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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: Final rule.

SUMMARY: This final rule revises two regulations of the Legal Services Corporation (LSC). The first is the use of non-LSC funds by LSC recipients and the requirement that recipients maintain program integrity with respect to other entities that engage in LSC-restricted activities. It makes technical and stylistic updates to the rule without any substantive changes. The second is cost standards and procedures to make technical and stylistic updates and to add authority for LSC to question and disallow costs for violations of restrictions in the LSC Act involving public funds.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]

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SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

All Federal Register documents for this rulemaking, comments submitted, and other related materials are published on LSC's rulemaking website at www.lsc.gov/rulemaking.

A. Part 1610

The Legal Services Corporation Act (LSC Act or Act), 42 U.S.C. 2996–2996l, and the riders on LSC’s annual appropriations (Appropriations), Public Law 104-134, title V (1996) (as adopted by reference thereafter through Public Law 105-119, tit. V (1998), with modifications), set restrictions on recipients of grants from LSC for the delivery of civil legal aid (recipients). The Act and Appropriations also extend some of these restrictions to the use of recipients’ non-LSC funds. LSC implements most of these restrictions on non-LSC funds through part 1610 of title 45 of the Code of Federal Regulations. Part 1610 also contains the program integrity rule, which requires objective integrity and independence between a recipient and any entity that engages in LSC-restricted activities. This Final Rule makes several technical changes to part 1610 to improve clarity. These changes do not alter the operation and application of part 1610.

B. Part 1630

Section 1006(b)(1)(a) of the LSC Act states that LSC “shall have the authority to insure the compliance of recipients and their employees with the provisions of this title and the rules, regulations, and guidelines promulgated pursuant to this title” 42 U.S.C. 2996e(b)(1)(a).

Pursuant to that authority, part 1630 provides cost standards and procedures as part of grant administration and oversight that are similar to the Uniform Guidance for federal grants provided by the Office of Management and Budget at 2 CFR part 200. Part 1630 also authorizes LSC to question or disallow costs for violations of the LSC rules or restrictions.

Corresponding with part 1610, § 1630.16 authorizes LSC to question and disallow costs when a recipient uses non-LSC funds in violation of the restrictions on non-LSC funds. This Final Rule updates § 1630.16 to make two changes: (1) improve the coordination between this

section and the restrictions on non-LSC funds in part 1610; and (2) expand this section to eliminate a gap that omits from part 1630 the use of public funds without authorization of the public funder for activities restricted by the LSC Act.

II. PROCEDURAL HISTORY OF THIS RULEMAKING

On August 12, 2019, LSC 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. The Proposed Rule sets forth a detailed regulatory history of part 1610, 45 CFR 1630.16, and the basis for commencing this rulemaking. LSC received four comments on the Proposed Rule.

LSC had stated that the Proposed Rule did not contain any substantive changes to either rule. However, comments to the Proposed Rule identified that it would, in fact, make one substantive change to § 1630.16 to close an unexplained gap in the coverage of the rule. Upon reviewing the comments, LSC agreed and published a Further Notice of Proposed Rulemaking (FNPRM) in the Federal Register at 85 FR 7518 to provide clear notice of that substantive change and to provide opportunity for public comment on it. LSC did not change the proposed language for § 1630.16 from the Proposed Rule or otherwise propose new or additional changes beyond those which were identified in the Proposed Rule. Rather, LSC requested comments on the substantive change in the Proposed Rule identified by comments. LSC received four comments on the FNPRM.

Based on review of the comments received during both public comment periods, LSC has made minor changes to the proposed language in part 1610, for added clarity, and has made no changes to the proposed language for § 1630.16. On July 27, 2020, LSC Management

presented this Final Rule to the Operations and Regulations Committee (Committee) of the LSC Board of Directors (Board). On that date, the Committee voted to recommend that the Board adopt this Final Rule. On July 28, 2020, the Board voted to adopt this Final Rule.

III. DISCUSSION OF COMMENTS AND REGULATORY PROVISIONS

LSC received four comments on the initial Proposed Rule. These comments generally supported the Proposed Rule. The National Legal Aid & Defender Association’s Civil Council and Regulations Committee (NLADA) responded to the Proposed Rule globally and section-by-section. NLADA generally agreed with LSC that the proposed changes to part 1610 would improve clarity without making substantive changes. NLADA objected to the proposed changes to § 1630.16 that would close the unexplained enforcement gap. NLADA also noted that the Proposed Rule said that LSC was not proposing any substantive changes to parts 1610 or 1630. NLADA recommended retaining the current language, with the gap.

The Northwest Justice Project (NJP), a recipient of LSC funds, responded to “agree[] in significant part with the comments submitted by [NLADA]” and to “identify one item on which [NJP] differ[s] from NLADA.” Like NLADA, NJP objected to closing the enforcement gap in § 1630.16. Unlike NLADA, NJP objected to the regrouping of the restrictions in the definitions of part 1610.

The American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants (SCLAID) submitted a comment that “agree[d] with and support[ed]” NLADA’s comments. The National Association of IOLTA Programs (NAIP) submitted a comment asking LSC to either retain the gap in § 1630.16 or provide an additional comment period for that substantive change.

LSC received four comments to the FNRPM regarding the substantive change to § 1630.16. NLADA, SCLAID, NJP, and NAIP all submitted comments opposing the proposal to eliminate the gap in § 1630.16.

LSC now responds to the comments to both the Proposed Rule and the FNPRM. Because SCLAID and NJP largely joined the comments of NLADA, the discussion will only mention SCLAID or NJP when their comments differ from those of NLADA.

IV. SECTION-BY-SECTION DISCUSSION OF PROPOSED CHANGES AND COMMENTS

A. Part 1610—Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity

LSC proposed reorganizing part 1610 into four subparts to improve the organization and coherence of the rule. No comments discussed this change or raised any objections to it. LSC will adopt the proposed four subparts in the final rule.

1. Subpart A—General Provisions

§ 1610.1 Purpose.

LSC proposed several changes to state the purpose of the rule more clearly and accurately. NLADA commented that the proposed edits “improve clarity, and we have no concerns” LSC is adopting this section with no changes.

§ 1610.2 Definitions.

LSC proposed reorganizing, rewriting, and adding to the definitions to improve clarity in the rule. The comments addressed individual definitions, which are discussed, in turn, below.

§ 1610.2(a) Use of funds.

LSC proposed introducing and defining new terms for “authorized” and “unauthorized” uses of funds to more clearly apply the statutory restrictions that refer to the “purposes for

which [non-LSC funds] are provided” by public or tribal funders. NLADA commented that “[t]his new definition is an improvement in that it is written with greater brevity and does not lose any clarity or meaning.” NJP, on the other hand, criticized this definition as part of its objection to the changes in § 1630.16. NJP stated that “[a]dding ‘any unauthorized use’ implies extremely broad authority of LSC to regulate how a recipient is using public funds.” NJP misunderstood these definitions. The terms “authorized use” and “unauthorized use” are defined by the “purposes for which those funds were provided,” as stated in the current rule. Nothing in these proposed definitions would provide LSC with any new or different authority to regulate a recipient’s use of public funds as compared with the current rule.

NLADA expressed concern that the list of examples provided in the definition might be read narrowly and stated that it “should be explicit that [the list of examples] is in fact not exhaustive.” NLADA also had a concern that the labels in the examples for *limited purposes* or *general purposes* are unclear, undefined, and not self-evident. LSC agrees and has modified the definition to state that the examples are not exhaustive and to remove the terms *limited purposes* and *general purposes*.

§ 1610.2(b) Derived from.

No comments addressed this definition.

§ 1610.2(c) Non-LSC funds.

LSC proposed reorganizing and grouping together the definitions of the three types of non-LSC funds: private funds, public funds, and tribal funds. NLADA commented that LSC could “improve clarity by listing the definition for private funds last instead of first.” LSC will retain the order of these definitions with the private funds first because it tracks the logical order of

the application of the restrictions in § 1610.4 to private funds, public funds, and tribal funds, and it does not cause significant confusion.

§ 1610.2(d) Restrictions.

LSC proposed regrouping the restrictions on non-LSC funds into three new categories: extended restrictions, standard restrictions, and limited restrictions. Those categories align with the application of different restrictions to different types of non-LSC funds. This definition would replace the current groupings of restrictions by statutory source (i.e., the LSC Act or the LSC Appropriations). NLADA did not comment directly on the revised definitions, but it referred to them in a comment to § 1610.4 that “NLADA also believes the structure of the proposed §1610.4, which breaks down how different restrictions apply to different non-LSC funds[,] provides greater clarity.”

NLADA agreed with LSC’s proposal to delete the current § 1610.4(d) that discusses the financial eligibility requirements in part 1611. NLADA agreed with LSC that part 1611 “does not apply to any non-LSC funds” and suggested that LSC add part 1611 to the list of *limited restrictions* that do not apply to non-LSC funds.

LSC agrees that adding a reference to part 1611 will add to the clarity of the rule. Unlike the restrictions in the rule, part 1611 is not a statutory prohibition expressing Congressional disfavor toward specific activities. Rather, part 1611 sets out a requirement regarding client eligibility that applies only to the LSC funds. As such, adding part 1611 in the definition of *limited restrictions* would cause confusion. Instead, LSC has added a new § 1610.4(f) stating that part 1610 does not apply to part 1611 and, thus, does not apply the requirements of part 1611 to the use of non-LSC funds.

NJP objected to the reorganization of the restrictions in these definitions and stated that, “dividing the restrictions and prohibitions into three categories of Extended, Standard, and Limited is entirely unhelpful and creates confusion.” NJP recommended keeping the current groupings by statute (i.e., LSC Act or LSC Appropriation) because “LSC recipients have always understood the distinction between LSC Act funding restrictions and the appropriations act entity restrictions and their exceptions.”

LSC will retain the proposed definitions because they add clarity by grouping the restrictions in the way that Congress has applied them to different types of non-LSC funds. This approach best furthers the purpose of the rule to explain and apply these restrictions to each type of non-LSC funds. Furthermore, the definitions in the existing rule that group the restrictions by statutory source introduced confusion because each statute contains restrictions that apply differently to different types of non-LSC funds. The LSC Act contains restrictions on recipients that do not apply to non-LSC funds (e.g., section 1007(b)(11) regarding assisted suicide activities), that apply to some non-LSC funds (e.g., section 1007(b)(1) regarding fee generating cases), and that apply to all non-LSC funds (e.g., section 1006(e)(1) prohibiting the intentional identification of a recipient with the campaign of any candidate for public or political party office). Similarly, most of the restrictions in LSC’s Appropriations apply to public and private funds, but some do not apply to any non-LSC funds (e.g., section 504(e) permitting the use of non-LSC funds to comment on public rulemaking).

NJP also noted that, “LSC oddly references 1608 as a standard restriction, when in fact it applies in part to both LSC funds and entities (i.e. 1608.5).” NJP is correct that part 1608 contains multiple restrictions, some of which apply to all funds of a recipient while others do

not. That combination of different restrictions on different types of funds in one rule exemplifies one of the problems with the current definitions. The rule includes part 1608 as an LSC Act restriction and make no mention of § 1608.5 or other provisions of part 1608 that apply more broadly to non-LSC funds than most of the other LSC Act restrictions. The proposed rule addressed that problem by including some part 1608 restrictions in the definition of *standard restrictions* and the remaining part 1608 restrictions in the proposed § 1610.3 addressing other requirements. In the final rule, LSC added language to the definition of *standard restrictions* to make that distinction about part 1608 clearer.

NLADA recommended moving to the definition of *extended restrictions* the references to three restrictions in parts 1608 and 1612 from the proposed § 1610.3(b), (d), and (f). LSC agrees that those restrictions are better placed in the § 1610.2(d) definitions. Because those restrictions apply to non-LSC funds differently than the restrictions in the proposed definitions for *extended, standard, and limited restrictions*, LSC has added them in a new, fourth, definition for “other restrictions,” as discussed with the comments on § 1610.3. LSC has also added a parallel provision at § 1610.4(e) addressing the application of these three *other restrictions* to non-LSC funds.

§§ 1610.2(e)–(h)

None of the comments addressed these proposed definitions, which LSC has adopted without change in the final rule.

§ 1610.3 Other requirements on non-LSC funds.

LSC proposed moving the content of the current § 1610.3 to § 1610.4. In its place, LSC proposed creating a new section cross-referencing other LSC regulations that contain

restrictions and requirements that apply to non-LSC funds in ways that are different than the restrictions listed in the definitions in § 1610.2(d). The proposed § 1610.3 states that those regulations, not part 1610, address how they apply to the use of non-LSC funds. For example, § 1608.4 prohibits the use of any political test or qualification by a recipient without regard to which funds are used.

NLADA agreed with this approach to four of the referenced requirements. As to the other three, NLADA stated that they are more properly characterized as restrictions and suggested moving them to the definition of *extended restrictions* in § 1610.2(d). LSC agrees with NLADA that those three restrictions should appear with the other restrictions in § 1610.2(d), but disagrees that they should be classified as *extended restrictions* because they are not based on the funds used (e.g., § 1608.4 prohibiting use of any political test or qualification). Therefore, rather than add them to the *extended restrictions* definition, LSC has instead moved them to a new definition for *other restrictions* in § 1610.2(d)(4). As discussed in the summary of § 1610.2(d), these changes also address NJP's comments about confusion regarding some of the restrictions included in this section in the Proposed Rule.

LSC retained the reference to the other four regulations in § 1610.3 because they are not restrictions. Rather, they are affirmative requirements that apply regardless of the source of the funds used (e.g., part 1635—Timekeeping). LSC also updated the title and language in this section to make clear that part 1610 does not alter the way that the referenced regulations apply these requirements to non-LSC funds.

2. Subpart B—Use of Non-LSC Funds

§ 1610.4 Prohibitions on the use of non-LSC funds.

The Proposed Rule relocated and restated the application of the restrictions to non-LSC funds from § 1610.3 to the new § 1610.4 using the new definitions in § 1610.2. NLADA stated that the new structure of this section “provided greater clarity” and the use of the new definitions is an “improvement.” NJP disagreed with the new approach for the reasons stated in the discussion of the definition of restrictions in § 1610.2(d). LSC decided to retain the proposed definitions and restructuring in this section because they more accurately present the ways that the different restrictions apply to different types of non-LSC funds in the LSC Act and Appropriations.

LSC added two new paragraphs to § 1610.4 in the final rule. First, LSC added a new § 1610.4(e) to correspond with the new definition for *other restrictions* in § 1610.2(d)(4), as discussed with the comments to that definition and § 1610.3. The new section explains that parts 1608 and 1612, which implement the *other restrictions*, govern how they apply to non-LSC funds. Second, as discussed in reference to § 1610.2(d), LSC added a new § 1610.4(f) stating that part 1610 does not apply to the financial eligibility requirements of part 1611.

§ 1610.5 Grants, subgrants, donations, and gifts made by recipients.

The proposed rule clarified the application of part 1610 to the non-LSC funds of entities receiving grants, subgrants, donations, or gifts from recipients, consistent with recent revisions to parts 1627 and 1630. NLADA generally approved of these changes and stated that “adding the references to § 1627 [sic] and § 1630 [sic] increases clarity and ease of use in the larger regulatory framework.”

NJP expressed concern about the second clause of § 1610.5(c) regarding non-LSC funds provided by recipients to other entities. LSC decided to eliminate that proposed clause because

it is not necessary. Entities that receive non-LSC funds from an LSC recipient through any of these mechanisms are not LSC recipients themselves under the LSC Act or regulations (unless they otherwise receive LSC funds through a grant or subgrant). Thus, the LSC restrictions do not apply to those entities or to their use of those non-LSC funds.

§ 1610.6 Exceptions for public defender programs and criminal or related cases.

LSC proposed restructuring this section and NLADA stated that it “applauds LSC’s efforts to improve clarity for this section.”

§ 1610.7 Notification to non-LSC funders and donors.

LSC moved this section from § 1610.5 and proposed minor edits for clarity. NLADA stated that it “believes these edits improve clarity, and we have no concerns as it relates to the revisions in this section.”

3. Subpart C—Program Integrity

§ 1610.8 Program integrity of recipient.

LSC renumbered this section and added language to clarify that program integrity requires that the recipient does not subgrant LSC funds to an entity that engages in restricted activities. NLADA commented that “this is an important clarification and an improvement on the current section.”

4. Subpart D—Accounting and Compliance

§ 1610.9 Accounting.

LSC renumbered this section and added text to improve clarity. NLADA stated that it “believes the revisions improve upon the current text and adds clarity.” NLADA also suggested that LSC make clear that this section applies to all of part 1610 and incorporates the definitions

of restricted activities appearing in § 1610.2(d). LSC has added language to emphasize those points.

§ 1610.10 Compliance.

LSC proposed adding this new section to cross reference the cost requirements of part 1630 that apply to the use of non-LSC funds in violation of these restrictions. NLADA commented that it “believes a cross-reference to §1630.16 is a good idea, and we endorse adding this section.” NLADA’s concerns about changes to § 1630.16 are addressed in the discussion of that section.

B. 45 CFR Part 1630—Cost Standards and Procedures

Section 1630.16 authorizes LSC to question and disallow costs when a recipient uses non-LSC funds in violation of the restrictions on non-LSC funds. The Proposed Rule and the FNPRM proposed rewriting § 1630.16 regarding costs charged to non-LSC funds in violation of the restrictions on non-LSC funds. The proposed language would add clarity by referring directly to the prohibitions in revised §§ 1610.3 and 1610.4. The proposed language would also eliminate an enforcement gap in the current rule, which restates all the restrictions on non-LSC funds except for one: use of public funds for activities restricted by the LSC Act without authorization of the public funder (“unauthorized use of public funds”). That omission, for which no explanation appears in the regulatory history, makes this section inconsistent with § 1010(c) of the LSC Act and the substantive restrictions on non-LSC funds stated in both the current and the proposed versions of part 1610. The Proposed Rule revised this section to eliminate that unexplained gap while retaining the authorization for recovery of LSC funds in an

amount not to exceed the amount of non-LSC funds used in violation of the restrictions set out in the LSC Act and Appropriations, as incorporated in part 1610.

Section 1010(c) of the LSC Act states that funds from non-LSC sources “shall not be expended by recipients for any purpose prohibited by this title” and provides an exception for public or tribal funds when recipients are “expending them in accordance with the purposes for which they are provided” The existing § 1630.16 incorporates all restrictions on non-LSC funds in the Act and Appropriations except for omitting the reference in section 1010(c) of the Act to the restrictions on unauthorized use of public funds. By contrast, both the existing part 1610 and the revisions to part 1610 contain all of the section 1010(c) restrictions without exception. The proposed language for this section would eliminate the gap by referring to part 1610 for the substantive determination of whether any non-LSC funds were used in violation of the restrictions.

By eliminating the gap, the proposed language would also resolve the inconsistency across parts 1630, 1606, and 1623. If a recipient violates one of the restrictions, then part 1630 authorizes LSC to question and disallow the costs from the LSC grant. Depending on the severity of the violation, LSC may also suspend funding from the LSC grant pursuant to part 1623, impose a sanction through reducing funding by up to 10% of the LSC grant pursuant to part 1606, or terminate the LSC grant in part or in full pursuant to part 1606. The gap in § 1630.16 creates the only situation in which any option is unavailable. If a recipient makes unauthorized use of public funds for an LSC Act restricted activity, then LSC can suspend, reduce, or terminate funding but not use the least severe option to disallow costs.

Because elimination of the gap would substantively change the section, LSC specifically requested public comment on that change in the FNPRM and stated that comments opposing the change must address three issues, identified below. LSC received comments from NLADA, SCLAID, NAIP, and NJP. The responses to the comments are grouped by the three issues. Generally, all four comments opposed the change. For the reasons set out below, LSC disagrees with the comments and has adopted in the final rule the language for § 1630.16 as set out in the proposed rule.

1. Identify a valid purpose for the gap consistent with the statutory restrictions.

None of the comments identified a valid purpose for the gap consistent with the clear language of section 1010(c) of the LSC Act prohibiting use of public funds for activities restricted by the Act unless engaging in those restricted activities is “in accordance with the purposes for which [the public funds] are provided” The comments either disregard the language in § 1010(c) of the LSC Act or ask LSC to disregard it. NLADA cites to floor statements by multiple senators that the LSC Act restrictions will not affect public funds without mentioning the caveat in the Act that the public funds must be used for the purpose for which they were provided. Those floor statements cannot override the explicit text of the Act, nor does NLADA argue that they should in part 1610 or in the enforcement options set forth in parts 1606 and 1623.

Instead, the comments erroneously interpreted the proposed rule as changing how LSC would determine whether a recipient has violated an LSC Act restriction. NLADA summarized the criticism as follows: “To parse out the words ‘in accordance with the purposes for which they are provided’ as a restricting clause, allowing LSC to interpret the intent of public funders, potentially even contrary to that specific public funder’s interpretation of their own conditions,

would go against the statutory intent of the LSC Act.” None of the comments point to any language in the proposed rule that support this contention about how LSC would handle that determination. Furthermore, the proposed changes to this section and to part 1610 are entirely consistent with NLADA’s suggested reading of section 1010(c) that “even though public funds might be given for a purpose disallowed by the provisions of the LSC Act, LSC recipients would still be free to receive funds and spend them ‘in accordance with the purposes for which they are provided.’”

Similarly, NLADA observed that the district court in *National Center for Youth Law v. Legal Services Corp.*, 749 F. Supp. 1013 (N.D. Cal. 1990) (*Center for Youth Law*), held that LSC may not “review de novo a state agency's determination of eligibility for a state legal services grant program and supplant the state's decision with its own.” Nothing in the current or proposed rules contemplates LSC acting contrary to the holding in *Center for Youth Law*. The decision only addressed LSC’s lack of authority to overrule a public funder’s stated decision about the purpose of its grant to a recipient. Nothing in the decision limits LSC’s authority to enforce § 1010(c) of the Act when, in fact, a recipient uses public funds in violation of a restriction in the LSC Act and does so contrary to the purposes for which they were provided.

SCLAID agreed with NLADA’s comments and stated that the proposed revisions to this section “appear to shift” to LSC inquiries into the purpose of public funds when “[i]n the past, LSC has referred questions about the authorized use of non-LSC funds to the entity that granted the funds.” Nothing in the proposed rule addressed or changed how LSC handles those determinations. The inquiries into the purpose of public funds that are required by section

1010(c) of the Act appear in the existing part 1610 and are unchanged in these revisions to part 1610.

SCLAID also expressed concern about shifting to LSC “the decision to recoup funds [that in the past] has been left to the entity that granted the funds.” Nothing in the proposed rule would “shift to LSC” any responsibility from a public funder regarding oversight of its grant or decisions it makes regarding recoupment of public funds. Rather, this section deals with separate authority for LSC to disallow costs based on a violation of the restrictions in the LSC Act or Appropriations through a recipient’s use of private, public, or tribal funds. This section of part 1630 exists, in part, out of respect for the independence of public funders from LSC. LSC does not expect and cannot compel other funders to take actions to respond to the use of their funds in violation of the LSC restrictions.

SCLAID also stated that it “believes legal aid programs around the country should be able to receive funds from sources other than LSC without examination or regulation by LSC.” SCLAID’s policy goal directly conflicts with section 1010(c) of the LSC Act, which requires LSC to determine “the purposes for which [public and tribal funds] are provided” if recipients use those funds for activities restricted by the LSC Act. Congress, not LSC, decided to include in the LSC Act both that condition on the use of non-LSC funds and LSC’s obligation to enforce it.

NJP expressed the concern that “[t]he language as written potentially applies to any unauthorized use of public funds regardless of whether the use of those funds violates a restriction.” NJP stated that the proposed language would have that effect because it authorizes a questioned or disallowed cost based on a violation of § 1610.4. NJP is mistaken. Under the Proposed Rule, a violation of § 1610.4 and a corresponding disallowed cost under

§ 1630.16 always requires that the recipient has engaged in one of the restricted activities set out in the § 1610.2(d) definitions.

NJP provided an example of paying for a laptop with public funds that are not available for that purchase. NJP incorrectly concluded that the proposed rule would authorize LSC to disallow costs due to a violation of § 1610.4 in that situation. To the contrary, because NJP's example does not include activities covered by one of the restrictions defined in the proposed § 1610.2(d), it does not violate the prohibition in the proposed § 1610.4 and would not support a questioned or disallowed cost under the proposed § 1630.16.

By contrast, LSC addressed a situation in 2014 involving public funds and part 1613, which prohibits providing "legal assistance with respect to any criminal proceeding" and implements that restriction from section 1007(b)(2) of the Act. LSC discovered that a then-recipient had used public funds for criminal cases in direct violation of the state law that provided those funds. The State of Michigan had provided the recipient with public funds for "indigent civil legal assistance" and prohibited using those funds "to provide legal services in relation to any criminal case or proceeding" MCL §§ 600.151a and 600.1485(10). When the recipient used those Michigan public funds for criminal cases, it violated the purposes for which they were provided by Michigan and did so for an activity restricted by part 1613 and section 1007(b)(2) of the LSC Act. That combination of unauthorized use of public funds and doing so for an LSC-restricted activity resulted in a violation of part 1610 under the current § 1610.3 and would also do so under § 1610.4 of the revised rule.

Nonetheless, § 1630.16 did not authorize LSC to disallow costs in that situation, even though LSC could have imposed harsher penalties such as a suspension, reduction of funding,

partial termination of funding, or full termination of funding under parts 1606 and 1623. The proposed § 1630.16 would close this gap so that LSC could disallow costs if this type of violation occurs in the future, as it already can do for all other uses of non-LSC funds that violate the restrictions in the LSC Act or Appropriations.

NAIP also opposed the proposed language for § 1630.16 because “[c]omity requires that individual IOLTA programs, not LSC, determine if, when, and to what extent IOLTA funds are used in a manner that is inconsistent with the purposes for which those funds were granted” Per the decision in *Center for Youth Law* and as discussed above, nothing in the proposed rule would change LSC’s approach to determining the purposes for which funds were provided consistent with the grant award of the public funds, applicable laws and rules, and any determinations by the funder. Congress mandated that LSC consider the purpose of the public funds in section 1010(c) of the LSC Act, and both the existing and proposed versions of part 1610 contain that requirement without objection in the comments.

NAIP also stated that IOLTA programs, not LSC, should determine “what remedial and/or punitive actions are required with respect to those funds.” LSC does not propose to interfere with any public funder’s enforcement of the terms of that funder’s grant. Rather, the proposed language in this section provides authority for LSC to disallow costs when the recipient uses those public funds in violation of the LSC Act, which Congress has charged LSC to enforce.

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.

Rather than address the inconsistency, all comments instead recommended that LSC expand the gap so that this section would omit disallowing costs for recipient uses of both public funds and tribal funds that violate the restrictions in the LSC Act. LSC agrees that nothing in the LSC Act justifies treating public funds differently than tribal funds, but LSC declines the suggestion of expanding the gap without any justification for the inconsistency with the LSC Act, as discussed with the responses to Question One.

NLADA suggested that the gap is larger than thought because it excludes some tribal funds along with public funds. They read the provision regarding “tribal funds used for the specific purposes for which they are provided” to modify the term “private funds.” Thus, NLADA speculated that it applies only to tribal funds from foundations (which are private funds) and not to tribal funds from tribes or tribal governments. SCLAID specifically stated that they agreed with this interpretation. While NLADA presents a plausible reading of the text, it still does not provide a reason for treating these types of non-LSC funds differently in this situation when no such distinction appears in 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 Appropriations.

NLADA addressed this question by stating that the Appropriations restrictions apply to public funds without regard to the purpose for which the funds were provided. By contrast, the restrictions in section 1010(c) of the LSC Act apply to public funds only when a recipient uses those funds for a purpose other than the purposes for which they were provided. Thus, the LSC Act restrictions on public funds require an additional inquiry that does not apply to the

Appropriations restrictions. LSC agrees with that description, but it does not explain why this gap exists in § 1630.16 regarding costs. Rather, that difference between the statutes is an element in part 1610 for determining when different LSC restrictions apply to the use of different types of non-LSC funds.

SCLAID agreed with NLADA's comments and stated that "there is no legislative requirement or history justifying the recovery of funds from non-LSC sources for activities not authorized by the Act." To the contrary, section 1006(b)(1)(A) of the LSC Act specifically provides LSC with the authority "to insure the compliance of recipients and their employees with the provisions of this title and the rules, regulations, and guidelines promulgated pursuant to this title" Section 1010(c) of the LSC Act explicitly states that the restrictions in the LSC Act apply to all non-LSC funds with limited exceptions. Thus, the LSC Act authorizes LSC to adopt and enforce cost standards and to question and disallow costs when a recipient violates the LSC Act restrictions with LSC or non-LSC funds. Furthermore, this section already provides LSC with authority to disallow costs based on the use of private or tribal funds in violation of the LSC Act or on the use of any non-LSC funds in violation of the Appropriations. The proposed change simply adds the use of public funds in violation of the LSC Act to harmonize this section with the statutory restrictions and their enforcement throughout the LSC regulations.

List of Subjects

45 CFR Part 1610

Grant programs – law, Legal services.

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 amends 45 CFR chapter XVI as follows:

1. Revise part 1610 to read as follows:

PART 1610—USE OF NON-LSC FUNDS; PROGRAM INTEGRITY

Subpart A—General Provisions

§1610.1 Purpose.

§1610.2 Definitions.

§1610.3 Other Requirements on recipients' funds.

Subpart B—Use of Non-LSC funds

§1610.4 Prohibitions on the use of non-LSC funds.

§1610.5 Grants, subgrants, donations, and gifts made by recipients.

§1610.6 Exceptions for public defender programs and criminal or related cases.

§1610.7 Notification to non-LSC funders and donors.

Subpart C—Program Integrity

§1610.8 Program integrity of recipient.

Subpart D—Accounting and Compliance

§1610.9 Accounting.

§1610.10 Compliance.

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

Subpart A—General Provisions

§1610.1 Purpose.

This part is designed to implement restrictions and requirements on the use of non-LSC funds by LSC recipients and to set requirements for each LSC recipient to maintain program integrity with respect to any organization that engages in LSC-restricted activities.

§1610.2 Definitions.

(a) *Use of funds* means the expenditure of funds by an LSC recipient.

(1) *Authorized use of funds* means any use of funds within the purpose for which the funds were provided. The following non-exhaustive list provides examples of some of the types of purposes that a grantor, donor, or other might identify.

(i) A grant stating that the funds provided are available to support legal services for victims of domestic violence regardless of income or financial resources are authorized for those purposes;

(ii) A grant stating that the funds provided are available to support any civil legal services to people with household incomes below 200% of the Federal Poverty Guidelines are authorized for those purposes;

(iii) A private donation stating that the funds are for eviction work are authorized for that purpose; or

(iv) A private donation without any instructions from the donor or grantor regarding the use of the funds are available for any purposes.

(2) *Unauthorized use of funds* means any use of funds that is not an authorized use as defined above.

(b) *Derived from* means the recipient obtained the funds either directly from the source or as the result of a series of grants and subgrants (or similar arrangements) originating from the source. For example, a state provides public funds to a private, non-LSC-funded statewide legal aid entity. The statewide legal aid entity subgrants some of those public funds to an LSC recipient to provide services in six counties. The subgranted funds remain public funds under this rule because they are derived from public funds.

(c) *Non-LSC funds* means funds derived from any source other than LSC.

(1) *Private funds* means funds that are derived from any source other than LSC or the other categories of non-LSC funds in this section. Examples of private funds are donations from individuals or grants that do not qualify as public funds or tribal funds in this section.

(2) *Public funds* means funds that are:

(i) Derived from a Federal, State, or local government or instrumentality of a government; or

(ii) Derived from Interest on Lawyers' Trust Account (IOLTA or IOLA) programs established by State court rules or legislation that collect and distribute interest on lawyers' trust accounts.

(3) *Tribal funds* means funds that are derived from an Indian tribe or from a private nonprofit foundation or organization for the benefit of Indians or Indian tribes.

(d) *Restrictions* means the prohibitions or limitations on the use of LSC funds by a recipient and on the use of non-LSC funds as described in this part. LSC has four categories of restrictions: extended, standard, limited, and other. The restrictions appear in 45 CFR

parts 1600 through 1644, in the LSC Act at 42 U.S.C. 2996–2996l and in the sections of LSC’s annual appropriation (Appropriations Restrictions) that incorporate the restrictions enacted in section 504 of Title V in Public Law 104-134, 122 Stat. 1321-50 (1996), as incorporated through Pub. L. 105-119, tit. V, § 502(a)(2), 111 Stat. 2440, 2510 (1998) and subject to modifications in other statutes.

- (1) *Extended restrictions* are the restrictions on:
 - (i) Abortion litigation (other abortion activities are subject to a standard restriction)—Section 504(a)(14) of the Appropriations Restrictions;
 - (ii) Aliens (representation of non-U.S. citizens)—45 CFR part 1626;
 - (iii) Class actions—45 CFR part 1617;
 - (iv) Evictions from public housing involving illegal drug activities—45 CFR part 1633;
 - (v) Lobbying in general—45 CFR 1612.3, subject to the limitations and exceptions in 45 CFR 1612.5 (activities that are not lobbying) and 45 CFR 1612.6 (exceptions for non-LSC funds that are a limited restriction);
 - (vi) Prisoner litigation—45 CFR part 1637;
 - (vii) Redistricting or census—45 CFR part 1632;
 - (viii) Solicitation of clients—45 CFR part 1638;
 - (ix) Training on prohibited topics—45 CFR 1612.8; and
 - (x) Welfare reform—45 CFR part 1639.

- (2) *Standard restrictions* are the restrictions on:
- (i) Abortion activities (other than abortion litigation subject to an extended restriction)—42 U.S.C. 2996f(b)(8);
 - (ii) Criminal proceedings—45 CFR part 1613;
 - (iii) Draft registration violations (violations of Military Selective Service Act) or military desertion—42 U.S.C. 2996f(b)(10);
 - (iv) Desegregation of schools—42 U.S.C. 2996f(b)(9);
 - (v) Fee-generating cases—45 CFR part 1609;
 - (vi) Habeas corpus (collaterally attacking criminal convictions)—45 CFR part 1615;
 - (vii) Organizing—45 CFR 1612.9;
 - (viii) Persistent incitement of litigation and other activities prohibited by rules of professional responsibility for attorneys—Section 42 U.S.C. 2996f(a)(10); and
 - (ix) Political activities—the provisions of 45 CFR part 1608 that are stated as restrictions on the use of LSC funds (e.g., the clause of § 1608.4(b) regarding “the use of any Corporation funds”) but not the other provisions of part 1608, which are included in the category for other restrictions (e.g., § 1608.3(a) prohibiting the use of “any political test or qualification”).).
- (3) *Limited restrictions* are the restrictions on:
- (i) Lobbying permitted with non-LSC funds (upon government request, in public rulemaking, or regarding state or local funding of the recipient)—45 CFR 1612.6;
 - (ii) Assisted suicide, euthanasia, and mercy killing—45 CFR part 1643; and

(iii) Use of appropriated LSC funds to file or pursue a lawsuit against LSC—Section 506 of the Appropriations Restrictions.

(4) *Other restrictions* are the restrictions on:

(i) Demonstrations, picketing, boycotts, or strikes—45 CFR 1612.7(a).

(ii) Political activities—the provisions of 45 CFR part 1608 other than those stated as restrictions on the use of LSC funds (which are standard restrictions) (e.g., § 1608.3(a) prohibiting the use of “any political test or qualification” is an other restriction).

(iii) Rioting, civil disturbances, or violations of injunctions—45 CFR 1612.7(b).

(e) *Restricted activity* means an activity prohibited or limited by the restrictions.

(f) *Program integrity* means that a recipient is maintaining objective integrity and independence from any organization that engages in restricted activities, as required by subpart C of this part.

§1610.3 Other requirements on recipients’ funds.

The following requirements apply to non-LSC funds as provided in the referenced regulations. This part neither expands nor limits those requirements.

(a) Client identity and statement of facts—45 CFR part 1636.

(b) Disclosure of case information—45 CFR part 1644.

(c) Priorities for the provision of services—45 CFR part 1620.

(d) Timekeeping—45 CFR part 1635.

Subpart B—Use of Non-LSC funds

§ 1610.4 Prohibitions on the use of non-LSC funds.

(a) *Non-LSC funds.* Non-LSC funds may not be used by recipients for restricted activities as described in this section, subject to the exceptions in §§ 1610.5 and 1610.6 of this part.

(b) *Extended restrictions.* The extended restrictions apply to the following uses of non-LSC funds:

- (1) Private funds—any use of private funds;
- (2) Public funds—any use of public funds; and
- (3) Tribal funds—any unauthorized use of tribal funds.

(c) *Standard restrictions.* The standard restrictions apply to the following uses of non-LSC funds:

- (1) Private funds—any use of private funds;
- (2) Public funds—any unauthorized use of public funds; and
- (3) Tribal funds—any unauthorized use of tribal funds.

(d) *Limited restrictions.* The limited restrictions do not apply to the use of non-LSC funds.

(e) *Other restrictions.* The other restrictions apply to non-LSC funds as provided in the referenced regulations. This part neither expands nor limits those requirements.

(f) *Inapplicability to part 1611—financial eligibility.* This part does not expand, limit, or otherwise apply to the financial eligibility rules of 45 CFR part 1611.

§ 1610.5 Grants, subgrants, donations, and gifts made by recipients.

(a) Subgrants in which a recipient provides LSC funds or LSC-funded resources as some or all of a subgrant to a subrecipient are governed by 45 CFR part 1627. That rule states how

the restrictions apply to the subgrant and to the non-LSC funds of the subrecipient, which can vary with different types of subgrants.

(b) Donations and gifts using LSC funds are prohibited by 45 CFR part 1630.

(c) Use of non-LSC funds. Grants, subgrants, donations, or gifts provided by a recipient and funded entirely with non-LSC funds are not subject to this part.

§ 1610.6 Exceptions for public defender programs and criminal or related cases.

The following restrictions do not apply to: (1) A recipient's or subrecipient's separately funded public defender program or project; or (2) Criminal or related cases accepted by a recipient or subrecipient pursuant to a court appointment.

(a) Criminal proceedings—45 CFR part 1613;

(b) Actions challenging criminal convictions—45 CFR part 1615;

(c) Aliens—45 CFR part 1626;

(d) Prisoner litigation—45 CFR part 1637;

§ 1610.7 Notification to non-LSC funders and donors.

(a) No recipient may accept funds from any source other than LSC unless the recipient provides the source of the funds with written notification of LSC prohibitions and conditions that apply to the funds, except as provided in paragraph (b) of this section.

(b) LSC does not require recipients to provide written notification for receipt of any single contribution of less than \$250.

Subpart C—Program Integrity

§ 1610.8 Program integrity of recipient.

(a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

- (1) The other organization is a legally separate entity;
- (2) The other organization receives no subgrant of LSC funds from the recipient, as defined in 45 CFR part 1627, and LSC funds do not subsidize restricted activities; and
- (3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. LSC will determine whether sufficient physical and financial separation exists on a case-by-case basis and will base its determination on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:

- (i) The existence of separate personnel;
- (ii) The existence of separate accounting and timekeeping records;
- (iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
- (iv) The extent to which signs and other forms of identification that distinguish the recipient from the organization are present.

(b) Each recipient's governing body must certify to LSC on an annual basis that the recipient is in compliance with the requirements of this section.

Subpart D—Accounting and Compliance

§1610.9 Accounting.

- (a) Recipients shall account for funds received from a source other than LSC as separate and distinct receipts and disbursements in a manner directed by LSC.
- (b) Recipients shall adopt written policies and procedures to implement the requirements of this part.
- (c) Recipients shall maintain records sufficient to document the expenditure of non-LSC funds for any restricted activities as defined in Subpart A and to otherwise demonstrate compliance with the requirements of this part.

§1610.10 Compliance.

In addition to all other compliance and enforcement options, LSC may recover from a recipient's LSC funds an amount not to exceed the amount improperly charged to non-LSC funds, as provided in § 1630.16 of this chapter.

PART 1630 -- COST STANDARDS AND PROCEDURES

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

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

3. 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 45 CFR 1610.3 or 1610.4.
- (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: September 15, 2020

Mark Freedman

Senior Associate General Counsel

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