC rules, regulations, guidelines, and instructions, the Accounting Guide for LSC Recipients, the terms and conditions of the grant or contract, and other applicable law . . . .” *Id.* at § 1630.5(a)(4). LSC must provide the recipient with a written notice of the questioned costs, identifying both “the amount of the cost and the factual and legal basis for disallowing it.” *Id.* at § 1630.11(b). The recipient has an opportunity to respond with evidence and arguments “to show that the cost was allowable, or [with] equitable, practical, or other reasons” why LSC should allow the cost. *Id.* at § 1630.11(d). If LSC proceeds to disallow a cost over \$2,500, the recipient can appeal the decision to the LSC President who may adopt, modify, or reverse the decision. *Id.* at § 1630.12.

Part 1630 generally focuses on the costs charged to LSC funds provided in an LSC grant, including standards for allowability of such costs and a process for LSC to question impermissible costs incurred by a grantee. By contrast, § 1630.16(c) provides a mechanism to respond to the use of non-LSC funds in violation of the LSC restrictions by authorizing LSC to

“recover from a recipient's LSC funds an amount not to exceed the amount improperly charged to non-LSC funds.” Part 1630 has contained a version of this provision since 1986, when LSC first adopted the rule. 51 FR 29076 (§ 1630.12 in the first rule), 62 FR 68219 (§ 1630.11 in the revised rule with updates), 82 FR 37327 (§ 1630.16 in the revised rule without changes).

As discussed above, part 1610 provides the rules for determining when the LSC restrictions prohibit a recipient from engaging in restricted activities using certain categories of non-LSC funds. Generally, when part 1610 and § 1630.16(c) are read together, they provide the authority for LSC to invoke § 1630.16(c) any time a recipient uses non-LSC funds in violation of the LSC restrictions. Regardless of disallowing costs, LSC has authority to address any violation of the restrictions or part 1610 with non-LSC funds through all other remedial options, including suspensions, sanctions, or terminations pursuant to parts 1606, 1618, and 1623.

Section 1630.16 creates a conflict with part 1610 by providing an incomplete summary of the statutory restrictions on non-LSC funds. Section 1630.16(a) summarizes the application of the LSC Act Restrictions to public and tribal funds, but it omits the LSC Act Restrictions on unauthorized uses of public funds. The history of part 1630 provides no explanation for this omission. By contrast, the § 1630.16(b) summary of the Appropriations Restrictions does not omit any categories of non-LSC funds and includes public, private, and tribal funds. The Proposed Rule would eliminate this unexplained gap.

The National Legal Aid and Defender Association stated in its comment on the Proposed Rule that the current omission in § 1630.16(a) means that the authority to question and disallow costs in § 1630.16(c) does not apply when a recipient uses non-LSC public funds for an activity prohibited by an LSC Act restriction and contrary to the authorized purposes set by the public

funder providing those funds. Thus, in that situation, the recipient will have violated the LSC Act and § 1610 with non-LSC public funds, but LSC cannot question or disallow an equivalent amount of LSC funds under § 1630.16(c). By contrast, § 1630.16(c) provides LSC with that authority for all other uses of public funds, or of other non-LSC funds, in violation of the restrictions on non-LSC funds set out in the LSC Act, Appropriations Restrictions, and part 1610.

### **C. Proposed Revisions to § 1630.16**

The revision to § 1630.16 in the Proposed Rule eliminates this problem by referring directly to part 1610 to define the scope of the restriction on the use of non-LSC funds. This approach is consistent with the relationship between part 1630 and the other LSC restrictions. Part 1630 provides the rules and procedures for questioning and disallowing costs charged to LSC funds based on violations of substantive restrictions appearing in the LSC statutes, regulations, and other requirements. Furthermore, the proposed approach ensures that LSC has one standard, set out in Part 1610, for determining whether a recipient has used non-LSC funds in violation of the restrictions.

In this rulemaking, the commenters asked LSC to retain the omission so that § 1630.16 would not permit LSC to disallow costs for the unauthorized use of public, non-LSC funds in violation of the LSC Act Restrictions. They provided no rationale, however, as to why such an exception should exist for public funds but not for private or tribal funds. They also did not address why such an exception should exist when public funds are used in violation of the LSC Act Restrictions but not when public funds are used in violation of the Appropriations Restrictions.

### III. Elimination of the Conflict Between Parts 1610 and 1630

LSC proposes to harmonize parts 1610 and 1630 with new text in § 1630.16(a) that will replace the existing § 1630.16(a) and (b) and that will reference the substantive rules on non-LSC funds set out in part 1610. Doing so will eliminate the conflict between the rules. It will also incorporate into § 1630.16 the more detailed information about the application of these restrictions to non-LSC funds set out in the proposed part 1610. These revisions capture the statutory requirements more accurately than the current text of either § 1630.16 or part 1610.

The Proposed Rule would provide at § 1630.16(a) that:

No cost may be charged to non-LSC funds in violation of §§ 1610.3 or 1610.4 of this chapter.

The referenced sections of part 1610 are as set out in the Proposed Rule at 84 FR 39787.

That proposed text would replace the existing text at § 1630.16(a) and (b) that provides (emphasis added):

- (a) No costs attributable to a purpose prohibited by the LSC Act, as defined by 45 CFR 1610.2(a), may be charged to **private funds**, except for tribal funds used for the specific purposes for which they were provided.
- (b) No cost attributable to an activity prohibited by or inconsistent with Pub. L. 103-134, title V, sec. 504, as defined by 45 CFR 1610.2(b), may be charged to **non-LSC funds**, except for tribal funds used for the specific purposes for which they were provided.

Part 1600 defines “non-LSC funds” as “any funds that are not Corporation funds or LSC funds,” which includes private funds, public funds, and tribal funds. Part 1610 defines “private funds,” “public funds,” and “tribal funds.”

#### **IV. Request for Comments**

LSC requests public comments on this proposal. Comments that propose keeping the gap between part 1610 and § 1630.16 must:

1. Identify a valid purpose for the gap consistent with the statutory restrictions;
2. Explain why, for the LSC Act Restrictions, § 1630.16 should not apply to unauthorized uses of public funds that violate the LSC Act while continuing to apply to unauthorized uses of tribal funds that violate the LSC Act;
3. Explain why § 1630.16 should not apply to unauthorized uses of public funds that violate the LSC Act while continuing to apply to any uses of public funds that violate the restrictions in the LSC appropriation.

Comments that otherwise oppose the proposed cross reference to part 1610 in § 1630.16(a) must provide a justification for any distinction between the rules for the use on non-LSC funds in part 1610 and in § 1630.16, including justifying the distinction consistent with the statutory restrictions and justifying any distinctions in § 1630.16 among the different types of restrictions on non-LSC funds set out in part 1610.

#### **List of Subjects**

45 CFR Part 1630

Accounting, Government contracts, Grant programs—law, Hearing and appeal procedures, Legal services, Questioned costs.

For the reasons set forth in the preamble, the Legal Services Corporation proposes to amend 45 CFR chapter XVI as follows:

**PART 1630—COST STANDARDS AND PROCEDURES**

1. The authority citation for part 1630 continues to read as follows:

Authority: 42 U.S.C. 2996g(e).

2. Revise § 1630.16 to read as follows:

§ 1630.16 Applicability to non-LSC funds.

(a) No cost may be charged to non-LSC funds in violation of §§ 1610.3 or 1610.4 of this chapter.

(b) LSC may recover from a recipient's LSC funds an amount not to exceed the amount improperly charged to non-LSC funds. The review and appeal procedures of §§ 1630.11 and 1630.12 govern any decision by LSC to recover funds under this paragraph.

Dated: February 4, 2020

Mark Freedman,

Senior Associate General Counsel.

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