

95-541, as amended by the Antarctic Science, Tourism and Conservation Act of 1996, Public Law 104-227, and Article 15 of the Protocol on Environmental Protection to the Antarctic Treaty done at Madrid on October 4, 1991. Specifically, this part is designed to ensure that non-U.S. flagged vessels supporting non-governmental expeditions to Antarctica will have appropriate emergency response plans. This part is also designed to ensure that expedition members are informed of their environmental protection obligations under the Antarctic Conservation Act.

#### § 673.2 Scope.

The requirements in this part apply to non-governmental expeditions to or within the Antarctic Treaty area for which the United States is required to give advance notice under Paragraph (5) of Article VII of the Antarctic Treaty.

#### § 673.3 Definitions.

In this part:

*Antarctica* means the area south of 60 degrees south latitude

*Expedition* means an activity undertaken by one or more nongovernmental persons organized within or proceeding from the United States to or within the Antarctic Treaty area for which advance notification is required under Paragraph 5 of Article VII of the Antarctic Treaty.

*Person* has the meaning given that term in section 1 of title 1, United States Code, and includes any person subject to the jurisdiction of the United States except that the term does not include any department, agency, or other instrumentality of the Federal Government.

#### § 673.4 Environmental protection information.

(a) Any person organizing a non-governmental expedition to or within Antarctica and who does business in the United States shall notify expedition members of the environmental protection obligations of the Antarctic Conservation Act. Upon request by the National Science Foundation, the person organizing such an expedition shall provide the National Science Foundation Office of Polar Programs with copies of materials used to meet this notification obligation.

(b) The National Science Foundation Office of Polar Programs may prepare for publication and distribution explanation of the prohibited acts set forth in the Antarctic Conservation Act, as well as other appropriate educational material for tour operators, their clients, and employees. Such material provided

to tour operators for distribution to their passengers and crew shall be disseminated prior to or during travel to the Antarctic.

#### § 673.5 Emergency response plan.

Any person organizing an expedition to or within Antarctica who is transporting passengers aboard a non-U.S. flagged vessel shall ensure that:

(a) The vessel owner's or operator's shipboard oil pollution emergency plan, prepared and maintained according to Regulation 26 of Annex I of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), has provisions for prompt and effective response action to such emergencies as might arise in the performance of the vessel's activities in Antarctica. If the vessel owner or operator does not have a shipboard oil pollution emergency plan, a separate plan for prompt and effective response action is required.

(b) The vessel owner or operator agrees to take all reasonable measures to implement the plan for a prompt and effective response action in the event of an emergency, taking into account considerations of risk to human life and safety.

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## LEGAL SERVICES CORPORATION

### 45 CFR Parts 1606 and 1625

#### Termination and Debarment Procedures; Recompensation Denial of Refunding

**AGENCY:** Legal Services Corporation.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would remove the Corporation's rule on denial of refunding from the Code of Federal Regulations and substantially revise the Corporation's rule governing the termination of financial assistance. These revisions are intended to implement major changes in the law governing how the Corporation deals with post-award grant disputes. The proposed termination rule also adds new provisions authorizing the Corporation to re-compete service areas and to debar recipients for good cause from receiving additional awards of financial assistance.

**DATES:** Comments should be received on or before August 3, 1998.

**ADDRESSES:** Comments should be submitted to the Office of the General Counsel, Legal Services Corporation,

750 First St. NE., 11th Floor, Washington, DC 20002-4250.

**FOR FURTHER INFORMATION CONTACT:** Office of the General Counsel, 202-336-8817.

**SUPPLEMENTARY INFORMATION:** The Operations and Regulations Committee (Committee) of the Legal Services Corporation's (LSC) Board of Directors (Board) met on April 5, 1998, in Phoenix, Arizona, to consider proposed revisions to the Corporation's rules governing procedures for the termination of funding, 45 CFR part 1606, and denial of refunding, 45 CFR part 1625. The Committee made several changes to the draft rule and adopted this proposed rule for publication in the **Federal Register** for public comment. This proposed rule is intended to implement major changes in the law governing how the Corporation deals with post-award grant disputes.

Prior to 1996, LSC recipients could not be denied refunding, nor could their funding be suspended or their grants terminated, unless the Corporation complied with sections 1007(a)(9) and 1011 of the LSC Act, 42 U.S.C. 2996 et seq., as amended. For suspensions, the Corporation could not suspend financial assistance unless the recipient had been provided reasonable notice and an opportunity to show cause why the action should not be taken. For terminations and denials of refunding, the Corporation was required to provide the opportunity for a "timely, full and fair hearing" before an independent hearing examiner.

In 1996, the Corporation implemented a system of competition for grants that ended a recipient's right to yearly refunding. Under the competition system, grants are now awarded for specific terms, and, at the end of a grant term, a recipient has no right to refunding and must reapply as a competitive applicant for a new grant. Accordingly, this rule proposes to remove 45 CFR part 1625, the Corporation's regulation on the denial of refunding, from the Code of Federal Regulations as no longer consistent with applicable law.

The FY 1998 appropriations act made additional changes to the law affecting LSC recipients' rights to continued funding. See Pub. L. 105-119, 111 Stat. 2440 (1997). Section 504 provides authority for the Corporation to debar a recipient from receiving future grant awards upon a showing of good cause. Section 501(c) authorizes the Corporation to re-compete a service area when a recipient's financial assistance has been terminated. Finally, section 501(b) of the appropriations act

provides that the hearing rights prescribed by sections 1007(a)(9) and 1011 are no longer applicable to the provision, denial, suspension, or termination of financial assistance to recipients. This proposed rule implements section 501(b) as it applies to terminations and denials of refunding. Also in this publication of the **Federal Register** is a related proposed rule, 45 CFR part 1623, which sets out new proposed policies and procedures for the suspension of financial assistance to recipients.

The change in the law on hearing rights does not mean that grant recipients have no rights to a hearing before the Corporation may terminate funding or debar a recipient. Sections 501(b) and 501(c) of the FY 1998 appropriations act require the Corporation to provide a recipient with "notice and an opportunity for the recipient to be heard" before it can terminate a grant or debar a recipient from future grants. In addition, constitutional due process generally requires that a discretionary grant recipient is entitled to "some type of notice" and "some type of hearing" before its grant funding can be suspended or terminated during the term of the grant period. Stein, *Administrative Law* at § 53.05(4). However, the new law in the appropriations act emphasizes a congressional intent to strengthen the ability of the Corporation to ensure that recipients are in full compliance with the LSC Act and regulations and other applicable law. See H. Rep. No. 207, 105th. Cong., 1st Sess. 140 (1997). Accordingly, under this proposed rule, the hearing procedures in part 1606 have been streamlined. The changes are intended to emphasize the seriousness with which the Corporation takes its obligation to ensure that recipients comply with the terms of their grants and provide quality legal assistance. At the same time, the Corporation intends that recipients be provided notice and a fair opportunity to be heard before any termination or debarment action is taken.

### Section-by-Section Analysis

#### Section 1606.1 Purpose

One purpose of this proposed rule is to ensure that the Corporation is able to terminate grants or debar recipients from receipt of future grants in a timely and efficient manner when necessary as part of its ongoing effort and obligation to ensure compliance by recipients with the terms of their LSC grants or contracts. Another purpose of the rule is to ensure that scarce LSC funds are

provided to recipients who can provide the most effective and economical legal assistance to the poor. Finally, the rule is also intended to ensure that a recipient is provided notice and an opportunity to be heard before it may be debarred or before its grant may be terminated by the Corporation.

#### Section 1606.2 Definitions

Paragraph (a) of this section defines "debarment" as an action to prohibit a recipient from receiving another grant award from the Corporation or from entering into a future agreement with another recipient for LSC funds. Thus, for the period of time stated in the debarment decision, a recipient would not be permitted to participate in future competitions for LSC grants or contracts. Nor could the recipient enter into any future subgrant, subcontract or similar agreement for LSC funds with another recipient. The proposed definition is similar to those used in various Federal agency debarment regulations.

Paragraph (b) defines "recipient" as any grantee or contractor receiving funds from the Corporation under 1006(a)(1)(A) of the LSC Act. This provision in the Act generally refers to recipients who provide direct legal assistance to eligible clients.

Paragraph (c) defines "termination." A termination is a permanent reduction of funding, as opposed to a temporary withholding of funds under a suspension. When funds are suspended, they are returned to the recipient at the end of the suspension period, either because the problem has been or is in the process of being cured, or the Corporation initiates a termination process. In a termination, the funds taken or withheld by the Corporation are not returned to the recipient at a later date.

A termination may be "in whole or in part." A termination "in whole" means that the recipient's grant with the Corporation is completely terminated and the recipient is no longer a grantee of the Corporation, at least for the grant that was terminated. A partial termination or a termination "in part" means that only a percentage of the recipient's grant with the Corporation is terminated. The recipient is still a grantee of the Corporation but receives less funding under the grant. The definition of termination also includes language that clarifies that partial terminations will reduce only the amount of the recipient's current year's funding, unless the Corporation provides otherwise in the final termination decision.

The definition is not intended to suggest that a partial termination affects the amount of funding required by statute to be allocated to the affected recipient's service area. The Corporation's appropriations act requires that funding be provided to service areas according to a prescribed formula. Pursuant to that formula, a specific grant amount is awarded to a recipient pursuant to the Corporation's competition process. However, this does not mean that the Corporation cannot recover funds awarded under a grant when it sanctions a recipient for cause. The legislative history of the funding provision makes it clear that the Corporation may withhold or recover grant funds for good cause. When funds are recovered, they may be reprogrammed and used for similar purposes, according to relevant law and Corporation policy. Comments are requested on whether substantial recoveries should be applied to the same service areas.

Paragraphs (c) (1) through (4) clarify what is not intended to be included within the definition of termination. Paragraph (c)(1) provides that a reduction or rescission of a recipient's funding required by law is not a termination for the purposes of this part. For example, in 1995, the Corporation was required to reduce and rescind its recipients' funding pursuant to Congressional legislation that rescinded the amount of appropriations for Corporation grants and required the termination of a category of recipients. Subparagraphs (c)(2) and (c)(3) provide that a recovery of funds pursuant to § 1630.9(b) of the Corporation's regulations on costs standards and procedures or § 1628.3(c) of the Corporation's rule on fund balances does not constitute a termination.

Finally, paragraph (c)(4) provides that a reduction of funding of less than 5 percent of a recipient's current annual level of financial assistance does not constitute a termination. Administrative hearings are costly and time-consuming for all parties involved. For certain compliance problems, the Corporation may wish to utilize lesser sanctions than suspensions and terminations. The Committee noted that the Corporation should promulgate regulations setting out standards and procedures for applying lesser sanctions before such actions may be taken by the Corporation. The use of lesser sanctions is consistent with the Corporation's rules on denials of refunding in which a denial of refunding did not include a reduction of 10 percent or less of a recipient's annual funding level. The notion that minor reductions do not

necessarily warrant elaborate hearings has been implicit in LSC's rules since the establishment of the Corporation and, indeed, is traceable to the rules of LSC's antecedent organization, the Office of Economic Opportunity (OEO) which defined a denial of refunding as a reduction of 20 percent or more of a grant. See 48 FR 54196 (Nov. 30, 1983). OEO's denial of a hearing for cases covering funding reductions of less than 20 percent was specifically upheld. *Economic Opportunity Commission of Nassau County v. Weinberger*, 524 F.2d 393 (2d Cir. 1975). Part 1618, the Corporation's regulations on enforcement procedures, has long provided that, in addition to the statutory defunding remedies, the Corporation "may take other action to enforce compliance with the Act." See § 1618.5(b).

The Committee specifically seeks input on the legal and practical effects of including this provision in the rule and, if included, whether the provision's 5 percent is the appropriate cutoff and whether a dollar amount should also be included.

#### *Section 1606.3 Grounds for a Termination*

This section sets out the grounds for a termination. Paragraph (a)(1) permits termination for a substantial violation by a recipient of applicable law or the terms or conditions of its grant with the Corporation. This provision has been carried over from the current rule, except that the proposed provision no longer provides the recipient with a right to take corrective action before the Corporation may terminate its grant. A recipient that has substantially violated the terms of its grant with the Corporation is not entitled to a second chance as a matter of right. If the Corporation identifies a compliance problem with a recipient that has the potential for easy correction pursuant to a corrective action plan, the Corporation already has discretion to require a recipient to take corrective action. In addition, paragraph (b)(4) provides that, in determining if there has been a substantial violation that warrants initiation of procedures under this part, the Corporation will consider whether a recipient has failed to take appropriate and adequate steps to cure the problem when it became aware of a violation.

Paragraph (b) of this section proposes criteria for the Corporation to consider to determine whether there has been a "substantial violation" under paragraph (a)(2). The current rules on termination and denial of refunding include two different undefined standards. Terminations are undertaken for

*substantial violations* and denial of refunding for *significant violations*. There has been some confusion over the years about the scope of the meaning of the two standards.

The proposed criteria include the consideration of whether the violation was intentional, the importance of the restriction or requirement violated, and whether the violation is of a serious nature rather than merely technical or minor. The Corporation will also consider whether the immediate problem is part of a history of violations by the recipient and whether the recipient took appropriate action to correct the problem when it became aware of the violation. These criteria would permit the Corporation to take action, for example, for a single serious violation. The fifth criterion permits the Corporation to consider whether the violation was intentional. Although the Committee included this criterion in the proposed rule, it requests public comment on whether other standards would be more appropriate; for example, whether the recipient "knowingly and willfully" committed the violation.

The current rule expressly states that action will be taken against a recipient only for a substantial violation that occurred at a time when the law violated by the recipient was in effect. This proposed rule deletes such language as unnecessary. Retroactive application of law is strongly disfavored in the law, and the Corporation may not sanction recipients for violations of a law that was not in effect at the time of the violation. Paragraph (a)(2) includes as a ground for termination the substantial failure of the recipient to provide high quality, economical, and effective legal assistance. This provision is in the current rule. Although the competition process provides another method for making quality judgments about and weeding out recipients that perform poorly, this provision is retained so that the Corporation may act when necessary during the term of a grant or contract to terminate a recipient that has substantially failed to provide high quality, economical, and effective legal assistance. The Committee requests public comment on what standards should be considered by the Corporation to determine whether there has been a substantial failure of a recipient to provide such legal assistance.

#### *Section 1606.4 Grounds for Debarment*

Section 504 of the Corporation's FY 1998 appropriations act provides authority for the Corporation to debar a recipient from receiving future grant

awards upon a showing of good cause. Debarments are common in the Federal government for both procurement contracts and assistance grants. Causes for debarment range from debarments for fraud, embezzlement, and false claims, to debarments for a Federal grantee's longstanding unsatisfactory performance or the failure to pay a substantial debt owed to the Federal government. *Principles of Federal Appropriations Law* at 10-28, United States Government Accounting Office (GAO); Grants Management Advisory Service at section 558 (1995).

The grounds for debarment of an LSC grantee implement section 501(c) of the Corporation's appropriations act and are set out in paragraph (b) of this section. They include a termination of a recipient for violations of Federal law related to the use of Federal funds, such as law on fraud, bribery, or false claims against the government; or substantial violations by a recipient of the terms of its grant with the Corporation. Also, similar to Federal practice, recipients may also be debarred for knowingly entering into any subgrant or similar agreement with an entity debarred by the Corporation.

Section 1606.4(a)(5) permits the Corporation to debar a recipient if the recipient seeks judicial review of an agency action taken under any Federally-funded program for which the recipient receives Federal funds and applies regardless of the source of funding used by the recipient for the litigation. This provision applies when the recipient files a lawsuit on behalf of the recipient and the lawsuit is related to a program for which the recipient receives Federal funds. It does not apply when the recipient files a lawsuit on behalf of a client of the recipient which seeks judicial review of an agency action that affected the client.

#### *Section 1606.5 Termination and Debarment Procedures*

This section states the due process requirement that, before a recipient's grant or contract may be terminated or a recipient may be debarred, it will be provided notice and an opportunity to be heard according to the procedures in this part.

#### *Section 1606.6 Proposed Decision*

This section sets out the requirements for providing notice to the recipient of the Corporation's proposed decision to terminate a recipient's funding or to debar a recipient. Under this section the Corporation may simultaneously take action to terminate and debar a recipient in the same proceeding.

The notice of the proposed decision is required by paragraph (a) of this section to be in writing and must provide the grounds for termination or debarment in a manner sufficiently detailed to inform the recipient of the charges against it, the legal and factual bases of the charges, and the proposed sanctions. Paragraph (b) requires that the recipient be told of its right to request an informal conference and a hearing. Paragraph (c) sets out the circumstances when a proposed decision becomes final.

#### *Section 1606.7 Informal Conference*

This section is generally the same as § 1606.5 in the current rule, but has been renumbered and restructured for clarity and ease of use. It allows the Corporation and recipient to have an informal conference to either resolve the matter at issue through compromise or settlement or to narrow the issues and share information so that any subsequent hearing might be rendered shorter or less complicated. Language in the current rule stating that the preliminary conference may be adjourned for deliberation or consultation is proposed to be deleted as unnecessary. Nothing in this section requires that the conference must be completed under any particular time frame and, indeed, the language in this section emphasizes the informality of the conference, thus providing the Corporation a large measure of discretion in determining how the conference will be conducted.

This proposed rule has also eliminated the provisions providing a right for the recipient or the Corporation to request a pre-hearing conference. The intent is to simplify and shorten the hearing procedures available for terminations. The informal conference section already provides an opportunity for the parties in the dispute to narrow and define issues and to determine whether compromise or settlement is possible.

#### *Section 1606.8 Hearing*

This section delineates the procedures for the due process hearing that will be provided to a recipient before it may be debarred or before its grant may be terminated. It has been simplified from the process in the current rule by deleting unnecessary provisions and provisions permitting third party participation in the hearing. The deletion is not intended to mean that third parties may never participate in a hearing. However, the proposed rule would no longer provide a recipient with the right to demand such participation.

Paragraph (c) provides for an impartial hearing officer who will be appointed by the President or designee. Reference to a designee is included because, occasionally, the President may be disqualified from choosing a hearing officer. Delegation would be appropriate, for example, if the President has had prior involvement in the matter under consideration.

Under the current rule, which was promulgated to implement section 1011 of the LSC Act, an independent hearing examiner was required to preside over the hearing. The independent hearing examiner was required to be someone who was not employed by the Corporation or who did not perform duties within the Corporation. Because section 1011 no longer applies to hearing procedures under this part, recipients no longer have a right to an independent hearing examiner.

Constitutional due process, however, requires that, before funding for a recipient of Federal grants may be terminated during the grant term, the recipient must be provided a hearing before an impartial decision maker. Stein, *Administrative Law* at § 53.05(4). An impartial decision maker may be an employee of the Corporation as long as that employee has not prejudged the adjudicative facts and has no pecuniary interest or personal bias in the decision. *Id.*; *Spokane County Legal Services v. Legal Services Corporation*, 614 F. 2d 662, 667-668 (9th Cir. 1980). See also, M. Asinow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 *Columbia Law Review* 759, 782 (1981). In order to ensure against such prejudgment, this rule requires that a hearing officer be a person who has not been involved in the pending action.

The Corporation has the burden of proof under the current rule. This proposed section places the burden on the recipient. It is the intent of these procedures that the Corporation not make a prejudgment before the hearing. Rather, when it has reason to believe that grounds exist for a termination or debarment, it issues a proposed decision and the recipient then has the burden to show why the Corporation should not take the action it proposes. The Committee has asked for comments on whether the language in this proposed rule adequately reflects that intent. The change is also intended to reflect the emphasis in current law on strengthening the Corporation's ability to sanction recipients and to recompetitively service areas. See H. Rep. No. 207, 105th Cong., 1st Sess. 140 (1997).

#### *Section 1606.9 Recommended Decision*

Only minor changes have been made to this section, which sets out the requirements for the recommended decision issued by the hearing officer.

#### *Section 1606.10 Final Decision*

Mostly technical revisions are made to this section, which delineates the process by which a party to the termination proceeding may request a review of the recommended decision by the President. Language has been added, however, requiring that the President's review be based solely on the record of the hearing below and any additional submissions requested by the President. A decision by the President is a final decision.

#### *Section 1606.11 Qualifications on Hearing Procedures*

It is the intent of this section to clarify that, if a recipient has already been provided a termination hearing on the underlying grounds for the debarment, the recipient is not due a second termination hearing under this part. Rather, the recipient will be given a brief review process set out in paragraph (b) of this section. In many cases, the Corporation may utilize the procedure delineated in paragraph (a) of this section, which permits the Corporation to simultaneously take action to terminate and debar a recipient within the same hearing procedure. In any debarment action where the recipient has not already been provided a termination hearing, the recipient will be provided the same hearing procedures set out in this rule for terminations.

Paragraph (d) permits the Corporation to reverse a debarment decision if there has been a reversal of the conviction or civil judgment upon which the debarment was based, new material evidence has been discovered, there has been a bona fide change in the ownership or management of the recipient, the causes for the debarment have been eliminated, or for other reasons the Corporation finds appropriate. This paragraph is patterned after Federal debarment regulations. See, e.g., 29 CFR 1471.320. Paragraph (d)(2) takes account of reversals of convictions for violations of Federal law under part 1640.

#### *Section 1606.12 Time and Waiver*

With two exceptions, this paragraph is essentially the same as in the current rule. Paragraph (b) in the current rule is deleted in this proposed rule, because it implemented a time limit to the proceedings required under law that no

longer has effect. Also, paragraph (c) in the current rule is not included, because it provides for the waiver or modification of any provision in this part. Such a sweeping waiver provision has the potential to undo the due process rights of recipients that are required under the Constitution. The rule already provides sufficient discretion and flexibility.

#### Section 1606.13 Interim Funding

This section requires the Corporation to continue funding the recipient at its current level until the termination proceeding set out in this part is completed. This is consistent with the current rule and the due process requirement that funding not be terminated until a fair hearing has been provided.

Paragraph (b) provides that a failure of the Corporation to meet a time requirement does not preclude the Corporation from terminating funding or debaring a recipient from receiving additional funding. See *Brock v. Pierce County*, 476 U.S. 253 (1986).

#### Section 1606.14 Recompetition

This section replaces the section in the current rule on termination funding. Section 501(c) of Public Law 105-119 authorizes the Corporation to recompute a service area when a recipient's financial assistance has been terminated after notice and an opportunity to be heard. Accordingly, this section authorizes the Corporation to recompute any service area where a final decision has been made under this part to terminate in whole a recipient's grant for any service area. It also provides that until a new recipient has been awarded a grant for the service area pursuant to the competition process, the Corporation shall take all practical steps to ensure the continued provision of legal assistance in the service area pursuant to § 1634.11 of the Corporation's rule on competition procedures.

#### List of Subjects in 45 CFR Part 1606

Administrative practice and procedures, Legal services.

For reasons set out in the preamble, LSC proposes to revise 45 CFR part 1606 to read as follows:

### PART 1606—TERMINATION AND DEBARMENT PROCEDURES; RECOMPETITION

Sec.

- 1606.1 Purpose.
- 1606.2 Definitions.
- 1606.3 Grounds for a termination.
- 1606.4 Grounds for debarment.

- 1606.5 Termination and debarment procedures.
- 1606.6 Proposed decision.
- 1606.7 Informal conference.
- 1606.8 Hearing.
- 1606.9 Recommended decision.
- 1606.10 Final decision.
- 1606.11 Qualifications on hearing procedures.
- 1606.12 Time and waiver.
- 1606.13 Interim funding.
- 1606.14 Recompetition.

**Authority:** 42 U.S.C. 2996e (b)(1) and 2996f(a)(3); Pub. L. 105-119, 111 Stat. 2440, Secs. 501(b) and (c) and 504; Pub. L. 104-134, 110 Stat. 1321.

#### § 1606.1 Purpose.

The purpose of this rule is to:

(a) Ensure that the Corporation is able to take timely action to deal with incidents of substantial noncompliance by recipients 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;

(b) Provide timely and fair due process procedures when the Corporation has made a preliminary decision to terminate a recipient's LSC grant or contract, or to debar a recipient from receiving future LSC awards of financial assistance; and

(c) Ensure that scarce funds are provided to recipients who can provide the most effective and economical legal assistance to eligible clients.

#### § 1606.2 Definitions.

For the purposes of this part:

(a) *Debarment* means an action taken by the Corporation to exclude a recipient from receiving an additional award of financial assistance from the Corporation or from receiving additional LSC funds from another recipient of the Corporation pursuant to a subgrant, subcontract or similar agreement, for the period of time stated in the final debarment decision.

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

(c)(1) *Termination* means that a recipient's level of financial assistance under its grant or contract with the Corporation will be permanently 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; or

(iv) A reduction of funding of less than 5 percent of a recipient's current annual level of financial assistance imposed by the Corporation as a lesser sanction.

#### § 1606.3 Grounds for a termination.

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

(1) There has been a substantial violation by the recipient of a provision of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, or Corporation rule, regulation, guideline or instruction, or a term or condition of the recipient's grant or contract; 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 or guidance issued by the Corporation.

(b) A determination of whether there has been a substantial violation for the purposes of paragraph (a)(1) of this section will be based on consideration of the following criteria:

- (1) The importance and number of restrictions or requirements violated;
- (2) The seriousness of the violation;
- (3) The extent to which the violation is part of a pattern;
- (4) The extent to which the recipient has failed to take action to cure the violation when it became aware of a violation; and
- (5) Whether the violation was intentional.

(c) Paragraph (a)(1) of this section is not applicable to any violation that occurred more than 5 years prior to the date the recipient receives notice of the violation pursuant to § 1606.6(a).

#### § 1606.4 Grounds for debarment.

(a) The Corporation may debar a recipient, on a showing of good cause, from receiving an additional award of financial assistance from the Corporation.

(b) As used in paragraph (a) of this section, "good cause" includes:

(1) Termination of financial assistance of the recipient pursuant to part 1640 of this chapter;

(2) Termination of financial assistance in whole of the most recent grant of financial assistance;

(3) The substantial violation by the recipient of the restrictions delineated in § 1610.2(a) and (b) of this chapter, provided that the violation occurred within 5 years prior to the receipt of the debarment notice by the recipient;

(4) Knowing entry by the recipient into a subgrant, subcontract, or other similar agreement with an entity debarred by the Corporation; or

(5) The filing of a lawsuit by a recipient, provided that the lawsuit:

(i) Was filed on behalf of the recipient;

(ii) Was related to a program for which the recipient receives Federal funds;

(iii) Named the Corporation, or any agency or employee of a Federal, State, or local government as a defendant; and

(iv) Was initiated after the effective date of this rule.

#### § 1606.5 Termination and debarment procedures.

Before a recipient's grant or contract may be terminated or a recipient may be debarred, the recipient will be provided notice and an opportunity to be heard as set out in this part.

#### § 1606.6 Proposed decision.

(a) When the Corporation has made a proposed decision that a recipient's grant or contract should be terminated and/or that a recipient should be debarred, the Corporation employee who has been designated by the President as the person to bring such actions (hereinafter referred to as the "designated employee") shall issue a written notice upon the recipient and the Chairperson 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 sanctions.

(4) Advise the recipient of its right to request:

(i) An informal conference under § 1606.7; and

(ii) A hearing under § 1606.8; and

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

(b) If the recipient does not request review within the time prescribed in

§ 1606.7(a) or § 1606.8(a), the proposed determination shall become final.

#### § 1606.7 Informal conference.

(a) A recipient may submit a request for an informal conference within 30 days of its receipt of the proposed decision.

(b) Within 5 days of receipt of the request, the designated employee shall notify the recipient of the time and place the conference will be held.

(c) The designated employee shall conduct the informal conference.

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

(e) The designated employee may modify, withdraw, or affirm the proposed determination in writing, a copy of which shall be provided to the recipient within 10 days of the conclusion of the informal conference.

#### § 1606.8 Hearing.

(a) The recipient may make written request for a hearing within 30 days of its receipt of the proposed decision or within 15 days of receipt of the written determination issued by the designated employee after the conclusion of the informal conference.

(b) Within 10 days after receipt of a request for a hearing, the Corporation shall notify the recipient in writing of the date, time and place of the hearing and the names of the hearing officer and of the attorney who will represent the Corporation. The time, date and location of the hearing may be changed upon agreement of the Corporation and the recipient.

(c) A hearing officer shall be appointed by the President or designee and may be an employee of the Corporation. The hearing officer shall not have been involved in the current termination or debarment action and the President or designee shall determine that the person is qualified to preside over the hearing as an impartial decision maker. An impartial decision maker is a person who has not formed a prejudgment on the case and does not have a pecuniary interest or personal bias in the outcome of the proceeding.

(d) The hearing shall be scheduled to commence at the earliest appropriate date, ordinarily not later than 30 days after the notice required by paragraph (b) of this section.

(e) The hearing officer shall preside over and conduct a full and fair hearing, avoid delay, maintain order, and insure that a record sufficient for full

disclosure of the facts and issues is maintained.

(f) The hearing shall be open to the public unless, for good cause and the interests of justice, the hearing officer determines otherwise.

(g) The Corporation and the recipient shall be entitled to be represented by counsel or by another person.

(h) At the hearing, the Corporation and the recipient each may present its case by oral or documentary evidence, conduct examination and cross-examination of witnesses, examine any documents submitted, and submit rebuttal evidence.

(i) The hearing officer shall not be bound by the technical rules of evidence and may make any procedural or evidentiary ruling that may help to insure full disclosure of the facts, to maintain order, or to avoid delay. Irrelevant, immaterial, repetitious or unduly prejudicial matter may be excluded.

(j) Official notice may be taken of published policies, rules, regulations, guidelines, and instructions of the Corporation, of any matter of which judicial notice may be taken in a Federal court, or of any other matter whose existence, authenticity, or accuracy is not open to serious question.

(k) A stenographic or electronic record shall be made in a manner determined by the hearing officer, and a copy shall be made available to a party upon payment of its cost.

(l) The recipient shall have the burden of proof in the hearing under this section.

#### § 1606.9 Recommended decision.

(a) Within 20 calendar days after the conclusion of the hearing, the hearing officer shall issue a written recommended decision which may:

(1) Terminate financial assistance to the recipient as of a specific date; or

(2) Continue the recipient's current grant or contract, subject to any modification or condition that may be deemed necessary on the basis of information adduced at the hearing; and/or

(3) Debar the recipient from receiving an additional award of financial assistance from the Corporation.

(b) The recommended decision shall contain findings of the significant and relevant facts and shall state the reasons for the decision. Findings of fact shall be based solely on the record of, and the evidence adduced at, the informal conference and the hearing or on matters of which official notice was taken.

**§ 1606.10 Final decision.**

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

(b) The recipient or the Corporation may seek review by the President of a recommended decision. A request shall be made in writing within 10 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 termination or debarment proceedings and any additional submissions, either oral or in writing, that the President may request.

(d) 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 may adopt, modify, or reverse the recommended decision, or direct further consideration of the matter. In the event of modification or reversal, the President's decision shall conform to the requirements of § 1606.9(b).

(e) The President's decision shall become final upon receipt by the recipient.

**§ 1606.11 Qualifications on hearing procedures.**

(a) The Corporation may simultaneously take action to debar and terminate a recipient within the same hearing procedure that is set out in §§ 1606.6 through 1606.10 of this part. In such a case, the same hearing officer shall oversee both the termination and debarment actions.

(b) If the Corporation does not simultaneously take action to debar and terminate a recipient under paragraph (a) of this section and initiates a debarment action based on a prior termination under § 1606.4(b) (1) or (2), the hearing procedures set out in § 1606.6 through 1606.10 shall not apply. Instead:

(1) The President shall appoint a hearing officer to review the matter and make a written recommended decision on debarment.

(2) The hearing officer's recommendation shall be based solely on the information in the administrative record of the termination proceedings providing grounds for the debarment and any additional submissions, either oral or in writing, that the hearing officer may request.

(3) If neither party appeals the hearing officer's recommendation within 10 days of receipt of the recommended

decision, the decision shall become final.

(4) Either party may appeal the recommended decision to the President who shall review the matter and issue a final written decision pursuant to § 1606.9(b).

(c) All final debarment decisions shall state the effective date of the debarment and the period of debarment, which shall be commensurate with the seriousness of the cause for debarment but shall not be for longer than 6 years.

(d) The Corporation may reverse a debarment decision upon request for the following reasons:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management of a recipient;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the Corporation deems appropriate.

**§ 1606.12 Time and waiver.**

Except for the 6-year time limit for debarments in § 1606.11(c), any period of time provided in these rules may, upon good cause shown and determined, be extended:

(a) By the designated employee who issued the proposed decision until a hearing officer has been appointed;

(b) By the hearing officer, until the recommended decision has been issued;

(c) By the President at any time.

**§ 1606.13 Interim funding.**

(a) Pending the completion of termination 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) Failure by the Corporation to meet a time requirement of this part does not preclude the Corporation from terminating a recipient's grant or contract with the Corporation.

**§ 1606.14 Recompetition.**

After a final decision has been issued by the Corporation terminating financial assistance to a recipient in whole for any service area, the Corporation shall implement a new competitive bidding process for the affected service area. Until a new recipient has been awarded a grant pursuant to such process, the Corporation shall take all practical steps to ensure the continued provision of legal assistance in the service area pursuant to § 1634.11.

**PART 1625—[REMOVED AND RESERVED]**

For the reasons set out in the preamble, and under the authority of 42 U.S.C. 2996g(e), 45 CFR part 1625 is proposed to be removed and reserved.

Dated: May 29, 1998.

**Victor M. Fortuno,**  
General Counsel.

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BILLING CODE 7050-01-P

**LEGAL SERVICES CORPORATION****45 CFR Part 1623****Suspension Procedures**

**AGENCY:** Legal Services Corporation.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule substantially revises the Legal Services Corporation's rule on procedures for the suspension of financial assistance to recipients to implement changes in the law governing how the Corporation deals with post-award grant disputes.

**DATES:** Comments should be received on or before August 3, 1998.

**ADDRESSES:** Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First St. NE., 11th Floor, Washington, DC 20002-4250.

**FOR FURTHER INFORMATION CONTACT:** Office of the General Counsel, 202-336-8817.

**SUPPLEMENTARY INFORMATION:** The Operations and Regulations Committee (Committee) of the Legal Services Corporation's (LSC) Board of Directors (Board) met on April 5, 1998, in Phoenix, Arizona, to consider proposed revisions to the Corporation's rule on procedures for suspending funding to LSC recipients. The Committee made several changes to the draft rule and adopted this proposed rule for publication in the **Federal Register** for public comment. This proposed rule is intended to implement major changes in the law governing how the Corporation deals with post-award grant disputes.

Prior to 1996, LSC recipients could not be denied refunding, nor could their funding be suspended or their grants terminated, unless the Corporation complied with sections 1007(a)(9) and 1011 of the LSC Act, 42 U.S.C. 2996 et seq., as amended. For suspensions, the Corporation could not suspend financial assistance unless the recipient had been provided reasonable notice and an opportunity to show cause why the action should not be taken. For terminations and denials of refunding,