

Authority: Secs. 1102 and 1871 of the Social Security Act, unless otherwise noted (42 U.S.C. 1302 and 1395hh).

2. Section 482.43 is amended by adding paragraphs (c)(6)(i) through (c)(6)(iii) to read as follows:

§ 482.43 Condition of participation: Discharge planning.

* * * * *

(c) * * *

(6) If a hospital refers a Medicare beneficiary to an HHA or another entity in which the hospital has a reportable financial interest, or the HHA or other entity has a reportable financial interest in the hospital, CMS will make available to the public the following information:

(i) The name of the hospital, HHA, or other entity and the nature of the financial interest to the hospital.

(ii) The number of beneficiaries who the hospital discharged and identified as requiring home health services.

(iii) The percentage of the referrals in paragraph (c)(6)(ii) of this section in which the hospital had financial interest in the HHA, or the HHA had a financial interest in the hospital.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: July 3, 2002.

Thomas A Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: August 5, 2002.

Tommy G. Thompson,

Secretary.

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LEGAL SERVICES CORPORATION

45 CFR Part 1611

Financial Eligibility

AGENCY: Legal Services Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Legal Services Corporation (“LSC” or “Corporation”) proposes to amend its regulations relating to financial eligibility for LSC-funded legal services. The proposed revisions are intended to reorganize the regulation to make it easier to read and follow; simplify and streamline the requirements of the rule to ease administrative burdens faced by LSC grantees in implementing the regulation and to aid LSC in enforcement of the regulation; and to clarify the focus of the regulation on the financial eligibility of

applicants for LSC-funded legal services.

DATES: Comments must be submitted on or before December 23, 2002.

ADDRESSES: Comments must be submitted in writing and may be sent by regular mail, or may be transmitted by fax or email to: Mattie C. Condray, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 750 First St., NE., 11th Floor, Washington, DC 20002–4250; (202) 336–8952 (fax); mcondray@lsc.gov (e-mail).

FOR FURTHER INFORMATION CONTACT: Mattie C. Condray, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 750 First St., NE., 11th Floor, Washington, DC 20002–4250; (202) 336–7 (phone); (202) 336–8952 (fax); mcondray@lsc.gov (e-mail).

SUPPLEMENTARY INFORMATION: Section 1007(a) of the Legal Services Corporation Act requires LSC to establish guidelines, including setting maximum income levels, for the determination of applicants’ financial eligibility for LSC-funded legal assistance. Part 1611 implements this provision, setting forth the requirements relating to determination and documentation of client financial eligibility.

The current version of 1611 was adopted in 1983. In 1995, LSC published a proposed revision to part 1611 which represented a major overhaul of the regulation (60 FR 3798, January 15, 1995). The product of significant discussions and negotiation among LSC staff and representatives of the field, the proposed rule reflected an attempt to clarify and simplify the rule without changing most of the underlying policies and concepts of the rule. Following publication of the NPRM, however, no further action on the proposed revisions to part 1611 was taken. Many outstanding issues prompting the 1995 rulemaking remain extant and there are additional issues which have arisen since then. In addition, there are statutory changes which need to be incorporated into the regulation. In light of the above, the LSC Board of Directors identified 45 CFR part 1611, Eligibility, as an appropriate subject for rulemaking on January 27, 2001. On June 30, 2001, the LSC President and the Chair of the Operations and Regulations Committee of the Board of Directors made a determination to proceed with a Negotiated Rulemaking to consider amendments to part 1611. In accordance with the LSC Rulemaking Protocol, LSC

published a notice in the **Federal Register** formally soliciting suggestions for appointment to the Negotiated Rulemaking Working Group from the regulated community, its clients, advocates, the organized bar and other interested parties (66 FR 46976, September 10, 2001).

After receiving submissions of interest, a Working Group was appointed. The members of the Working Group are: Legal Services Corporation, Washington, DC (represented by Mattie C. Condray, Senior Assistant General Counsel, Office of Legal Affairs; John Eidleman, Acting Vice President for Compliance and Administration; Anh Tu, Program Counsel, Office of Program Performance; and Danilo Cardona, Director, Office of Compliance and Enforcement); Legal Services Corporation, Office of Inspector General, Washington, DC (represented by Laurie Tarantowicz, Assistant Inspector General and Legal Counsel); Center for Law and Social Policy, Washington, DC (represented by Linda Perle, Senior Attorney—Legal Services); National Legal Aid and Defenders Association, Washington, DC (represented by Jon Asher, Member NLADA Regulations Committee and Executive Director of Colorado Legal Services); Legal Aid of North Carolina, Raleigh, NC (represented by George Hausen, Executive Director); Northwest Justice Project, Seattle, WA (represented by Deborah Perluss, Director of Advocacy/General Counsel); Blue Ridge Legal Services, Inc., Harrisonburg, VA (represented by John Whitfield, Executive Director); West Texas Legal Services, Fort Worth, TX (represented by Vernon Lewis, Deputy Director); Land of Lincoln Legal Assistance Foundation, Inc., Alton, IL (represented by Joseph Bartylak, Executive Director); Atlanta Legal Aid Society, Atlanta, GA (represented by Steven Gottlieb, Executive Director); and the American Bar Association’s Standing Committee on Legal Aid and Indigents and Defendants (represented by Phyllis Holmen, Member SCLAID and Executive Director, Georgia Legal Services Program).

The Working Group held three meetings: January 7–8, 2002; February 11–12, 2002; and April 11–12, 2002. All three meetings were noticed in the **Federal Register** and were open to public observation. The Working Group conducted its work under the guidance of a professional facilitator. The facilitator, although selected by and under contract to LSC pursuant to LSC’s Rulemaking Protocol, did not represent LSC on the Working Group and served

as a neutral with the continuing support of the Working Group.

The Working Group developed a Draft NPRM which was considered by the Operations and Regulations Committee of the Board of Directors at its meeting on November 8, 2002. The Committee suggested two major revisions to the Draft NPRM (discussed below) and this NPRM (as revised) was approved for publication by the Board of Directors at its meeting on November 9, 2002. Except as noted, all of the specific proposed revisions contained herein represent the consensus opinion of the Working Group.

While specific revisions are discussed in greater detail in the Section-by-Section analysis, below, it should be noted that the proposed revisions reflect several overall goals of the Working Group: reorganization of the regulation to make it easier to read and follow; simplification and streamlining of the requirements of the rule to ease administrative burdens faced by LSC grantees in implementing the regulation and to aid LSC in enforcement of the regulation; and clarification of the focus of the regulation on the financial eligibility of applicants for LSC-funded legal services. In particular, LSC is proposing to significantly reorganize and simplify the sections of the rule which set forth the various requirements relating to establishment of recipient annual income and asset ceilings, authorized exceptions and determinations of eligibility. These changes are intended to improve the clarity of the regulation and include substantive changes to make intake simpler and less burdensome and basic financial eligibility determinations easier for recipients to make. LSC is also proposing to move the existing provisions on group representation, with some amendment, to a separate section of the regulation.

LSC also proposes to eliminate the retainer agreement requirement currently found at § 1611.8 of the regulation. The retainer agreement requirement was the subject of significant discussion in the Working Group. Representatives of the field agreed with the LSC representatives that a retainer agreement may be appropriate under certain circumstances, but argued that this regulatory requirement is not required by statute, is not justified under applicable rules of professional responsibility, may be unnecessarily burdensome in some instances and is not related to financial eligibility determinations. They contended that, barring a statutory mandate, decisions about the use of retainer agreements, like those involving many other matters

relating to the best manner of providing high quality legal assistance, should be determined by a recipient's Board, management and staff, with guidance from the Corporation. They urged LSC to delete this requirement. The LSC representatives, however, were of the opinion that the existing provision in the regulations requiring the execution of retainer agreements is professionally desirable, authorized in accordance with LSC's mandate under section 1007(a)(1) of the Act to assure the maintenance of the highest quality of service and professional standards, and appropriate to assure that there are no misunderstandings as to what services are to be rendered to a particular client. Retainer agreements protect the attorney and recipient in cases of an unfounded malpractice claim and protect the client if the attorney and the recipient should fail to provide legal assistance measuring up to professional standards. In the end, the Working Group was unable to reach consensus on this issue and the Draft NPRM retained a provision generally requiring the execution of retainer agreements, along with proposing requirements for client service notices and PAI referral notices in lieu of retainer agreements under certain circumstances.

In its deliberations on the Draft NPRM, the Operations and Regulations Committee determined that while it agreed that retainer agreements are professionally desirable, it did not find it necessary, either by statute or policy, for LSC to continue to impose such a requirement on recipients. The Committee recommended that the entire proposed § 1611.7 in the Draft NPRM, entitled *Retainer Agreements, Client Service Notices and Referral Notices*, be stricken from the draft prior to publication. In approving the recommendation of the Committee, the Board directed that this action be taken and any conforming amendments necessary be made prior to publication of the NPRM for comment. This NPRM reflects this direction. LSC specifically invites comment on this issue.

One other general issue merits discussion. Section 509(h) of the FY 1996 LSC appropriations act, Pub. L. 104-134, provides that, among other records, eligibility records "shall be made available to any auditor or monitor of the recipient * * * except for such records subject to the attorney-client privilege." This provision has been retained in each subsequent appropriations measure and continues to be in force. The Office of the Inspector General has been interested in having this language expressly incorporated into part 1611.

The Working Group took up the issue and discussed the fact that there is some measure of disagreement about the scope and extent of the access authority granted to the OIG by the statute. Mindful of this disagreement, the Working Group determined that an appropriate approach would be simply to propose language that tracked very closely that of the statute and the Working Group was close to reaching consensus on what would have been proposed § 1611.10, Access to Records. The Working Group acknowledged that such an approach would not settle all of the questions about the meaning of the access provisions, but agreed that it was the best way to incorporate the statutory requirements without causing undue delay in completing its work on this proposed rule. Simultaneously, however, in the course of a similar discussion taking place in a separate negotiated rulemaking on LSC's alien eligibility regulations, 45 CFR part 1626, it became apparent that the 1626 Working Group would not be able to agree to such an approach, with several participants favoring either leaving an access provision out of the regulation or drafting a provision that reflects a more thorough discussion and interpretation of 509(h).

This situation created a problem for LSC because LSC is not willing either to adopt two differing regulations implementing the same statutory provision, or to have an access to records provision relating to 1611 eligibility records but not an access to records provision relating to 1626 eligibility records when both regulations are in the process of revision. Either of these situations would invite unnecessary implementation problems for LSC, the OIG and recipients. Moreover, upon reflection LSC has determined that, as 509(h) covers significantly more than eligibility records, conducting a full discussion of the meaning of 509(h) in the context of either 1611 or 1626, which deal only with eligibility issues, is not appropriate. The OIG's authority under the statute is not affected by a decision not to incorporate express access to records provisions in either 1611 or 1626. Consequently, LSC does not propose to include regulatory language implementing 509(h) with respect to records covered by this part. Similarly, LSC does not propose to add language regarding 509(h) access to the retainer agreement, client service notice and referral notice provisions of proposed § 1611.7.

Although the field representatives to the Working Group concur in this decision, the OIG dissents. As noted

above, the OIG has been interested in incorporating the 509(h) authority in the regulations for some time. The OIG disagrees with LSC's position that conducting a full discussion of the meaning of 509(h) in the context of either 1611 or 1626 is inappropriate. Rather, the OIG is of the opinion that since one of the goals of this rulemaking (and the 1626 rulemaking) is to clarify the requirements applicable to recipients relating to eligibility records and since access to eligibility records is provided by 509(h), the 1611 and 1626 negotiated rulemakings provide an opportunity to clarify the statutory authority. Failing a full discussion of 509(h) in the current regulatory context, the OIG believes that including an access provision which closely tracks the statutory language would make clear that the documentation and records recipients are required to maintain under parts 1611 and 1626 are eligibility records to which LSC has access under 509(h).

Moreover, the OIG is of the opinion that even if a consensus could not be reached during the negotiated rulemaking process, LSC nonetheless should include an access provision in the rule. Negotiated rulemaking has at its ultimate goal the resolution of differences of all issues by consensus. Yet, the negotiated rulemaking process anticipates that consensuses may not be achieved on all issues, and in such cases, LSC, as the entity responsible for implementing the law, promulgates the rule it deems appropriate. The OIG believes this is especially warranted in the case of access, where the anticipated lack of ability to reach consensus highlights the very problem the rulemaking should address and resolve. The OIG notes that the discussions among the Working Group members make clear that there are differences in interpretation regarding the access to which LSC is authorized. The OIG further notes that those differences have resulted in problems and delays when access to grantee information is sought, causing the unnecessary expenditure of time and resources for all involved. The OIG believes that attempting to avoid the problem by not including an access provision in the rule resolves nothing.

LSC acknowledges that not including an access provision in § 1611 does not resolve the issues relating to the meaning and scope of the 509(h) access provision. Indeed, as noted above, LSC has determined that, as section 509(h) covers a range of records beyond financial eligibility records, it is not appropriate for LSC to use this rulemaking to explore and resolve these contentious and important issues.

Title of Part 1611

LSC proposes to change the title of part 1611 from "Eligibility" to "Financial Eligibility." This proposed change is intended, first, to make clear that with respect to individuals seeking LSC-funded legal assistance, the standards of this part deal only with the financial eligibility of such persons. LSC believes this change will help clarify that a finding of financial eligibility under part 1611 does not create an entitlement to service. Rather, financial eligibility is merely a threshold question and the issue of whether any otherwise eligible applicant will be provided with legal assistance is a matter for the program to determine with reference to its priorities and resources. In addition, this part does not address eligibility based on citizenship or alienage status; those eligibility requirements are set forth in part 1626 of LSC's regulations, Restrictions on Legal Assistance to Aliens.

Section-by-Section Analysis

Section 1611.1 Purpose

LSC is proposing to revise this section to make clear that the standards of this part concern only the financial eligibility of persons seeking LSC-funded legal assistance and that a finding of financial eligibility under part 1611 does not create an entitlement to service. In addition, LSC proposes to remove the language in the current regulation referring to giving preferences to "those least able to obtain legal assistance." Although the original LSC Act contained language indicating that programs should provide preferences in service to the poorest among applicants, that language was deleted when the Act was reauthorized in 1977 and has remained out of the legislation ever since. Thus, as there is no statutory basis for a preference for those least able to afford assistance and because LSC believes that the regulation should focus on financial eligibility determinations without reference to issues relating to service determinations, this language should be removed from the regulation. Finally, LSC proposes to add language specifying that this part also sets forth financial standards for groups seeking legal assistance supported by LSC funds.

Section 1611.2; Definitions

LSC proposes to add definitions for several terms and to amend the definitions for each of the existing terms currently defined in the regulation. LSC believes that the new definitions and the amended definitions will help to

make the regulation more easily comprehensible.

Section 1611.2(a) Applicable Rules of Professional Responsibility

LSC proposes to add a definition of the term "applicable rules of professional responsibility" as that term appears in proposed § 1611.7, Change in Financial Eligibility Status. This definition is intended to make clear that the references in the regulation refer to the rules of ethics and professional responsibility applicable to attorneys in the jurisdiction where the recipient either provides legal services or maintains its records.

Section 1611.2(b) Applicant

Consistent with the intention throughout to keep the focus of the regulation on the standards and criteria for determining the financial eligibility of persons seeking legal assistance supported with LSC funds, LSC proposes to use the term "applicant" throughout the regulation to emphasize the distinction between applicants, clients, and persons seeking or receiving assistance supported by other than LSC funds. Accordingly, LSC proposes to add a definition of applicant providing that an applicant is an individual seeking legal assistance supported with LSC funds. Groups, corporations and associations would be specifically excluded from this definition, as the eligibility of groups would be addressed wholly within proposed § 1611.8.

Programs currently may provide legal assistance without regard to a person's financial eligibility under part 1611 when the assistance is supported wholly by non-LSC funds. LSC does not propose to change this (in fact, LSC proposes to restate this principle in proposed § 1611.4(a)) and believes that the use of the term applicant as proposed herein will help to clarify the application of the rule.

Section 1611.2(c) Assets

LSC proposes to add a definition of the term assets to the regulation. The proposed definition, "cash or other resources that are readily convertible to cash, which are currently and actually available to the applicant," is intended to provide some guidance to programs as to what is meant by the term assets, yet provide considerable latitude to programs in developing a description of assets that addresses local concerns and conditions. The key concepts intended in this definition are (1) ready convertibility to cash; and (2) availability of the resource to the applicant.

Although the term is not defined in the regulation, current § 1611.6(c) states that “assets considered shall include all liquid and non-liquid assets. * * *”

The intent of this requirement is that programs are supposed to consider all assets upon which the applicant could draw in obtaining private legal assistance. While there was no intent to change the underlying requirement, in discussing the issues of assets and asset ceilings in the Working Group it became apparent that the terms “liquid” and “non-liquid” were obscuring the understanding of the regulation. To some, the term “non-liquid” implied something not readily convertible to cash, while to others the term implied an asset that was simply something other than cash, without regard to the ease of convertibility of the asset. Thus, the Working Group decided that the terms “liquid” and “non-liquid” should be eliminated and that the regulation should focus instead on the ready convertibility of the asset to cash.

The other key concept in the definition of asset is the availability of the resource to the applicant. Although the current regulation notes that the recipient’s asset guidelines “shall take into account impediments to an individual’s access to assets of the family unit or household,” the Working Group was of the opinion that this principle could be more clearly articulated. LSC believes that the proposed language accomplishes that purpose.

Section 1611.2(d) Governmental Program for Low Income Individuals or Families

LSC proposes to change the term that is used in the regulation from “governmental program for the poor” to “governmental program for low income individuals and families.” This change is not intended to create any substantive change in the current definition, but merely reflect preferred nomenclature.

Section 1611.2(e) Governmental Program for Persons With Disabilities

LSC is proposing to add a definition of the term “governmental program for persons with disabilities.” LSC proposes to include in the authorized exceptions to the annual income ceilings an exception relating to applicants seeking to obtain or maintain governmental benefits for persons with disabilities. Accordingly, it is appropriate to include a proposed definition for this term. The proposed definition, “any Federal, State or local program that provides benefits of any kind to persons whose eligibility is determined on the basis of mental and/or physical disability,” is intended

to be similar in structure and application to the definition of the term “governmental program for low income individuals and families.”

Section 1611.2(f) Income

LSC proposes to revise the current definition of income to refer to the total cash receipts of a “household,” instead of a “family unit” and to make clear that programs have the discretion to define the term household in any reasonable manner. Currently, the definition of income refers to “family unit,” while the phrase “household or family unit” appears in the section on asset ceilings. It appears that there is no difference intended by the use of different terms in these sections and LSC believes that it is appropriate to simplify the regulation to use the same single term in each place, without creating a substantive change in the meaning of either term. LSC proposes to use “household” instead of “family unit” because it is a simpler, more accessible term.

As noted above, LSC does not intend the use of the term “household” to have a different meaning from the current term “family unit.” Under current guidance from the LSC Office of Legal Affairs, recipients have considerable latitude in defining the term “family unit”. Specifically, OLA External Opinion No. EX-2000-011 states:

Neither the LSC Act nor the LSC regulations define “family unit” for client eligibility purposes. The Corporation will defer to recipient determinations on this issue, within reason. Recipients may consider living arrangements, familial relationships, legal responsibility, financial responsibility or family unit definitions used by government benefits agencies, amongst other factors, in making such decisions.

LSC intends that this standard would also apply to definitions of “household” and the proposed definition would make this clear.

Field representatives on the Working Group also suggested deleting the words “before taxes” from the definition of income. Such a change is desirable, they contend, because automatically deducted taxes are not available for an applicant’s use and the failure to take current taxes into account in determining income has an adverse impact on the working poor. While it is undoubtedly true that automatically deducted taxes are not available to an applicant, LSC does not believe that the definition of income is the appropriate place in the regulation to deal with this problem. Taking the phrase “before taxes” out of the definition of income would effectively change the meaning of income from gross income to net income. The term income has meant

gross income since the original adoption of the eligibility regulation in 1976. See 41 FR 51604, at 51606, November 23, 1976. The maximum income guidelines are based on gross income, as are the underlying DHHS Federal Poverty Guidelines amounts. Changing the definition of income effectively from gross to net would introduce two different uses of the term income into the regulations. LSC believes that this action would cause greater confusion. Moreover, LSC believes that the practical problem (that taxes, indeed, represent funds unavailable to the applicant), is better addressed by considering taxes a fixed debt or obligation which can be considered by the recipient in making financial eligibility determinations. LSC invites comment on this issue. This matter is presented in greater detail in the discussion of proposed § 1611.5, below.

In addition, LSC proposes to move the information on what is encompassed by the term “total cash receipts” into the definition of income. LSC believes that having this information in the definition of income, rather than in a separate definition will make the regulation easier to use, particularly as the term “total cash receipts” is used only in the definition of income. In incorporating the language on “total cash receipts,” LSC proposes to take the current definition of the term without any substantive amendment, but reorganized to make it easier to understand. Specifically, LSC proposes to separate the definition into two sentences, one of which sets forth the list of things which are included in total cash receipts and one which sets forth those things which are specifically excluded from the definition of total cash receipts. It is worth noting that the sentence on items included is not intended to be exhaustive, while the sentence on items to be excluded is intended to be exhaustive.

Finally, LSC wishes to take this opportunity to restate in this preamble some guidance on the treatment of Indian trust fund monies in making income determinations. Several provisions of Federal law regulate whether or not income or interests in Indian trusts are taxable or should be considered as resources or income for federal benefits. Under the terms of those laws, LSC has determined that recipients may disregard up to \$2000 per year of funds received by individual Native Americans that are derived from income or interests in Indian trusts from being considered income for the purpose of determining financial eligibility of Native American applicants for service, and that such

funds or interests of individual Native Americans in trust or restricted lands should not be considered as a resource for the purpose of LSC eligibility. See LSC Office of Legal Affairs External Opinion 99-17, August 27, 1999.

As noted in External Opinion 99-17, the exclusion applies only to funds and other interests held *in trust* by the federal government and investment income accrued therefrom. The following have been found to qualify for the exclusion from income in determining eligibility for various government benefits: income from the sale of timber from land held in trust; income derived from farming and ranching operations on reservation land held in trust by the federal government; income derived from rentals, royalties, and sales proceeds from natural resources of land held in trust; sales proceeds from crops grown on land held in trust; and use of land held in trust for grazing purposes. On the other hand, per capita distributions of revenues from gaming activity on tribal trust property are not protected because such funds are not held in trust by the federal government. Thus, such distributions are considered to be income for purposes determining LSC financial eligibility.

Total Cash Receipts

LSC proposes to delete the definition of "total cash receipts," currently at § 1611.2(h), as a separately defined term in the regulation. Rather, LSC proposes to reorganize the information contained in the definition and move it directly into the definition of "income." As noted above, the only place the term "total cash receipts" is used is in the definition of "income" and LSC believes that having a separate definition for "total cash receipts" is cumbersome and unnecessary.

Section 1611.3 Financial Eligibility Policies

LSC proposes to create a new § 1611.3, Financial Eligibility Policies, based on requirements currently found in §§ 1611.5(a), 1611.3(a)-(c) and 1611.6. The new § 1611.3 would address in one section recipients' responsibilities for adopting and implementing financial eligibility policies. Under the proposed new section, the current requirement that recipients' governing bodies have to adopt policies for determining financial eligibility would be retained. LSC proposes, however, to change the current requirement for annual review of these policies and instead require recipients' governing bodies to conduct triennial reviews of policies. The

Working Group agreed that an annual review was unnecessary and has tended to result in rather pro forma reviews of policies. In contrast, a triennial review requirement would be sufficient to ensure that financial eligibility policies remain relevant and would encourage a more thorough and thoughtful review when such review is undertaken. The section would also add an express requirement that recipients would be required to adopt implementing procedures. While this is already implicit in the current regulation, LSC believes it would be better for this requirement to be expressly stated. Such implementing procedures could be adopted either by a recipient's governing body or by the recipient's management.

Proposed § 1611.3 would also contain certain minimum requirements for the content of recipient's financial eligibility policies. Specifically, LSC proposes that the recipient's financial eligibility policy must:

- Specify that only applicants for service determined to be financially eligible under the policy may be further considered for LSC-funded service;
 - Establish annual income ceilings of no more than 125% of the current Department of Health and Human Services Federal Poverty Guidelines amounts;
 - Establish asset ceilings; and
 - Specify that, notwithstanding any other provisions of the regulation or the recipient's financial eligibility policies, in assessing the financial eligibility of an individual known to be a victim of domestic violence, the recipient shall consider only the income and assets of the individual applicant and shall not consider any jointly held assets.
- In establishing income and asset ceilings, the recipient would have to consider the cost of living in the locality; the number of clients who can be served by the resources of recipient; the potentially eligible population at various ceilings; and the availability of other sources of legal assistance. With respect to jointly held assets of domestic violence victims, this requirement applies when the applicant has made the recipient aware that he or she is a victim of domestic violence.

In addition, LSC proposes to permit recipients to adopt financial eligibility policies which provide for authorized exceptions to the annual income ceiling pursuant to proposed § 1611.5 and for waiver of the asset ceiling under unusual circumstances and when approved by the Executive Director or his/her designee. Finally, LSC proposes to permit recipients to adopt financial

eligibility policies which permit financial eligibility to be established by reference to an applicant's receipt of benefits from a governmental program for low-income individuals or families consistent with proposed § 1611.4(b).

These proposed provisions are, with two exceptions, based directly on current requirements with a few substantive changes. First among the changes, recipients would no longer be required to routinely submit their asset ceilings to LSC. This requirement appears to serve little or no purpose, as compliance with this requirement has been spotty and LSC has taken no action to obtain the information from programs which have not automatically submitted it. Moreover, the information collected is not being put to any routine use. In addition, LSC has not had a parallel requirement for the submission of income ceilings. The Working Group determined that this requirement could be eliminated without any adverse effect on program compliance with or Corporation enforcement of the regulation.

Another substantive change is that recipients would be permitted to provide in their financial eligibility policies for the exclusion of (in addition to a primary residence, as provided for in the existing regulation) vehicles, assets used in producing income and other assets excluded from attachment under State or Federal law from the calculation of assets. In identifying other assets excluded from attachment under State or Federal law, LSC has in mind assets that are excluded from bankruptcy proceedings or other assets that may not be attached for the satisfaction of a debt, *etc.*

There was discussion within the Working Group about the appropriate scope of this provision. Field representatives suggested that the list of exclusions should be illustrative, and not exhaustive, allowing programs greater discretion in developing asset ceilings. LSC representatives, however, preferred to retain the approach in the current regulation in which the list of excludable assets is set forth *in toto*, to emphasize the policy that most assets are to be considered and to maintain a basic level of consistency nationally with respect to this issue. However, the LSC representatives agreed that the regulation could afford recipients some additional flexibility in developing asset ceilings, consistent with the policy articulated above. The Working Group believes that the proposed language meets those objectives, particularly in light of the proposed amendment to the asset ceiling waiver standard discussed below. LSC invites comment on whether

the list should be illustrative or exhaustive. LSC also invites comment on whether additional specific assets should be included in the list of excludable assets and, if so, what items might be appropriate.

LSC is also proposing to change the asset ceiling waiver standard slightly. The current regulation permits waiver in "unusual or extremely meritorious situations;" the proposed rule would permit waiver in "unusual circumstances." The Working Group determined that the current language is unnecessarily stringent and that it is unclear what the difference is intended to be between "unusual" and "extremely meritorious." It was suggested in the Working Group that the standard should be "where appropriate." LSC, however, felt that the regulation should continue to reflect the policy that waivers of the asset ceilings should only be granted sparingly and not as a matter of course. The Working Group agreed that the revised language accomplishes this goal, while providing some additional appropriate discretion to programs. In addition, where the current rule requires all waiver decisions to be made by the Executive Director, LSC proposes to permit those decisions to be made by the executive director or his/her designee. LSC believes it is important that a person in significant authority be involved in making asset ceiling waiver decisions, but recognizes that, especially as more programs consolidate and serve larger areas, it is important for programs to have the discretion to delegate certain authority to regional or branch office directors to increase administrative efficiency.

The first totally new element is the proposed language regarding victims of domestic violence. This proposal stems from LSC's FY 1998 appropriations law. Specifically, section 506 of that act provides:

In establishing the income or assets of an individual who is a victim of domestic violence, under section 1007(a)(2) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(2)), to determine if the individual is eligible for legal assistance, a recipient described in such section shall consider only the assets and income of the individual and shall not include any jointly held assets.

Although this law has been in effect since 1997, it has never been formally incorporated into part 1611. LSC notes that this provision of law applies regardless of whether it appears in the regulation. However, incorporating this language into the regulation is appropriate, particularly in light of the goal of this rulemaking to clarify the

requirements relating to financial eligibility determinations.

Finally, the proposal to permit recipients to adopt financial eligibility policies which permit financial eligibility to be established by reference to an applicant's receipt of benefits from a governmental program for low-income individuals or families consistent with proposed § 1611.4(b) is also new. This proposal is discussed in greater detail below.

Section 1611.4 Financial Eligibility for Legal Assistance

This proposed section would set forth the basic requirement that recipients may provide legal assistance supported with LSC funds only to those individuals whom the recipient has determined are financially eligible for such assistance pursuant to their program's policies, consistent with this part. This section also proposes to contain a statement that nothing in part 1611 prohibits a recipient from providing legal assistance to an individual without regard to that individual's income and assets if the legal assistance is supported wholly by funds from a source other than LSC (regardless of whether LSC funds were used as a match to obtain such other funds, as is the case with Title III or VOCA grant funds) and the assistance is otherwise permissible under applicable law and regulation. This proposed section would further provide that a recipient may find an applicant to be financially eligible if the applicant's assets are at or below the recipient's applicable asset ceiling level (or the ceiling has been properly waived) and the applicant's income is at or below the recipient's applicable income ceiling, or if one or more of the authorized exceptions to the ceiling applies. These provisions are based on existing provisions found in §§ 1611.3, 1611.4 and 1611.6. As revised, the new provisions do not represent a substantive change, but LSC believes having the basic statements as to who may be found to be financially eligible for assistance in one section makes the regulation much clearer. In addition, where the existing regulation uses a construction that speaks to when a recipient may provide legal assistance, the proposed new language emphasizes the point that the requirements speak only to determinations of financial eligibility and not to decisions regarding whether or not to actually provide legal assistance.

LSC also proposes to incorporate into this section two significant substantive changes to the regulation. First, LSC proposes to include a requirement that,

in making financial eligibility determinations, a recipient shall make reasonable inquiry regarding sources of the applicant's income, income prospects and assets and shall record income and asset information in the manner specified for determining eligibility in proposed § 1611.6. This requirement would replace the process currently required by § 1611.5, whereby a recipient is effectively required to conduct a lengthy and often cumbersome inquiry as to the applicant's income, assets and income prospects, including inquiry into a detailed list of factors relating to an applicant's specific financial situation and ability to afford private counsel. The Working Group discussed this issue at length and representatives of the field noted that conducting such a detailed inquiry in most cases is a task which is often difficult to accomplish efficiently at the point of intake, especially as much of intake is performed by volunteers, interns or receptionists. Rather, many recipients, in practice, conduct a somewhat abbreviated version of the otherwise required process, inquiring into current income, assets, income prospects and probing for additional information on the basis of the responses provided, based upon the requirements of the regulation and their knowledge of the applicant base and local circumstances. This approach, the field representatives noted, is less prone to error and assists in fostering an appropriate attorney-client relationship with individuals accepted as clients. As LSC is not finding widespread instances of service being provided to financially ineligible persons, it was agreed that that the process required by the existing regulation is unduly complicated and that the simplified requirement proposed would be adequate to ensure that recipients are making sufficient inquiry into applicants' financial situations to determine financial eligibility status under the regulation while being less administratively burdensome for recipients and more conducive to the development of the attorney-client relationship. LSC also believes that adoption of the proposed streamlined eligibility determination process will aid the Corporation in conducting compliance reviews.

The other major change is that, consistent with proposed § 1611.3 as discussed above, if adopted, the regulation would permit recipients to determine an applicant to be financially eligible because the applicant's income is derived solely from a governmental program for low-income individuals or families, provided that the recipient's

governing body has determined that the income standards of the governmental program are at or below 125% of the Federal Poverty Level amounts. For many recipients, a significant proportion of applicants rely on governmental benefits for low-income individuals and families as their sole source of income. In order to qualify for these benefits, such persons have already been screened and determined to be financially eligible for those benefits by the agency providing the benefits through an eligibility determination process that is stricter than the one required under LSC regulations. In Working Group discussions, many representatives of the field noted that if they could rely on the determinations made by these agencies without having to otherwise make an independent inquiry into financial eligibility, it would substantially ease the administrative workload involved in making eligibility determinations.

The Working Group also noted that current LSC practice permits recipients to determine that an applicant's assets are within the recipient's asset ceiling level without additional review if the applicant is receiving governmental benefits for low-income individuals and families, eligibility for which includes an asset test. Key to this practice is that the recipient's governing body has to take some identifiable action to recognize the asset test of the governmental benefit program being relied upon. This ensures that the eligibility standards of the other program have been carefully considered and are incorporated into the overall eligibility policies adopted and regularly reviewed by the governing body. As this practice has proved efficient and effective, it was determined that a parallel process could also be adopted for income screening and that these practices should be expressly included in the regulations. It is important to note that this provision would only apply to applicants whose sole income is derived from such benefits. Applicants who also have income derived from other sources would be subject to an independent inquiry and assessment of financial eligibility.

Section 1611.5 Authorized Exceptions to the Annual Income Ceiling

This proposed section provides for authorized exceptions to the annual income ceiling. The proposed language, like the current language of §§ 1611.4 and 1611.5, on which it is based, is permissive. A recipient would be free to include some, none, or all of the authorized exceptions discussed below

in its financial eligibility policies. Thus, to the extent a recipient would choose to avail itself of the authority provided in this proposed section, a recipient would be permitted to determine an applicant to be financially eligible for assistance, notwithstanding that the applicant's income is in excess of the recipient's applicable income ceiling. In making such determinations, however, the recipient would have to determine that the applicant's assets were at or below the recipient's applicable asset ceiling (or the ceiling would have had to have been waived). This requirement is consistent with the current regulation, but would be affirmatively stated for clarity.

Under the proposed section, there would be two situations in which an applicant's income could exceed the recipient's income ceiling without an absolute upper limit: (1) Where the applicant is seeking to maintain governmental benefits for low-income individuals and families; and (2) where the executive director (or his/her designee) determines, on the basis of documentation received by the recipient, that the applicant's income is primarily committed to medical or nursing home expenses and, in considering only that portion of the applicant's income which is not so committed, the applicant would otherwise be financially eligible.

The first instance would be a new addition to the regulation. Currently, an applicant seeking to *obtain* governmental benefits for low income persons may be deemed financially eligible if the applicant's income does not exceed 150% of the national eligibility level. The existing regulation, however, does not specifically address applicants seeking to *maintain* such benefits. Thus, under the current regulation, an applicant whose income is over the income ceiling but under 150% of the national eligibility level may be deemed financially eligible for assistance in obtaining benefits, but not for assistance in maintaining them. Thus, the applicant seeking assistance to maintain benefits would have to be turned down, but that same applicant could then be found financially eligible for assistance to re-obtain such benefits once the benefits were lost. Accordingly, LSC proposes to address this problem in the regulation. However, unlike the situation in obtaining the benefits, in seeking to maintain benefits LSC considers an upper limit on income unnecessary since in such cases the applicant's income will necessarily be rather limited (for the applicant to have been eligible in the first place for the

benefits he or she is seeking to maintain).

The second instance is taken from § 1611.5(b)(1)(B) of the current regulation addressing instances in which the applicant's income is primarily devoted to medical or nursing home expenses and does not represent a substantive change in the current regulation. LSC does propose to specify in the regulation, however, that in such cases the recipient is still required to make a determination of financial eligibility with regard to the applicant's remaining income. The existing regulation could be read to permit an applicant with an income of \$300,000 to be deemed financially eligible if \$250,000 of the income is devoted to nursing home expenses, notwithstanding that the applicant's remaining income is \$50,000—substantially in excess of the income ceiling. This situation is not intended, and, indeed, LSC has no reason to believe recipients are serving such persons. However, consistent with the overall goal of clarifying the regulation, LSC believes that a requirement that an applicant must be otherwise financially eligible considering only that portion of the applicant's income which is not devoted to medical or nursing home expenses should be clearly set forth in the regulation.

LSC also proposes to permit exceptions for certain situations in which the applicant's income is in excess of the recipient's applicable income ceiling, but does not exceed 200% of the applicable Federal Poverty Guideline amount. At the outset, LSC notes that this section also proposes to change the current upper income limit of 150% of the national income guidelines amount, which is 150% of 125% of the Federal Poverty Guideline amounts, or 187.5% of the Federal Poverty Guidelines amounts. Under the proposed new regulation, the upper limit would increase to 200% of the Federal Poverty Guidelines amounts. This change is being proposed to further simplify the language of the regulation and in recognition of the changing demographic of the legal services client base, which now increasingly includes the working poor. The Working Group discussed the fact that this action would slightly increase the pool of potential applicants for service but was of the opinion that this would not have a negative impact on the quantity or quality of services delivered.

Turning to the exceptions, LSC proposes to retain the current exception for individuals seeking to obtain governmental benefits for low-income individuals and families. Second, LSC

proposes to add an exception for individuals seeking to obtain or maintain governmental benefits for persons with mental and/or physical disabilities. Many disability benefit programs provide only subsistence support and those individuals should be treated the same way as those seeking to obtain benefits available on the basis of financial need. However, many persons with disabilities who are eligible for disability benefits may not be particularly economically disadvantaged and should not be eligible for legal assistance simply by virtue of the eligibility for such disability benefits. Therefore, those applicants must have incomes below 200% of the applicable poverty level in order to be considered financially eligible for LSC-funded services.

Finally, the proposed regulation maintains the current authorized exceptions found in the factors listed in § 1611.5. Specifically, the recipient may determine an applicant whose income is below 200% of the applicable Federal Poverty Guidelines amount to be financially eligible for legal assistance supported with LSC funds based on one or more enumerated factors that affect the applicant's ability to afford legal assistance. As in the current regulation, recipients would not be required to apply these factors in a "spend down" fashion. That is, although recipients would be permitted to do so, they would not be required to determine that, after deducting the allowable expenses, the applicant's income is below the applicable income ceiling before determining the applicant to be financially eligible. The regulation would also be amended to clarify that the factors apply to the applicant and members of the applicant's household. The factors proposed are identical to the ones in the current regulation, with the following exceptions:

- The factor relating to medical expenses would be restated to make clear that it refers only to unreimbursed medical expenses, but that medical insurance premiums are included;
- The factor relating to employment expenses would be reorganized for clarity and would expressly include expenses related to job training or educational activities in preparation for employment;
- The factor relating to expenses associated with age or disability would no longer refer to resident members of the family as a reference to the applicant or members of the applicant's household is proposed to be incorporated elsewhere in this section of the regulation;

- The factor relating to fixed debts and obligations would be amended to read only "fixed debts and obligations."

With regard to "fixed debts and obligations," the current regulation provides little guidance as to what is meant by this term, except to specifically include unpaid taxes from prior years. LSC proposes to simply use the term "fixed debts and obligations," while providing guidance in the preamble as to what is encompassed by the term. LSC believes that this approach will provide recipients with flexibility in applying the rule, while providing for more guidance than could easily be contained in regulatory text.

Prior guidance from the LSC Office of Legal Affairs has stated that, "in the absence of any regulatory definition or guidance as to the meaning of "fixed debts and obligations," the common meaning of the term applies" and that it encompasses debts fixed as to both time and amount. See Letter of November 1, 1993 from J. Kelly Martin, Assistant General Counsel to Stephen St. Hilaire, Executive Director, Camden Regional Legal Services, Inc. Examples of such "fixed debts and obligations" would include mortgage payments, child support, alimony, and business equipment loan payments. LSC intends that this term should also include rent in addition to mortgage payments. Previous OLA opinions have addressed mortgage payments but not rent and rent has, heretofore, not been considered a fixed debt. LSC now sees no rational distinction between the two for the purposes of this regulation and therefore proposes to treat these expenses in a similar manner.

With respect to taxes, prior to 1983, part 1611 included current taxes along with past due unpaid taxes as a fixed debt. When the regulation was changed in 1983, the reference to taxes was amended to refer only to unpaid prior year taxes. This change was justified on the basis that the § 1611.5 factors were intended to account only for "special circumstances" affecting the ability to afford legal assistance. See 48 FR 54201 at 54203 (November 30, 1983). However, given that other types of expenses included in the list do not seem to be particularly "special" (e.g., mortgage payments; child care expenses), LSC no longer finds this explanation persuasive. Rather, LSC believes that the exclusion of current taxes, but not prior unpaid taxes, from fixed debts and obligations has the effect of punishing those persons who are in compliance with the law in favor of persons who are delinquent in their legal responsibility to pay taxes. Moreover, as noted above, the legal services client base is

increasingly comprises the working poor. Excluding current taxes from fixed debts has a disproportionate effect on applicants who work, versus applicants who do not work. Accordingly, LSC believes that including current taxes in fixed debts is appropriate to address this problem.

As noted above, the Working Group considered whether current taxes should just be excluded from the meaning of the term income, rather than including them as within the meaning of "fixed debts and obligations." Although representatives of the field preferred the former approach, LSC representatives preferred the latter approach. The Corporation has always considered income to be gross income and the eligibility ceilings are based on a gross income standard. Similarly, taxes, whether paid or unpaid, have always been considered within the rubric of the fixed debts and obligations exception. By proposing to include current taxes within the meaning of fixed debts and obligations, LSC proposes to return to the prior usage of that term from 1976 through 1983. However, as noted above, LSC invites comment on this issue.

The term "fixed debts and obligations," however, is not without limit. It is not intended to include expenses, such as food costs, utilities, credit card debt, etc. These types of debts are usually not fixed as to time and amount. Moreover, these sorts of expenses are typical living expenses which have not been, and are not intended to be, included as factors to be considered in assessing the financial eligibility of someone whose income exceeds the recipient's applicable annual income ceiling.

The Working Group considered whether there were additional factors which should be enumerated in this section and several members of the Working Group proposed adding other factors, such as utilities, to the list. Although the Working Group agreed in the end not to propose adding any additional factors, LSC specifically invites comment on this matter.

Section 1611.6 Manner of Determining Eligibility

LSC proposes several revisions to this section. First, LSC proposes to delete the requirement in existing paragraph (a) of this section that LSC eligibility forms and procedures must be approved by the Corporation. It has been LSC's experience that receiving the forms has not enhanced its ability to conduct oversight of recipients. These documents are readily available to LSC from recipients when needed. This

requirement appears only to create unnecessary work for recipients and LSC staff without serving any policy purpose.

LSC also proposes to add a provision to the regulation making clear that a recipient agreeing to extend legal assistance to a client referred from another recipient may rely upon the referring program's determination of financial eligibility, provided that the referring program provides and the receiving program retains a copy of the intake form documenting the financial eligibility of the client. This is the currently accepted practice, but is addressed nowhere in the existing regulation. A similar provision was included in the 1995 NPRM.

Section 1611.7 Change in Financial Eligibility Status

LSC proposes to add language to this section to provide that if a recipient later learns of information which indicates that a client is not, in fact, financially eligible, the recipient must discontinue the representation consistent with the applicable rules of professional responsibility. This addition is being proposed because sometimes, after an applicant has been accepted as a client, the recipient discovers or the client discloses information that indicates that the client was not, in fact, financially eligible for service. This situation is not covered by the existing regulation because the client may not have experienced a change in circumstance, but rather the recipient has discovered new pertinent information about the client. LSC notes that the proposed language, like the current regulation, is not intended to require a recipient to make affirmative inquiry after accepting an applicant as a client for information that would indicate a change in circumstance or the presence of additional information regarding the client's financial eligibility.

The proposed regulation would require that when a client is found to be no longer financially eligible on the basis of later discovered information, the recipient shall discontinue representation supported with LSC funds, if discontinuing the representation is not inconsistent with applicable rules of professional responsibility. This proposed language is parallel to the current requirement regarding discontinuation of representation upon a change in circumstance. LSC wishes to note that, to the extent that discontinuation of representation is not possible because of professional responsibility reasons, a recipient may continue to provide

representation supported by LSC funds. This is currently the case and LSC intends to make no change in the regulation on this point.

In addition, LSC proposes to change the name of this section from "change in circumstances" to "change in financial eligibility status" to reflect the addition of the later discovered information provision.

Section 1611.8 Representation of Groups

The subject of the eligibility of groups for legal assistance supported with LSC funds was one of intense discussion among the members of the Working Group. Prior to 1983, the regulation permitted representation of groups that were either primarily composed of eligible persons, or which had as their primary purpose the furtherance of the interests of persons in the community unable to afford legal assistance. In 1983, the regulation was amended to preclude the use of LSC funds for the representation of groups unless they were composed primarily of individuals financially eligible for service and to add a requirement that any group seeking representation demonstrate that it lacks the funds or the means to obtain the funds to retain private counsel.

Representatives from the field proposed that LSC revise the regulation to once again permit the representation of groups which, although not primarily composed of eligible persons, have as a primary function the delivery of services to, or furtherance of the interests of, persons in the community unable to afford legal assistance. Examples of such a group might be a food bank or a rural community development corporation working to develop affordable housing in an isolated community. Field representatives noted that in such cases, there may not be local counsel willing to provide pro bono representation and that the group might not otherwise be able to afford private counsel. Further, the field representatives noted that restricting recipients to representing with LSC funds only those groups primarily composed of eligible individuals prevents them from providing legal assistance in the most efficient manner possible as other groups may be better able to accomplish results benefitting more members of the eligible community than would representation of eligible individuals or groups composed primarily of such individuals. Field representatives also noted that the rule requires that the group would have to provide information showing that it lacks and has no means of obtaining the funds to

retain private counsel, so that the rule would not permit representation of well funded groups.

The LSC representatives were concerned that allowing the use of LSC funds to support the representation of groups not composed primarily of eligible clients would be problematic. In the examples given, the "primary function" of the group is easily discernable. It may be the case, however, that there is or can be a wide variety of opinion on what the "primary function" of any group is and on what is "in the interests" of the eligible client community. The LSC representatives were concerned that the risk and effort related to articulating and enforcing a necessarily subjective standard would be inappropriate in this case. Rather, LSC representatives were of the opinion that already scarce legal services resources would be better devoted to providing assistance to eligible individuals or groups of eligible individuals. In the end, the Working Group did not achieve consensus on this issue and the Draft NPRM did not propose to permit the representation of groups other than those primarily composed of eligible individuals.

In its deliberations on the Draft NPRM, the Operations and Regulations Committee acknowledged the legitimacy of the concerns of the LSC representatives, but determined that the value of permitting the representation of groups having a primary function of providing services to, or furthering the interests of, those who would be financially eligible outweighed any risks attendant upon such representation. In approving the recommendation of the Committee, the Board directed that the Draft NPRM be amended to propose permitting such representation (including any conforming amendments necessary) prior to publication of the NPRM for comment. This NPRM reflects this direction. LSC specifically invites comment on this issue.

Accordingly, the proposed rule would permit a recipient to provide legal assistance supported with LSC funds to a group, corporation, association or other entity if the recipient has determined that the group, corporation, association or other entity lacks and has not practical means of obtaining private counsel in the matter for which representation is sought and any of the following:

- (1) At least a majority of the group's members are financially eligible for LSC-funded legal assistance; or
- (2) For a non-membership group, at least a majority of the individuals who are forming or operating the group are

financially eligible for LSC-funded legal assistance; or

(3) The group has as its principal function or activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance; or

(4) The group has as its principal function or activity the furtherance of the interests of those persons in the community who would be financially eligible for LSC-funded legal assistance and the representation sought relates to such function or activity.

The first two instances, relating to the eligibility and representation of groups composed primarily of eligible individuals, represent the current practice permitted by current § 1611.5(c). The language of the proposed rule would expressly incorporate the interpretation of “primarily composed” that has developed and been adopted in practice over the years since 1983. In the case of membership groups, at least a majority of the members would have to be eligible; in the case of non-membership groups, at least a majority of members of the governing body would have to be eligible persons. The latter two instances represent the situations permitted by the pre-1983 rule, although the language would be revised to focus on the primary “function” rather than the primary “purpose” of the group. This choice is intended to make the analysis required in determining the permissibility of the representation more objective.

Finally, the proposed rule would retain and restate the current provision of the rule that nothing in this part prohibits a recipient from providing legal assistance to a group without regard to the nature or financial eligibility of the group, if the legal assistance is supported by funds from a source other than LSC, and is otherwise permissible under applicable law and regulation.

LSC notes that, as with other aspects of this rule, proposed § 1611.8 does not speak to eligibility of groups for legal assistance under other applicable law and regulations. For example, the eligibility of a group under proposed § 1611.8 does not address issues related to the eligibility of the group under part 1626 of the Corporation’s regulations, concerning citizenship and alien status eligibility. Similarly, the fact that a recipient may determine a group to be eligible for legal assistance under this part, does not address other questions relating to permissibility of the representation (*i.e.*, this part does not

confer authority for the representation of group on restricted matters, such as class action lawsuits or redistricting matters, etc.)

The OIG dissents from the proposed § 1611.8. The OIG’s position is that, in permitting the representation of groups without a determination of financial eligibility of all group members, the proposed rule allows the representation of ineligible individuals and, therefore, is inconsistent with the LSC Act. The OIG contends that the LSC Act contemplates the representation of individuals, rather than groups. The LSC Act declares Congress’s finding that “there is a need to provide equal access to the system of justice in our Nation for *individuals* who seek redress of grievances,” Sec. 1001(1) (emphasis added). The LSC Act established the Corporation “for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to *persons* financially unable to afford legal assistance,” Sec. 1003(a) (emphasis added). The Corporation is required to “establish, in consultation with the Director of the Office of Management and Budget and with the Governors of the several states, maximum income levels (taking into account family size, urban and rural differences, and substantial cost-of-living variations) for *individuals* eligible for legal assistance under this title,” Sec. 1007(a)(2) (emphasis added.). In addition, the LSC authorizes the Corporation “to provide financial assistance to qualified programs furnishing legal assistance to eligible clients,” Sec. 1006(a)(1)(A), and defines an “eligible client” as “any person financially unable to afford legal assistance.” Sec. 1002(3). Although the LSC Act refers to “persons,” and certain groups, such as corporations may be recognized as “persons” under the law, loose associations of individuals seeking representation as a group are not. Such a group exists only because it has members, that is individuals each of whose financial eligibility can be determined in the same way as any other individual client.

The OIG also expressed concern that the proposed rule does not address another issue growing out of allowing group representation without determining the financial eligibility of all group members. Group membership may, and likely will, change. It is easy to envision a case where a group might be eligible for representation when the case is accepted, but the composition of the group changes and ineligible individuals become the majority of the membership. This is particularly true if, as the proposed rule allows, only more

than 50 percent of the individuals must be eligible when the case is accepted. For example, if a recipient accepts as a client a group of 100 members, with 51 eligible and 49 ineligible members, the eligibility status of the group would change with the departure of but one eligible member. Thus, the OIG is of the opinion that allowing a mere majority of eligible individuals to determine the eligibility of the group, when there is a likelihood that the eligibility status of the group could easily change during the course of the representation, is problematic.

LSC disagrees and believes that the proposed regulatory requirements are consistent with the applicable laws. In particular, LSC believes that the legislative history of the 1977 LSC Act amendments demonstrates that Congress contemplated the representation of groups. In discussing an amendment relating to the prohibition by recipients on organizing, Senator Riegle stated:

A similar clarification is made in section 9(c) (of the Senate Reauthorization Bill) regarding the prohibition on organizing activities. Legal Services should not directly organize groups. However, it should provide full representation, education and outreach to those organized groups who are made up of or which represent eligible clients. This section will remove any inhibition which may have been improperly used to prevent such full representation to groups of the poor.

Congressional Record of October 10, 1977, p. S 16804. In addition, the House Report accompanying the 1997 LSC Act amendments bill states that the bill:

[P]rohibits the use of Corporation funds for direct organizing, but permits advice and legal assistance to clients who may themselves be engaged in such activities. * * * The Committee recognizes a distinction between proper activities such as (1) assisting groups of poor people to organize by providing advice on matters of incorporation, by-laws, tax problems and other matters essential to the planning of an organization; (2) providing counsel to poor people regarding appropriate behavior for group members; and (3) encouraging poor people aggrieved by particular problems to consider organizing to foster joint solutions to common problems on the one hand, and those activities that are improper on the part of legal services providers in that they usurp the rightful role of poor people as potential members of such organizations, namely, actually initiating the formation or organizing directly, an association, group, or organization.

House Report 95–310 at p. 14.

In terms of demonstrating and documenting eligibility of a group, the

proposed rule would require the program to collect information that reasonably demonstrates that the group meets the eligibility requirements. The OIG also dissents from this position and, for groups comprised of eligible individuals, if group representation as set out in the proposed rule is to be permitted, would require that the eligibility of a majority of the individuals in the group be documented in the same manner as is required for individual clients.

The proposed rule would allow recipients to determine the eligibility of groups by collecting "information that reasonably demonstrates that the group, corporation, association or other entity meets the eligibility requirements set forth herein." If LSC determines that groups are eligible for federally funded legal assistance, then, as with individuals, the OIG believes that it is LSC's responsibility to set out the requirements by which such eligibility is to be determined. The OIG believes that the proposed rule does not provide sufficient guidance. In addition, by allowing representation of groups "primarily composed of individuals who are financially eligible for legal assistance," but then allowing that determination of eligibility to be assessed by some undefined "reasonableness" standard (presumably something less than that which is required for a determination of the eligibility of individuals), the proposed rule may result in the representation of groups that are not in fact even primarily composed of eligible clients.

LSC disagrees and believes that the proposed regulatory requirements are consistent with the applicable laws. LSC further notes that the proposed rule would, essentially, codify the current practice relating to financial eligibility and representation of groups primarily composed of eligible individuals, which has not proven to be problematic in the way envisioned by the OIG. LSC does not see why it would prove any more problematic for demonstrating the eligibility of groups which have as a primary function the delivery of services to, or furtherance of the interests of, those who would be financially eligible for legal assistance.

List of Subjects in 45 CFR Part 1611

Legal services.

For reasons set forth in the preamble, LSC proposes to amend 45 CFR part 1611 by revising §§ 1611.1 through 1611.8 to read as follows:

PART 1611—FINANCIAL ELIGIBILITY

Sec.

- 1611.1 Purpose.
- 1611.2 Definitions.
- 1611.3 Financial eligibility policies.
- 1611.4 Financial eligibility for legal assistance.
- 1611.5 Authorized exceptions to the annual income ceilings.
- 1611.6 Manner of determining financial eligibility.
- 1611.7 Changes in financial eligibility status.
- 1611.8 Representation of groups.

Authority: 42 U.S.C. 2996e(b)(1), 2996e(b)(3), 2996f(a)(1), 2996f(a)(2); sec. 509(h) of Pub. L. 104–134, 110 Stat. 1321 (1996); Pub. L. 105–119; 111 Stat. 2512 (1998).

§ 1611.1 Purpose.

This part sets forth requirements relating to the financial eligibility of applicants for legal assistance supported with LSC funds and recipients' responsibilities in making financial eligibility determinations. This part is not intended to and does not create any entitlement to service for persons deemed financially eligible. This part also seeks to ensure that financial eligibility is determined in a manner conducive to development of an effective attorney-client relationship. This part also sets forth standards relating to the eligibility of groups for legal assistance supported with LSC funds.

§ 1611.2 Definitions

Applicable rules of professional responsibility means the rules of ethics and professional responsibility generally applicable to attorneys in the jurisdiction where the recipient provides legal services.

Applicant means an individual who is seeking legal assistance supported with LSC funds from a recipient. The term does not include a group, corporation or association.

Assets means cash or other resources that are readily convertible to cash, which are currently and actually available to the applicant.

Governmental program for low income individuals or families means any Federal, State or local program that provides benefits of any kind to persons whose eligibility is determined on the basis of financial need.

Governmental program for persons with disabilities means any Federal, State or local program that provides benefits of any kind to persons whose eligibility is determined on the basis of mental and/or physical disability.

Income means actual current annual total cash receipts before taxes of all persons who are resident members and contribute to the support of an applicant's household, as that term is

defined by the recipient. Total cash receipts include, but are not limited to, money, wages and salaries before any deduction; income from self-employment after deductions for business or farm expenses; regular payments from governmental programs for low income persons or persons with disabilities; social security payments; unemployment and worker's compensation payments; strike benefits from union funds; veterans benefits; training stipends; alimony; child support payments; military family allotments; public or private employee pension benefits; regular insurance or annuity payments; income from dividends, interest, rents, royalties or from estates and trusts; and other regular or recurring sources of financial support that are currently and actually available to the applicant. Total cash receipts do not include the value of food or rent received by the applicant in lieu of wages; money withdrawn from a bank; tax refunds; gifts; compensation and/or one-time insurance payments for injuries sustained; non-cash benefits; and up to \$2,000 per year of funds received by individual Native Americans that is derived from Indian trust income or other distributions exempt by statute.

§ 1611.3 Financial Eligibility Policies

(a) The governing body of a recipient shall adopt policies consistent with this part for determining the financial eligibility of applicants and groups. The governing body shall review its financial eligibility policies at least once every three years and make adjustments as necessary. The recipient shall implement procedures consistent with its policy.

(b) As part of its financial eligibility policies, every recipient shall specify that only individuals and groups determined to be financially eligible under the recipient's financial eligibility policies and LSC regulations may receive legal assistance supported with LSC funds.

(c)(1) As part of its financial eligibility policies, every recipient shall establish annual income ceilings for individuals and households, which may not exceed one hundred and twenty five percent (125%) of the current official Federal Poverty Level amounts for family units. The Corporation shall annually calculate 125% of the Federal Poverty Guidelines amounts and publish such calculations in the **Federal Register** as a revision to appendix A to this part.

(2) As part of its financial eligibility policies, a recipient may adopt authorized exceptions to its annual

income ceilings consistent with § 1611.5.

(d)(1) As part of its financial eligibility policies, every recipient shall establish reasonable asset ceilings for individuals and households. In establishing asset ceilings, the recipient may exclude consideration of a family's principal residence, vehicles required for work, assets used in producing income, and other assets which are exempt from attachment under State or Federal law.

(2) The recipient's policies may provide authority for waiver of its asset ceilings under unusual circumstances and when approved by the recipient's Executive Director, or his/her designee. When the asset ceiling is waived, the recipient shall record the reasons for such waiver and shall keep such records as are necessary to inform the Corporation of the reasons for such waiver.

(e) Notwithstanding any other provision of this Part or the recipient's financial eligibility policies, as part of its financial eligibility policies, every recipient shall specify that in assessing the income or assets of an individual applicant who is a victim of domestic violence, the recipient shall consider only the assets and income of the individual applicant and shall not include any jointly held assets.

(f) As part of its financial eligibility policies, a recipient may adopt policies that permit financial eligibility to be established by reference to an applicant's receipt of benefits from a governmental program for low-income individuals or families consistent with § 1611.4(d).

(g) Before establishing its financial eligibility policies, a recipient shall consider the cost of living in the service area or locality and other relevant factors, including but not limited to:

- (1) The number of clients who can be served by the resources of the recipient;
- (2) The population that would be eligible at and below alternative income and asset ceilings; and
- (3) The availability and cost of legal services provided by the private bar and other free or low cost legal services providers in the area.

§ 1611.4 Financial eligibility for legal assistance.

(a) A recipient may provide legal assistance supported with LSC funds only to individuals whom the recipient has determined to be financially eligible for such assistance. Nothing in this Part, however, prohibits a recipient from providing legal assistance to an individual without regard to that individual's income and assets if the

legal assistance is wholly supported by funds from a source other than LSC, and is otherwise permissible under applicable law and regulation.

(b) Consistent with the recipient's financial eligibility policies and this Part, the recipient may determine an applicant to be financially eligible for legal assistance if the applicant's assets do not exceed the recipient's applicable asset ceiling established pursuant to § 1611.3(d)(1), or the applicable asset ceiling has been waived pursuant to § 1611.3(d)(2), and:

(1) The applicant's income is at or below the recipient's applicable annual income ceiling; or

(2) The applicant's income exceeds the recipient's applicable annual income ceiling but one or more of the authorized exceptions to the annual income ceilings, as provided in § 1611.5, applies.

(c) In making financial eligibility determinations, a recipient shall make reasonable inquiry regarding sources of the applicant's income, income prospects and assets. The recipient shall record income and asset information in the manner specified for determining eligibility under § 1611.6.

(d) Consistent with the recipient's policies, a recipient may determine an applicant to be financially eligible without making an independent determination of income or assets, if the applicant's income is derived solely from a governmental program for low-income individuals or families, provided that the recipient's governing body has determined that the income standards of the governmental program are at or below 125% of the Federal Poverty Level amounts and that the governmental program has eligibility standards which include an assets test.

§ 1611.5 Authorized exceptions to the annual income ceiling.

(a) Consistent with the recipient's policies and this Part, a recipient may determine that an applicant whose income exceeds the recipient's applicable annual income ceiling to be financially eligible if the applicant's assets do not exceed the recipient's applicable asset ceiling established pursuant to § 1611.3(c), or the asset ceiling has been waived pursuant to § 1611.3(c)(2) and:

(1) The applicant is seeking legal assistance to maintain benefits provided by a governmental program for low income individuals or families; or

(2) The Executive Director of the recipient, or his/her designee, has determined on the basis of documentation received by the recipient, that the applicant's income is

primarily committed to medical or nursing home expenses and that, excluding such portion of the applicant's income which is committed to medical or nursing home expenses, the applicant would otherwise be financially eligible for service; or

(3) The applicant's income does not exceed 200% of the applicable Federal Poverty Level amount and:

(i) The applicant is seeking to obtain governmental benefits for low income individuals and families; or

(ii) The applicant is seeking to obtain or maintain governmental benefits for persons with disabilities; or

(4) The applicant's income does not exceed 200% of the applicable Federal Poverty Level amount and the recipient has determined that the applicant should be considered financially eligible based on consideration of one or more of the following factors as applicable to the applicant or members of the applicant's household:

(i) Current income prospects, taking into account seasonal variations in income;

(ii) Unreimbursed medical expenses including medical insurance premiums;

(iii) Fixed debts and obligations;

(iv) Expenses necessary for employment, job training or educational activities in preparation for employment, such as dependent care, transportation, clothing and equipment expenses;

(v) Non-medical expenses associated with age or disability; or

(vi) Other significant factors that the recipient has determined affect the applicant's ability to afford legal assistance.

(b) In the event that a recipient determines that an applicant is financially eligible pursuant to this section and is provided legal assistance, the recipient shall document the basis for the financial eligibility determination. The recipient shall keep such records as may be necessary to inform the Corporation of the specific facts and factors relied on to make such determination.

§ 1611.6 Manner of determining financial eligibility.

(a) A recipient shall adopt simple intake forms and procedures to obtain information from applicants and groups to determine financial eligibility in a manner that promotes the development of trust between attorney and client. The forms shall be preserved by the recipient.

(b) If there is substantial reason to doubt the accuracy of the financial eligibility information provided by an applicant or group, a recipient shall

make appropriate inquiry to verify the information, in a manner consistent with the attorney-client relationship.

(c) When one recipient has determined that a client is financially eligible for service in a particular case or matter, that recipient may request another recipient to extend legal assistance or undertake representation on behalf of that client in the same case or matter in reliance upon the initial financial eligibility determination. In such cases, the receiving recipient is not required to review or redetermine the client's financial eligibility unless there is a change in financial eligibility status as described in § 1611.7 or there is substantial reason to doubt the validity of the original determination, provided that the referring recipient provides and the receiving recipient retains a copy of the intake form documenting the financial eligibility of the client.

§ 1611.7 Change in financial eligibility status.

(a) If, after making a determination of financial eligibility and accepting a client for service, the recipient becomes aware that a client has become financially ineligible through a change in circumstances, a recipient shall discontinue representation supported with LSC funds if the change in circumstances is sufficient, and is likely to continue, to enable the client to afford private legal assistance, and discontinuation is not inconsistent with applicable rules of professional responsibility.

(b) If, after making a determination of financial eligibility and accepting a client for service, the recipient later determines that the client is financially ineligible on the basis of later discovered or disclosed information, a recipient shall discontinue representation supported with LSC funds if the discontinuation is not inconsistent with applicable rules of professional responsibility.

§ 1611.8 Representation of groups.

(a) A recipient may provide legal assistance supported with LSC funds to a group, corporation, association or other entity if the recipient has determined that the group, corporation, association or other entity lacks and has not practical means of obtaining private counsel in the matter for which representation is sought and:

(1) At least a majority of the group's members are financially eligible for LSC-funded legal assistance; or

(2) For a non-membership group, at least a majority of the individuals who are forming or operating the group are

financially eligible for LSC-funded legal assistance; or

(3) The group has as its principal function or activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance; or

(4) The group has as its principal function or activity the furtherance of the interests of those persons in the community who would be financially eligible for LSC-funded legal assistance and the representation sought relates to such function or activity.

(b) In order to make a determination that a group, corporation, association or other entity is eligible for legal services as required by paragraph (a) of this section, a recipient shall collect information that reasonably demonstrates that the group, corporation, association or other entity meets the eligibility requirements set forth herein.

(c) Nothing in this part prohibits a recipient from providing legal assistance to a group without regard to the nature or financial eligibility of the group, if the legal assistance is supported by funds other than LSC, and is otherwise permissible under applicable law and regulation.

Appendix A—Legal Services Corporation Poverty Guidelines

Note: Appendix A: The Corporation is not requesting comments on the current Appendix. The Appendix is revised annually, after the Department of Health and Human Services issues the new Federal Poverty Guidelines for that year.

Victor M. Fortuno,

General Counsel and Vice President for Legal Affairs.

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DEPARTMENT OF DEFENSE

48 CFR Part 216

[DFARS Case 2001-D013]

Defense Federal Acquisition Regulation Supplement; Provisional Award Fee Payments

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to address the use of provisional award fee payments under cost-plus-award-fee contracts. The rule provides for

successfully performing contractors to receive a portion of award fees within an evaluation period, prior to an interim or final evaluation for that period.

DATES: DoD will consider all comments received by January 21, 2003.

ADDRESSES: Respondents may submit comments directly on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. As an alternative, respondents may e-mail comments to: dfars@acq.osd.mil. Please cite DFARS Case 2001-D013 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Ms. Sandra Haberlin, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; facsimile (703) 602-0350. Please cite DFARS Case 2001-D013.

At the end of the comment period, interested parties may view public comments on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf>.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra Haberlin, (703) 602-0289.

SUPPLEMENTARY INFORMATION:

A. Background

Cost-reimbursement contracts containing award fees typically provide for an award fee payment no more frequently than every 6 months. This practice may place an undue financial burden on an otherwise successfully performing contractor. Therefore, the proposed rule provides for the payment of provisional award fees within an evaluation period, prior to an interim or final evaluation for that period. The provisional payments are based on (1) successful evaluations for prior evaluation periods, and (2) the fee determining official's expectation that payment of provisional fee amounts will not reduce the overall effectiveness of the award fee incentive.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule applies only to cost-plus-award-fee contracts. Most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis. Therefore, DoD has not performed an