

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

PART 111—[AMENDED]

1. The authority citation for 39 CFR Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 3001–3011, 3201–3219, 3403–3406, 3621, 3626, 5001.

2. Amend the following sections of the Domestic Mail Manual as set forth below:

M Mail Preparation and Sortation

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M800 All Automation Mail

M810 Letter-Size Mail

Mail 1.0 BASIC STANDARDS

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1.3 Documentation

[Amend 1.3 to read as follows:]

A complete, signed postage statement, using the correct USPS form or an approved facsimile, must accompany each mailing and must be supported by documentation produced by PAVE-certified (or, except for Periodicals, MAC-certified) software or by standardized documentation under P012. Exception: For mailings of fewer than 10,000 pieces, presort and rate documentation is not required if postage at the correct rate is affixed to each piece or if each piece is of identical weight and the pieces are separated by rate when presented for acceptance. Mailers may use a single postage statement and a single documentation report for all rate levels in a single mailing. Standard Mail (A) mailers may use a single postage statement and a single documentation report for both an automation carrier route mailing and a mailing containing pieces prepared at 5-digit, 3-digit, and basic automation rates as applicable, submitted for entry at the same time. Documentation of postage is not required if the correct rate is affixed to each piece or if each piece is of identical weight and the pieces are separated by rate when presented for acceptance. Combined mailings of Periodicals publications also must also be documented under M200. First-Class and Standard Mail (A) mailings prepared under the value added refund procedures or as combined mailings of different postage payment methods or different rates of postage affixed must meet additional standardized documentation requirements under P014 and P760.

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[Add new 1.8 to read as follows:]

1.8 Presentation

Upon presentation of letter-size automation rate First-Class Mail and Standard Mail (A) mailings to the Postal Service for verification, mailers must present all mixed AADC trays together, and such trays must either be adjacent to one another or side by side, and must be placed as the top layer(s) on any given container. Containerization instructions for First-Class Mail letters and cards may be established by local Postal Service managers.

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P Postage and Payment Methods

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P700 Special Postage Payment Systems

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P760 First-Class or Standard Mail (A) Mailings With Different Payment Methods

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2.0 POSTAGE

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2.3 Precanceled Pieces—First-Class Mail

[Amend 2.3 by revising the first sentence to read as follows:]

Pieces with precanceled stamps in a combined mailing must not weigh more than 1 ounce and must bear postage in any denomination of precanceled stamps permitted in a Presorted or automation rate mailing. Additional postage due for precanceled stamp pieces in a combined mailing is deducted from the mailer's postage due advance deposit account. Full postage at single-piece First-Class Mail rates must be paid on accompanying single-piece rate mail using one of the methods under P100. Additional preparation to verify postage due may be required by the Postal Service.

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An appropriate amendment to 39 CFR 111.3 will be published to reflect these changes.

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Chief Counsel, Legislative.

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BILLING CODE 7710-12-U

LEGAL SERVICES CORPORATION**45 CFR Part 1635****Timekeeping Requirement**

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule revises the Legal Services Corporation's rule on timekeeping to assure that allocations of expenditures of LSC funds are supported by accurate records. The final rule requires that recipient time records for attorneys and paralegals reflect the date as well as the amount of time spent on each case, matter or supporting activity. The final rule also requires that part-time attorneys and paralegals who also work for organizations that engage in restricted activities certify that they have not worked on such restricted activities (except for *de minimis* actions) during any time for which they are compensated with LSC funds nor used recipient resources for restricted activities. Finally, the final rule adds a definition for the term restricted activities.

EFFECTIVE DATE: This final rule is effective on August 7, 2000.

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SUPPLEMENTARY INFORMATION: The publication of this final rule completes a process dating back to early 1998. In February of that year, the LSC's Office of Inspector General (OIG) issued a Summary Report on Audits of Selected Grantees for Compliance with Selected Regulations which found that timekeeping records could not demonstrate that recipients' part-time attorneys and paralegals do not work on restricted activities during any time for which they are compensated by the recipient for their services. The OIG recommended that the LSC revise its timekeeping rule to require that part-time attorneys and paralegals maintain timekeeping records for all hours worked for the recipient by date and time of day. The Operations and Regulations Committee (Committee) of the LSC Board of Directors (Board) met in September 1998, to consider the OIG recommendation and other proposed revisions to the existing timekeeping rule. Following that meeting, LSC published a Notice of Proposed Rulemaking (NPRM) for public comment on October 22, 1998 (63 FR 56594).

Under the existing rule, all recipients are required to keep contemporaneous records of the amount of time their attorneys and paralegals spend on each case, matter or supporting activity. The NPRM proposed three changes to this

basic requirement. First, LSC proposed that full-time attorneys and paralegals be required to record the date that time was spent on each case, matter or supporting activity, in addition to the amount of time spent. The second proposed change would have required that time records for part-time attorneys and paralegals who also work for organizations which engage in restricted activities (a term of art referring to those activities in which organizations receiving LSC funding may not engage due to statutory and regulatory limitations) provide the date and exact time of day for time spent on each case, matter or supporting activity. The third change proposed that time records for both full-time and part-time attorneys and paralegals be consistent with the recipient's time and attendance records used for payroll purposes.

In addition to the proposed changes to the text of § 1635.3(b)(1), LSC requested comment on whether LSC should, as an alternative to the date and time of day record requirement being proposed for part-time attorneys and paralegals, require such employees to certify in writing that they had not engaged in any restricted activities during any time for which they were paid by the recipient. The NPRM did not contain any proposed language relating to a certification requirement, but invited comment on the matter of certification or other alternatives to the recordkeeping requirement that might address the OIG's concerns.

Most of the comments LSC received on the NPRM preferred the certification option over the date and time of day record proposed on the basis that the requirement to keep records by time of day was too onerous given the typical workday patterns of legal services attorney and paralegals. Some commenters also objected to the proposal that all attorney and paralegal time records reflect the date as well as the amount of time spent as unnecessary and administratively burdensome. Many of the comments also objected to the proposal that time records be consistent with payroll records, fearing that the proposal would place recipients in jeopardy of being in non-compliance with the Fair Labor Standards Act.

The Committee met in February 1999, to consider the comments on the NPRM. After considering the comments received, along with the recommendations of the OIG and staff, the Committee decided to retain certain elements of the NPRM, revise others, and to republish the proposed rule for further public comment. The new proposed rule ("republished NPRM"), issued on April 5, 1999 (64 FR 16383),

replaced the previous proposal that part-time attorneys and paralegals be required to record the exact date and time for time worked with a certification requirement. Under a new proposed § 1635.3(e), LSC proposed to require part-time attorneys and paralegals who also work for organizations that engage in restricted activities to certify on a quarterly basis that they had not worked on restricted activities during any time for which they were compensated with LSC funds nor used recipient resources for restricted activities. The proposed certification requirement contained an exception for *de minimis* activities, acknowledging that certain activities, such as opening or briefly screening mail or taking a phone call to schedule another time to discuss restricted activity matters, are often unavoidable. Related to this issue, the republished NPRM added a new § 1635.2 (c), containing a proposed definition of "restricted activities."

The republished NPRM retained the previously proposed requirement that all attorney and paralegal time records provide the date for each timekeeping entry. LSC was not convinced that this requirement would pose an undue administrative burden on recipients and that reference to a particular timeframe was necessary to an understanding of the records. The republished NPRM, however, did invite specific comment from those recipients whose current recordkeeping systems did not include recording by date on the anticipated effect of the proposal.

Finally, LSC deleted the previously proposed requirement that time keeping records be consistent with payroll records. Although LSC did not agree with the comments that the proposal would require recipients to run afoul of the Fair Labor Standards Act, LSC determined that the proposed recordkeeping consistency requirement was not necessary. The original proposal was intended to address a problem related to timekeeping records in a period during which many recipients were divesting themselves of matters which they were no longer permitted to handle as the result of legislative changes to the program in 1996. Since that time, however, the divestitures have been completed and LSC staff and OIG agreed that the risk of non-compliance with the new restrictions has decreased significantly, eliminating the need for consistency between payroll and timekeeping records. Thus, in light of the changed circumstances and the concerns raised by the comments, LSC decided simply to drop this proposal from the republished NPRM.

LSC received three comments on the republished NPRM. All of the comments generally favored the certification approach over the earlier proposal requiring part-time attorneys and paralegals to keep time by recording the exact time of day for each case, matter or supporting activity. The comments suggested making some specific changes to the language in several of the sections to improve what the commenters considered the clarity of the language rather than the substance of the proposed requirements. These comments are discussed at greater length in the Section-by-Section Analysis, below.

After a meeting in November 1999 to consider the comments and staff report on the republished NPRM, the Committee made a number of additional revisions to the rule and voted to recommend to the Board that the rule be adopted as revised. Subsequently, the Board adopted as final the Committee's revised and reported version of the rule, as set forth below.

Section-by-Section Analysis

Section 1635.1 Purpose

The final rule retains the provisions of the current rule. No comments were received on this section.

Section 1635.2 Definitions

The final rule adopts in § 1635.2(c), a modified definition of the term "restricted activities" to clarify the meaning of that term as used in the certification requirement (§ 1635.3(d)). Restricted activities are now defined as those activities that are prohibited in 45 CFR part 1610.

Restricted activities is a term of art which refers to activities which recipients are statutorily prohibited from engaging in by the LSC Act or Section 504 of the 1996 LSC appropriations act. The term is defined at length in the LSC's regulations relating to the use of non-LSC funds, transfer of LSC funds and program integrity at 45 CFR 1610.2 (a) and (b). See 62 FR 27695 (May 21, 1997). Because these definitions cite to the restrictions' statutory sources and each restriction's implementing regulation, if available, LSC proposed to define "restricted activities" as those activities inconsistent with section 504 in 45 CFR 1610.2 (a) and (b).

Several commenters requested that LSC clarify the definition. Upon further reflection, LSC determined that although the § 1610.2 definitions list the types of activities that are restricted by law, other portions of part 1610 provide additional useful information. For

example, part 1610 also contains information which explains the scope of the restrictions, especially in regard to the types of funds that may not be used for various activities. LSC, accordingly, is changing the definition of "restricted activities" in this final rule to refer to the use of that term in the entirety of part 1610. LSC believes that making reference to part 1610 for definition of the "restricted activities" will sufficiently inform recipients as to the intended meaning and scope of the term, as they should be well versed in the provisions of part 1610 whose violations have serious implications for their LSC funding. LSC also believes that the revised definition clarifies that nothing in the proposed rule is intended to expand the scope of any restriction or the type of recipient funds implicated by a particular statutory or regulatory restriction.

The final rule retains, with minor clarifying changes, the definition of matter in 1635.2(b). The term "referral" is added to the list of examples of indirect services to clarify that the process of interviewing an applicant, determining eligibility and making a referral to a PAI attorney or other agency is a matter.

The final rule retains the definitions of case in 1635.2(a) and supporting activity in 1635.2(d).

Section 1635.3 Timekeeping Requirement

Section 1635.3(b)(1) of the final rule adopts a requirement that all recipient attorneys and paralegals provide the date as well as the amount of time spent on each case, matter or supporting activity in their time-keeping records.

LSC believes that timekeeping records have little significance unless put into the context of a particular time frame. The previous rule already implied a connection between timekeeping records and a particular date because it required that timekeeping records be made contemporaneously. In practice, the timekeeping records of most LSC recipients already provide the date in their timekeeping records. Thus, LSC did not consider the proposal to add a date requirement to the regulation to be burdensome. Nonetheless, when the proposed rule was republished, LSC requested those recipients whose records did not provide the date to comment on how the requirement might affect their programs. No comments were received on this particular issue. Rather, one comment on the date requirement stated that it was not an unreasonable additional burden on recipients, in part because most current timekeeping systems used by LSC

recipients already include the date in the information routinely collected. Accordingly, LSC has adopted the date requirement in the final rule.

The final rule contains a new paragraph (d) (corresponding to proposed paragraph (e) in the republished NPRM) requiring that any attorney or paralegal who works part-time for a recipient and part-time for an organization that engages in restricted activities to certify in writing that, with the exception of *de minimis* actions, he or she has not worked on restricted activities during the time he or she was being compensated by the recipient, nor used recipient resources for restricted activities. Paragraph (d) also sets forth a standard for determining if an action can be classified as *de minimis*: *de minimis* actions are those that are of little substance; require little time; are not initiated by the part-time attorney or paralegal; and, for the most part, are unavoidable.

Activities that would meet the standard include answering the telephone and establishing another non-LSC program time with the caller to discuss the restricted activity, or opening and briefly screening mail. Actions that would not meet this standard include researching, preparing legal documents, meeting with or providing advice to the client and conferring with third parties on behalf of the client. Although the examples listed above are not intended to provide an exhaustive list of permissible and impermissible actions, LSC cautions recipients that it intends to interpret the *de minimis* standard strictly to permit only a very narrow range of actions. LSC is taking this position in order to ensure that part-time attorneys and paralegals are not engaged in restricted activities while being compensated by the recipient or using recipient resources for restricted activities.

In the republished NPRM, the proposed regulatory text for this paragraph contained examples of *de minimis* actions. Two comments requested that LSC provide additional examples of permitted actions and clarify the meaning of the exception. Rather than cluttering up the regulatory text with additional examples, LSC believes that it is better to set forth a standard for *de minimis* actions in the regulatory text and include a discussion and examples of *de minimis* actions in the preamble. The final rule reflects this judgment.

The proposed regulatory text and the related preamble discussion had stated that the certification requirement did not apply to *de minimis* actions "related to a restricted activity that does not

involve working on the restricted activity." LSC received a comment noting that the references to "working on the related activity" constitute a tautology that reiterates the same concept without providing sufficient guidance on the scope of the exception. LSC agrees that the reference to "working on restricted activities" is vague and repetitive. Accordingly, that phrase has been deleted from the final rule.

LSC also received comments suggesting adding the term "non-substantive" after *de minimis*. LSC has determined that the term "non-substantive" should not be added to the regulation because it does not clarify the meaning of *de minimis*. The meaning of *de minimis* (trifling; small matter; of little importance) is sufficiently similar to that of the term "non-substantive" (small amount; having little practical importance) that including both terms would be repetitive and not helpful.

One comment suggested replacing "works" with "is employed" to clarify that the part-time attorney or paralegal has an employee/employer relationship with the recipient. For the purposes of this rule, either term has the same meaning. Accordingly, the final rule retains the term "works" as proposed, without change.

Another comment requested a clarification that the term "time period" refers to the specific hours or work days the part-time attorney or paralegal is expected to work for the recipient rather than payroll periods during which the employee may work part-time for both the recipient and another organization that engages in restricted activities. LSC has deleted the word "period" from the final rule so that the language makes clear that the time referred to is the specific time the attorney or paralegal works for the recipient and for which he or she is paid by the recipient.

The final rule requires that certifications be made quarterly on a form determined by LSC. The republished NPRM proposed that certifications be made to LSC on a quarterly basis on dates established by LSC. One comment questioned the need for quarterly certifications stating that such frequent reporting would put a significant administrative burden on the recipient. The comment also suggested that LSC not establish a specific date on which a certification needs to be made, but require certification on or before a particular date instead. One comment also noted that the LSC has not always provided recipients with the appropriate forms in a timely manner. LSC disagrees that the quarterly requirement would impose a significant

administrative burden on recipients, but agrees that it is unnecessary for LSC to set a date upon which the certification is due. The final rule reflects these determinations. In addition, the final rule requires LSC to provide recipients with an appropriate form by the effective date of the final rule.

LSC received one comment suggesting that LSC require recipients to submit the certifications to LSC. LSC does not believe such a requirement is necessary. The certification requirement is intended to be a recordkeeping rather than a reporting requirement. The information is to be maintained by recipients so that it is available to auditors or LSC staff for annual audits or on-site reviews. A recipient would need to submit certifications to LSC only when requested to do so by LSC. Accordingly, this suggestion has not been adopted in the final rule.

The final rule eliminates the old paragraph (c) because it is outdated. This paragraph required that the time keeping system must be implemented within 30 days of the effective date of the regulation or within 30 days of the effective date of a grant or contract, whichever is later. The preamble states that the final rule becomes effective 30 days after publication. LSC management routinely provides new grantees with deadlines for compliance with various grant requirements, such as governing board composition and reporting requirements. Thus, the continued inclusion of this requirement is not necessary. This change was not contained in either the original or republished NPRMs, but as it is a technical, procedural change that has no adverse effect on recipients subject to this rule it may be made without prior public notice and comment. 5 U.S.C. 553(b).

In the final rule, paragraph (d) is relettered as (c) and contains a minor conforming language change. The final rule deletes the phrase "from the time of implementation." The timekeeping system must be capable of aggregating the time record information on both closed and pending cases by the legal problem type from the commencement of the case. The deleted phrase is confusing and unnecessary.

Section 1635.4 Administrative Provisions

The final rule retains the provisions of the current rule. No comments were received on this section.

For reasons set forth above, LSC revises 45 CFR part 1635 to read as follows:

Sec.
1635.1 Purpose.

1635.2 Definitions.
1635.3 Timekeeping requirement.
1635.4 Administrative provisions.

Authority: 42 U.S.C. 2996e(b)(1)(A), 2996g(a), 2996g(b), 2996g(e).

§ 1635.1 Purpose.

This part is intended to improve accountability for the use of all funds of a recipient by:

(a) Assuring that allocations of expenditures of LSC funds pursuant to 45 CFR part 1630 are supported by accurate and contemporaneous records of the cases, matters, and supporting activities for which the funds have been expended;

(b) Enhancing the ability of the recipient to determine the cost of specific functions; and

(c) Increasing the information available to LSC for assuring recipient compliance with Federal law and LSC rules and regulations.

§ 1635.2 Definitions.

As used in this part—

(a) A *case* is a form of program service in which an attorney or paralegal of a recipient provides legal services to one or more specific clients, including, without limitation, providing representation in litigation, administrative proceedings, and negotiations, and such actions as advice, providing brief services and transactional assistance, and assistance with individual PAI cases.

(b) A *matter* is an action which contributes to the overall delivery of program services but does not involve direct legal advice to or legal representation of one or more specific clients. Examples of matters include both direct services, such as but not limited to, community education presentations, operating *pro se* clinics, providing information about the availability of legal assistance, and developing written materials explaining legal rights and responsibilities; and indirect services, such as training, continuing legal education, general supervision of program services, preparing and disseminating desk manuals, PAI recruitment, referral, intake when no case is undertaken, and tracking substantive law developments.

(c) *Restricted activities* means those activities that recipients may not undertake as set out in 45 CFR part 1610.

(d) A *supporting activity* is any action that is not a case or matter, including management in general, and fund-raising.

§ 1635.3 Timekeeping requirement.

(a) All expenditures of funds for recipient actions are, by definition, for

cases, matters, or supporting activities. The allocation of all expenditures must be carried out in accordance with 45 CFR part 1630.

(b) Time spent by attorneys and paralegals must be documented by time records which record the amount of time spent on each case, matter, or supporting activity.

(1) Time records must be created contemporaneously and account for time by date and in increments not greater than one-quarter of an hour which comprise all of the efforts of the attorneys and paralegals for which compensation is paid by the recipient.

(2) Each record of time spent must contain: for a case, a unique client name or case number; for matters or supporting activities, an identification of the category of action on which the time was spent.

(c) The timekeeping system must be able to aggregate time record information on both closed and pending cases by legal problem type.

(d) Recipients shall require any attorney or paralegal who works part-time for the recipient and part-time for an organization that engages in restricted activities to certify in writing that the attorney or paralegal has not engaged in restricted activity during any time for which the attorney or paralegal was compensated by the recipient or has not used recipient resources for restricted activities. The certification requirement does not apply to a *de minimis* action related to a restricted activity. Actions consistent with the *de minimis* standard are those that meet all or most of the following criteria: actions that are of little substance; require little time; are not initiated by the part-time employee; and, for the most part, are unavoidable. Certifications shall be made on a quarterly basis and shall be made on a form determined by LSC.

§ 1635.4 Administrative provisions.

Time records required by this section shall be available for examination by auditors and representatives of LSC, and by any other person or entity statutorily entitled to access to such records. LSC shall not disclose any time record except to a Federal, State or local law enforcement official or to an official of an appropriate bar association for the purpose of enabling such bar association official to conduct an investigation of an alleged violation of the rules of professional conduct.

Victor M. Fortunato,

General Counsel and Vice President for Legal Affairs.

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