



7050-01

LEGAL SERVICES CORPORATION

45 CFR Parts 1610, 1627, and 1630

Use of Non-LSC Funds, Transfers of LSC funds, Program Integrity; Subgrants and Membership Fees or Dues; Cost Standards and Procedures

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule revises the Legal Services Corporation's (LSC or Corporation) regulations governing subgrants. LSC published a Notice of Proposed Rulemaking (NPRM) on April 20, 2015, and a Further Notice of Proposed Rulemaking (FNPRM) on April 26, 2016. This final rule identifies the factors to consider in determining whether an award from an LSC recipient to another organization is a subgrant, establishes a dollar threshold at which recipients must seek LSC's approval to award a subgrant, authorizes recipients to use property or services funded in whole or in part with LSC funds to support a subgrant, and establishes new processes for seeking prior approval of subgrants.

DATES: This final rule will be effective on April 1, 2017.

FOR FURTHER INFORMATION CONTACT: Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, (202) 295-1563 (phone), (202) 337-6519 (fax), sdavis@lsc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

LSC provided a more complete history of the impetus for this rulemaking in the April 20, 2015 NPRM. 80 FR 21692, Apr. 20, 2015. In brief, LSC initiated this rulemaking to address an issue identified by LSC's Office of Inspector General (OIG) through an audit of the

Corporation's Technology Initiative Grant (TIG) program. In its audit report, OIG disagreed with LSC management's (Management) interpretation and application of the rules governing subgrants and transfers of LSC funds because "[t]he subgrant rule appears to have been written with the LSC's principal legal service grants in mind, such that ordinarily, programmatic activities consist of the provision of legal services, and business services can easily be classified as ancillary. This division is not as easy to make in the case of TIG grants, and the rule does not seem to have anticipated this problem." Audit of Legal Services Corporation's Technology Initiative Grant Program, Report No. AU-11-01, at 42, Dec. 2010.

LSC initiated this rulemaking in 2012 to resolve the conflict of opinions. In 2015, Management proposed expanding this rulemaking to update these rules more comprehensively. On April 12, 2015, the Operations and Regulations Committee (Committee) of LSC's Board of Directors (Board) voted to recommend that the Board approve publication of an NPRM in the Federal Register for notice and comment. On April 14, 2015, the Board accepted the Committee's recommendation and approved publication of the NPRM. The NPRM was published in the Federal Register on April 20, 2015, with a comment closing date of May 20, 2015. 80 FR 21692, Apr. 20, 2015. After receiving a request to extend the comment period, LSC gave interested parties an additional 21 days to respond to the NPRM. 80 FR 29600, May 22, 2015.

LSC received five comments during the comment period. One LSC funding recipient, Northwest Justice Project (NJP), submitted comments. The other four comments came from OIG; Metro Volunteer Lawyers (MVL), the pro bono program of the Denver Bar Association; the National Legal Aid and Defender Association, through its Civil Policy Group and its Regulations and Policy Committee (NLADA); and the American Bar Association's Standing

Committee on Legal Aid and Indigent Defense (SCLAID). Collectively, the commenters identified five areas of concern with the NPRM: 1) an ambiguous definition of the term “programmatic”; 2) LSC’s proposal to adopt the five characteristics of a subgrant from the Office of Management and Budget’s (OMB) Uniform Guidance, 2 CFR part 200; 3) LSC’s proposal to prohibit recipients from using services or property acquired in whole or in part with LSC funds as the basis for a subgrant; 4) LSC’s proposal to remove a provision that deemed subgrants approved if LSC did not make a decision about whether to approve the subgrant within 45 days of submission; and 5) LSC’s proposal to require subrecipients to maintain timekeeping records in accordance with 45 CFR part 1635. Commenters also responded to LSC’s request for comments about whether to increase the dollar threshold at which fee-for-service arrangements, including judicare projects and contracts with private attorneys to provide legal assistance to eligible clients, are considered subgrants.

LSC reviewed all comments received and determined that revisions to the proposed rule were appropriate. LSC proposed to make significant changes to five provisions of the proposed rule:

- Removing the definition of the term programmatic from § 1627.2;
- Revising § 1627.3 to allow recipients to use property or services acquired in whole or in part with LSC funds to support a subgrant;
- Revising § 1627.4 to establish a \$15,000 threshold at which recipients must seek LSC’s prior written approval before awarding a subgrant;
- Committing LSC to publishing the time frames in which LSC will make decisions on requests for prior approval of subgrants in the Federal Register on an annual basis; and

- Revising § 1627.5 to allow recipients flexibility to negotiate the creation and maintenance of timekeeping records with subrecipients.

LSC determined that the changes were significant enough to warrant a second round of notice and comment rulemaking. On April 18, 2016, the Committee authorized publication of an FNPRM in the Federal Register. LSC published the FNPRM on April 26, 2016, with a 30-day comment period. 81 FR 24544. The comment period closed on June 10, 2016.

On October 16, 2016, LSC staff presented a proposed final rule to the Committee for consideration. During the public comment period of the Committee meeting, the Committee received comments from Kathleen Schoen of the Denver Bar Association, Robin Murphy of the National Legal Aid and Defender Association, and Terry Brooks of the American Bar Association.

The commenters remarked on two issues: timekeeping and LSC's oversight of subgrants, including audit requirements. Subrecipient timekeeping was the subject of significant revision and public comment at both the notice of proposed rulemaking (NPRM) and further notice of proposed rulemaking (FNPRM) stages of this rulemaking. Commenters did not raise concerns about LSC's oversight of subgrants until the FNPRM stage.

In response to the commenters' concerns, the Committee deferred voting on the final rule and directed LSC staff to reexamine whether LSC could (1) further tailor the level of detail proposed in the timekeeping requirement to reduce the burdens on bar associations receiving LSC-funded property or services to engage in pro bono activities while remaining sufficient to ensure compliance with LSC's governing statutes; and (2) reconsider the scope of the provisions governing oversight and auditing of subgrants as they apply to such bar associations.

LSC staff conducted the requested reexamination and developed revised language, on which they briefed the Committee and the public at an interim meeting on November 22, 2016. 81 FR 80686, Nov. 6, 2016. The Committee again received comments from ABA and NLADA during this meeting. NLADA also submitted a written comment, which LSC staff took under advisement.

On January 26, 2017, the Committee considered the final rule and voted to recommend its adoption and publication in the Federal Register to the Board. On January 28, 2017, the Board adopted the final rule and approved its publication.

Material regarding this rulemaking is available on the Rulemaking page of LSC's Web site at <http://www.lsc.gov/about-lsc/laws-regulations-guidance/rulemaking>. After the effective date of this rule, those materials will appear on the Closed Rulemaking page of LSC's Web site at <http://www.lsc.gov/about-lsc/laws-regulations-guidance/rulemaking/closed-rulemaking>.

II. Section-by-Section Discussion and Analysis

A. Part 1610

Section 1610.7 Transfers of LSC funds. In the NPRM, LSC proposed to transfer § 1610.7 to part 1627 to consolidate all provisions pertaining to the use of LSC funds for subgrants into one part of LSC's regulations. As a result of the transfer, LSC proposed to redesignate §§ 1610.8 and 1610.9 as §§ 1610.7 and 1610.8, respectively. LSC also proposed to delete the definition of the term transfer from § 1610.2. LSC received no comments on these proposals, and now adopts them in this final rule.

LSC is making a technical amendment to newly redesignated § 1610.7(a)(2) to reflect the deletion of the term transfer from the definitions section of part 1610.

B. Part 1627

Section 1627.1 Purpose. In the NPRM, LSC proposed to redefine the purpose of part 1627 as establishing the requirements applicable to subgrants of LSC funds. LSC received no comments on this proposal.

Section 1627.2 Definitions. LSC proposed several changes to this section in both the NPRM and the FNPRM. LSC received no comments on the NPRM proposals to transfer the definition of the term membership fees or dues to part 1630 and to redefine the terms recipient and subrecipient. LSC received one comment in favor of the proposal to adopt the definition of the term private attorney established by 45 CFR part 1614.

In the NPRM, LSC proposed to define the term programmatic to mean activities or functions carried out for the purpose of providing legal assistance, as defined in § 1002 of the LSC Act. 80 FR 21692, 21694, Apr. 20, 2015. As discussed more fully in the FNPRM, NLADA and NJP both objected to the proposed definition as ambiguous and overly broad. 81 FR 24544, 24545, Apr. 26, 2016. Both commenters recommended that LSC replace the phrase “activities or functions carried out to provide legal assistance” with “the delivery of legal assistance to eligible clients.” They both also recommended excluding “activities conducted by entities not directly involved in the delivery of legal assistance to eligible clients” from the definition. Finally, NLADA suggested that LSC expand the definition of programmatic to include “the provision of services under a special LSC grant project.”

LSC agreed that its proposed definition of the term programmatic created more problems than it solved. Commenters identified several ambiguities with the proposed definition and suggested solutions, but LSC determined that the potential solutions themselves created problems. For example, both NLADA and NJP stated that LSC’s proposed definition was too broad and unclear, so both organizations offered language they believe would clarify that

programmatic means only the delivery of legal assistance to eligible clients. Both NLADA's and NJP's suggested language, however, would narrow the definition beyond what LSC intended.

LSC found it difficult to redefine programmatic with a degree of precision sufficient to give grantees clear guidance about the term's meaning. Consequently, in the FNPRM, LSC instead proposed to remove the proposed definition of programmatic in § 1627.2 and to remove the term from the list of factors in proposed § 1627.3(b)(2). In its place, LSC proposed to define the term procurement contract in § 1627.2(b). LSC proposed to define and use this term for two reasons. The first was to highlight the distinction between subgrants, which involve provision of legal assistance, and procurement contracts, which are agreements to purchase property or services that a recipient needs to operate. The second was that LSC anticipated incorporating the federal government's Uniform Guidance principles applicable to procurement contracts into part 1630 and the Property Acquisition and Management Manual (PAMM) through an ongoing rulemaking. LSC received no comments on this proposal.

In the FNPRM, LSC also proposed to define the term property as real or personal property. This proposal resulted from the decision to allow recipients to use property acquired in whole or in part with LSC funds to support subgrants. LSC received no comments on this proposal.

§ 1627.2(e) Subgrant. In the NPRM, LSC proposed to redefine the term subgrant to substantially reflect the definition in the Uniform Guidance, 2 CFR 200.92. LSC proposed in the FNPRM to revise the term to reflect the decision to allow recipients to use property or services acquired in whole or in part with LSC funds to support a subgrant. LSC received no comments on either proposal.

In the existing rule, LSC excludes from the definition of subgrant fee-for-service arrangements, such as judicare arrangements and contracts with private attorneys for the direct delivery of legal assistance to recipients' clients, when the cost of such arrangements does not exceed \$25,000. During LSC's 2014 rulemaking to revise the private attorney involvement rule at 45 CFR part 1614, LSC received a comment recommending that LSC increase the threshold at which such arrangements are considered subgrants from \$25,000 to \$60,000. The commenter proposed increasing the threshold to \$60,000 to account for inflation since LSC established the original threshold in 1983. 70 FR 61770, 61780, Oct. 15, 2014. Consistent with that comment, LSC proposed to increase the threshold and sought comment on the appropriate amount to adopt. Commenters unanimously agreed that LSC should set the threshold at \$60,000. LSC agrees and is therefore adopting the \$60,000 threshold in this final rule.

§ 1627.2(f) Subrecipient. In the NPRM, LSC proposed to simplify the existing definition of subrecipient. LSC received no comments on this proposal.

§ 1627.3 Characteristics of subgrants. In the NPRM, LSC proposed to create a new section describing the factors that recipients should evaluate when determining whether a particular third-party agreement is a subgrant subject to the provisions of part 1627 or a procurement contract subject to part 1630 and the PAMM. LSC proposed to adopt in substantial part language from the Uniform Guidance, 2 CFR 200.330(a) and (c). These provisions explain the characteristics of a subgrant and state that recipients are to use judgment in evaluating the characteristics, all of which may not be present for any given subgrant. LSC made minor revisions to these provisions to make clear that the context for subgrant activities and the performance of the subrecipient is the LSC recipient's legal services work. LSC also provided

two examples of how third-party arrangements would be characterized—as a subgrant or as a procurement contract—when analyzed using the five characteristics.

Comment: NJP and NLADA both expressed concern about LSC’s proposal to adopt the Uniform Guidance characteristics. NLADA objected to the proposal because it does not “provide a definitive framework” for determining whether a particular third-party arrangement is a subgrant. NJP observed that “by authorizing recipients to ‘use judgment’ in classifying each agreement as a subgrant or procurement contract, recipients are placed at risk of making judgments that differ from how LSC would judge the relationship. If this occurs, the expenditure of funds could be a ‘questioned cost’ or subject to limited sanctions, creating disincentives for recipients to exercise any judgment.” NJP further claimed that the characteristics themselves were ambiguous and lacked definition and clarity about how and whether LSC expected recipients to, for example, delegate programmatic decision-making to a subrecipient. NJP and NLADA both recommended that if LSC were to adopt the proposed language, LSC should also adopt a provision that holds recipients harmless for making a good faith error in judgment about whether a third-party agreement is a subgrant.

Response: The commenters’ concerns appear to be rooted in a belief that using the Uniform Guidance framework will result in many arrangements being mischaracterized and that LSC will penalize recipients with whom they disagree. LSC’s research, however, has not indicated that federal grantees have had significant difficulty using these factors to assess their third-party agreements after years of applying them pursuant to OMB Circular A-133. The fact that the preambles to the Advance Notice of Proposed Guidance, Notice of Proposed Guidance, and Final Guidance for the Uniform Guidance are silent about the inclusion of these factors provides further evidence that federal grantees generally have not found them difficult to use.

See 77 FR 11778, Feb. 28, 2012 (ANPG); 78 FR 7282, Feb. 1, 2013 (NPG); 78 FR 78589, Dec. 26, 2013 (Final Guidance). Furthermore, neither OMB Circular A-133 nor the Uniform Guidance included a good faith exception of the type that NJP and NLADA recommended.

LSC continues to believe that providing a framework for analyzing third-party agreements is an improvement over the status quo, in which the existing definition provides little guidance. In addition, using the OMB factors enables recipients who have federal grants to use uniform standards for evaluating their third-party agreements. For these reasons, LSC will retain the characteristics of a subgrant in § 1627.3(b).

LSC will not adopt the recommendation to provide a safe harbor for recipients who make a good faith determination that a subaward to a third party is not a subgrant when LSC applies the characteristics of a subgrant and reaches the opposite conclusion for two reasons. First, the Uniform Guidance, from which LSC is adopting the characteristics, does not provide a safe harbor. Second, if a recipient has questions about whether a particular award would constitute a subgrant under the characteristics in § 1627.3(b), the recipient is encouraged to contact LSC for guidance before making the award.

Currently, LSC evaluates third-party agreements for whether they meet the definition of subgrant, whether the recipient sought prior approval of the subaward, and whether the recipient's use of funds is reasonable and allocable to the grant under the cost standards of part 1630. If LSC determines that the subaward is reasonable but the recipient did not seek prior approval, LSC may direct the recipient to submit a request for approval of a subgrant. LSC will then treat the award as a subgrant from the date on which LSC approves the subgrant. If LSC determines that the subaward does not meet the standards of part 1630, LSC may initiate a questioned cost proceeding based on that finding. Whether a recipient sought prior approval of

the subaward may be a factor in determining whether a subaward satisfies part 1630, but generally is not dispositive.

In the Uniform Guidance, OMB described the characteristics of a procurement relationship and the characteristics of a subaward in the same section. 2 CFR 200.330(b). LSC compares the two sets of characteristics, as LSC would apply them, in the chart below.

Characteristics of a Subgrant
Third party determines who is eligible to receive legal assistance under the recipient's LSC grant
Third party's performance is measured in relation to whether programmatic objectives of the LSC grant were met
Third party has responsibility for programmatic decision-making regarding the delivery of legal assistance under the recipient's LSC grant
Third party is responsible for adhering to applicable LSC program requirements specified in the LSC grant award
Third party, in accordance with the subgrant agreement, uses LSC funds to carry out a program for a public purpose specified in LSC's governing statutes and regulations
Characteristics of a Procurement Contract
Third party provides the goods and services within its normal business operations
Third party provides similar goods or services to many different purchasers
Third party normally operates in a competitive environment
Third party provides goods or services that are ancillary to the operation of the recipient's programmatic activities
Third party is not subject to compliance requirements of LSC's governing statutes and regulations as a result of the contract, though similar requirements may apply for other reasons

LSC provides this comparison to help demonstrate the differences between subgrants and procurement contracts. Some types of subawards, such as those pursuant to which the third party is providing goods or services that require the third party to use substantive legal knowledge, will involve judgment calls about whether the awards more closely meet the characteristics of a

subgrant or those of a contract. In those situations, LSC encourages recipients to contact LSC to work through the analysis of the characteristics.

In the NPRM, LSC published an analysis of two fact patterns to demonstrate how subawards of LSC funds to third parties would be analyzed under the subgrant characteristics. In the interest of providing more practical guidance about applying the characteristics of a subgrant, LSC is providing five additional examples.

Example 1: An LSC funding recipient provides an award to a bar association to recruit pro bono attorneys by sending out email blasts to the association's subscriber list announcing a recipient's pro bono opportunities. This award would not be a subgrant because all of the characteristics under § 1627.3(b) are lacking. Sending an email message about pro bono opportunities would not make the association responsible for determining client eligibility under the LSC grant. This responsibility would remain with the recipient. Additionally, the bar association would not have its performance measured in relation to whether objectives of the recipient's Basic Field-General grant were met. The bar association's performance would not be measured by how well it achieves the objectives of the recipient's grant, but rather by how well it succeeds in sending an email to its membership. Furthermore, by sending a simple email blast, the bar association would have no responsibility for programmatic decision-making (such as setting new or different priorities than the priorities set by the recipient), nor would the bar association be responsible for adhering to applicable LSC program requirements specified in the LSC grant award. Finally, the association would be sending the email as a technical service for the benefit of the recipient.

Example 2: An LSC funding recipient gives an award to a bar association that 1) recruits pro bono attorneys; 2) provides support to recipient-sponsored trainings; and 3) refers its

members to the recipient to take pro bono cases. Recruitment consists of communicating about the upcoming training and pro bono opportunities in the form of newsletters, email blasts, and mailings. Support for the training involves logistical support in the form of space, audio-visual equipment, refreshments, and administrative processing of paperwork for continuing legal education credits. The bar association does not provide substantive input on the training. The bar association's support for the pro bono opportunities involves referring any of its interested members/attorneys to the recipient to take a case or otherwise get involved. It makes no determinations about, nor does it get involved in, client eligibility or cases.

Applying the five factors in proposed § 1627.3(b), this award would not constitute a subgrant. As in the prior example, the bar association does not determine who is eligible to receive legal assistance under the recipient's LSC grant. Nor does it have its performance measured in relation to whether objectives of the LSC grant were met. In this case, the recipient would simply assess whether the bar association recruited attorneys, provided technical support at trainings, and referred members to the recipient to take pro bono cases. Because the bar association is only recruiting, referring, and providing technical support, it is not responsible for making decisions about priorities or which services to deliver to eligible clients. The bar association would not be responsible for adhering to requirements set forth in the LSC grant award. Finally, the services provided by the bar association primarily benefit the recipient because they are recruitment and administrative tasks that the recipient would otherwise have to do. Consequently, this agreement does not constitute a subgrant.

Example 3: An LSC recipient provides an award to a bar association to conduct part of its PAI program. Pursuant to the terms of the award, the bar association will recruit attorneys by sending its membership information about upcoming trainings and pro bono opportunities. The

bar association will provide training to interested attorneys on substantive areas of law, will screen clients for eligibility, will refer cases of eligible clients to participating private attorneys to handle, and will supervise private attorneys who agree to accept cases. The bar association will report to the recipient about how many attorneys it recruits, how many cases it placed, the outcomes of those cases, the number of individuals who seek assistance through the award, and the number of eligible individuals referred to private attorneys.

In contrast to the two previous examples, this award would be considered a subgrant because the majority of characteristics under § 1627.3(b) are satisfied. First, the recipient would transfer screening and intake responsibilities to the bar association as part of the award. The bar association would be responsible for determining whether an applicant is eligible to receive legal assistance under the recipient's LSC grant. Second, the bar association would have its performance measured in relation to whether objectives—delivering legal services to eligible clients of the LSC grant—are met because it is referring cases to private attorneys and supervising their handling of clients' cases. Third, the bar association could have significant responsibility for programmatic decision-making. For example, the bar association may choose to set its own priorities for the types of cases the private attorneys it recruits will handle. Fourth, in conducting the program, the bar association would be responsible for adhering to applicable LSC program requirements specified in the LSC grant award (such as the restrictions, timekeeping, and recordkeeping requirements), but only with respect to the PAI award. Finally, this award would use LSC funds to carry out a public purpose described in the grant award and statute authorizing the grant. The more technical activities described in the prior examples are services provided to the recipient, while the bar association's conduct of a PAI program helps

the recipient carry out a public purpose—delivery of legal assistance to eligible clients—specified in the LSC Act. Consequently, this award would constitute a subgrant.

Example 4: An LSC recipient pays an expert to educate the recipient’s staff members on an area of law unfamiliar to the staff members. The recipient pays the expert from its Basic Field-General grant award. This award would not be a subgrant because it lacks most, if not all, of the characteristics under § 1627.3(b). The expert would make no determinations about who is eligible to receive services under the recipient’s grant; rather, the expert’s objective would be to educate the recipient’s staff members. The expert also would not have his or her performance measured in relation to the objectives of the Basic Field-General grant. Furthermore, the expert would not be responsible for programmatic decision-making (for example, setting new priorities or determining what services to provide), nor would the expert be responsible for adhering to applicable LSC program requirements specified in the LSC grant award (for example, complying with LSC’s Case Service Report Handbook or Audit Guide). Finally, the award primarily benefits the recipient because it increases the recipient staff’s knowledge.

Example 5: An LSC recipient provides an award to an expert to disseminate legal information to the public through an in-person presentation. Under the terms of the award, the expert is not responsible for determining who is eligible to receive legal assistance. The expert will not have his or her performance measured in relation to whether objectives of the recipient’s grant are met. However, the expert has responsibility for programmatic decision-making because under the award, he or she is responsible for deciding what legal information to convey directly to the public and how to convey it most effectively. Under the terms of the award, the expert must comply with the terms of the LSC Act, Public Law 104-134 to the extent it is adopted in the current year’s appropriations statute, other applicable statutes, and LSC’s regulations. Finally,

the expert is being paid to provide legal information directly to the public. In contrast to the preceding example, the award in this situation would be a subgrant because it has many of the characteristics under § 1627.3(b).

In the FNPRM, LSC proposed to revise the language of § 1627.3 as presented in the NPRM. First, LSC proposed to incorporate in paragraph (a) language from the Uniform Guidance stating that recipients must determine on a case-by-case basis whether each award to a third party is a subgrant or procurement contract. LSC also proposed to replace the introductory language of paragraph (b) with language from the Uniform Guidance stating that the list of characteristics support the classification of an award as a subgrant. 2 CFR 200.330(a). Finally, as described in the preceding discussion of § 1627.2, LSC proposed to remove the term programmatic from paragraph (b)(2). LSC received no comments on these proposals. Consequently, LSC adopts them in this final rule.

§ 1627.4 Requirements for all subgrants. In the NPRM, LSC proposed to transfer existing § 1627.4—Membership fees or dues, to 45 CFR part 1630 and redesignate it as § 1630.14 without change. LSC also proposed to redesignate existing § 1627.3 as § 1627.4. LSC received no comments on these proposals.

Changes to the subgrant approval process. The most significant proposal in this section was LSC's proposed changes to the subgrant approval process. In paragraph (a), LSC proposed to link the subgrant approval process for Basic Field Grants more closely to the annual grant competition and renewal process. LSC also proposed to formalize the procedures for two kinds of recipients: 1) those seeking to make subgrants under LSC's special grant programs, which currently are limited to Technology Initiative Grants (TIG), Pro Bono Innovation Fund grants, and emergency relief grants; and 2) those who need to make subgrants in the middle of a funding

period. LSC proposed to eliminate the provision automatically deeming a subgrant approved if LSC fails to act on a subgrant proposal within 45 days of submission by the recipient.¹

NLADA objected to LSC's proposal to remove the rule deeming a subgrant approved if LSC did not respond within the prescribed time. NLADA stated that the proposal "leaves programs in a state of fiscal uncertainty as to subgrant agreements" and recommended leaving both provisions in the rule to "preserve[] an important backstop for recipients and subrecipients who depend on LSC-funding and who, without hearing in a timely fashion from LSC, may plan a budget as if the funding has been approved." NLADA further argued that "it is important in keeping with LSC's focus on uniformity and consistent application of rules and regulations that all parties bear equitable burdens with regard to meeting LSC statutory and regulatory requirements."

LSC disagreed with NLADA's recommendation to leave the existing rule in place. NLADA's comments did not reflect the greater assurance of a timely response from LSC provided by the consolidation of the Basic Field Grant competition and subgrant approval processes. Nor did they acknowledge that responsible grants management practices do not include allowing the expenditure of a large amount of funds without the approval of the funding agency.

As explained more fully in the FNPRM, LSC considered four options for responding to NLADA's comments. 81 FR 24544, 24548, Apr. 10, 2016. The first was to retain the language proposed in the NPRM. The second was to reinstate the existing rule in its entirety. The third

¹ Existing § 1627.3(a)(2) states that if LSC fails to act on the subgrant proposal within 45 days of submission, the recipient "shall notify the Corporation of this failure" and gives LSC 7 additional days to respond to the proposal. The subgrant is deemed approved if LSC fails to respond within the additional 7 days. For ease of reference, we refer to the entire § 1627.3(a)(2) period as "the 45-day period."

was to reinstate the 45-day limit, but include a provision stating that if LSC does not respond, the subgrant is deemed denied. The last option was to include either a waiver provision or a notice provision similar to the ones provided in the Uniform Guidance. LSC chose the last, proposing to include in the Federal Register notices described in § 1627.4(a)(2)(i) and (a)(3) a statement that if LSC has not responded to a recipient's request for approval of a subgrant under paragraph (a)(2) or (a)(3) within the number of days specified in the notice, LSC will inform the recipient in writing of the date when the recipient may expect the decision. The notice would be given only for subgrant approvals requested as part of a special grant or during the mid-year grant process.

Commenters again opposed LSC's proposal. NLADA reiterated its concern that "LSC's proposal basically omits any time frame for LSC to take action on subgrants, leaving programs in a state of fiscal uncertainty as to subgrant agreements." NLADA opined that the fixed 30-day time period for response provided in the Uniform Guidance was a "more equitable and workable time frame" than the flexible, annually determined period LSC had proposed.

NJP also submitted comments urging LSC to adopt the Uniform Guidance approach of committing to a 30-day period in which to make a decision on a subgrant application or to give the applicant notice of the date by which LSC expected to make a decision. Like NLADA, NJP opined that a fixed 30-day period was a reasonable time frame for LSC to make decisions on subgrant applications. NJP also urged LSC to adopt 45 days, or 15 days after the initial 30-day decision period ends, as an outside limit for making decisions on subgrant applications. Such a process, NJP concluded, "will provide recipients assurance that the approval process is underway and that a decision will be made in the very near term. This prevents uncertainty and administrative delay in the provision of critically needed legal help for clients."

LSC appreciates the commenters' views on the value of a fixed response date, rather than the flexible option LSC proposed in the FNPRM. LSC also understands the commenters' desire for a 30-day initial response time. LSC's staffing and operations, however, make it impractical to commit to a 30-day initial time frame for response. The staff who review and make recommendations to Management about whether to approve, deny, or suggest changes to a subgrant application are the same staff who conduct site visits and issue reports of those visits. Because those staff balance subgrant review with their other oversight responsibilities, it is necessary for the initial response period to be longer than the 30-day period provided in the Uniform Guidance. Consequently, LSC is responding to the commenters by adopting a 45-day period in which LSC must make a decision on an application for a subgrant or give the requester notice of the date by which it expects to make a decision. LSC believes this rule appropriately balances recipients' need for certainty about when a decision will be made with LSC's need to afford its staff adequate time to carry out their responsibilities.

Prior approval threshold. Under the existing part 1627, all subgrants are subject to the prior approval requirement, regardless of cost. In calendar year 2015, recipients made 77 subgrants. The smallest subgrant was for \$2,000, 15 of the subgrants were for less than \$10,000, and 25 were for less than \$15,000. Ten of the 77 subgrants originating in calendar year 2015 exceeded \$100,000. LSC understands that recipients spend significant amounts of time and resources preparing applications for approval of subgrants. LSC determined that, on balance, the burdens of prior approval on both sides outweigh the benefits of the increased oversight of subgrants involving less than \$15,000. Consequently, LSC proposed to redesignate paragraph (a) from the NPRM as paragraph (b) and introduce a new paragraph (a) establishing the thresholds for prior approval of subgrants.

For both cash and in-kind subgrants, LSC proposed to set the prior approval threshold at \$15,000. LSC believed this amount represents a significant enough investment of LSC funding or LSC-funded resources that LSC should have increased oversight over the award. For in-kind subgrants, LSC proposed to adopt language in paragraph (a)(2) that substantially adopts the provisions of the Uniform Guidance pertaining to valuation of goods and services used to satisfy a federal grantee's cost-sharing requirements. In paragraph (a)(2)(i), LSC proposed to require recipients to use the fair market value of the asset at the time the subgrant is made to evaluate whether the subgrant requires prior approval. In paragraph (a)(2)(ii), which pertains to valuations of leased space, LSC proposed that recipients should evaluate the fair rental value of the space. Finally, in paragraph (a)(2)(iii), LSC proposed to adopt language from the Uniform Guidance that requires recipients to document and support the fair rental value of the asset by the same methods used internally for its other in-kind valuations.

Comment: NLADA “strongly” supported the proposal, noting that because “grantees are required to comply with part 1630, which includes a requirement that all expenses be necessary and reasonable, additional oversight for smaller subgrants is not necessary.” NLADA noted that eliminating the prior approval requirement for smaller subgrants “increases efficiency for both grantees, and LSC.” NLADA also recommended that LSC consider a higher threshold of \$20,000.

Response: LSC agrees with NLADA's recommendation. Upon further review of all subgrants undertaken during the 2015 grant year, LSC determined that increasing the threshold to \$20,000 would have eliminated the prior approval requirement for a total of 30 subgrants. In other words, the proposed \$5,000 increase would have eliminated the prior approval requirement for only five additional subgrants. Because all subgrants are subject to oversight under part 1630

regardless of whether recipients must seek prior approval, LSC does not believe that increasing the prior approval threshold to \$20,000 would materially decrease its oversight of subgrants.

Although subgrants for less than the threshold amount are not subject to the prior approval requirement, they continue to be governed by part 1630 and § 1627.5. Part 1630 requires that all expenditures of LSC funds be reasonable and necessary to carry out the grant, and that recipients maintain documentation sufficient to demonstrate that all expenditures charged to the grant are allowable. 45 CFR 1630.3.

Subgrants of property or services acquired in whole or in part with LSC funds. In the FNPRM, LSC proposed technical changes to § 1627.4 to reflect its decision to allow in-kind subgrants. In paragraph (b), LSC proposed to insert language stating that for all subgrants exceeding the proposed \$15,000 threshold, recipients must submit applications to LSC for prior written approval. LSC also proposes to add the phrase property or services to paragraph (e)(2), which pertains to a recipient's responsibility to ensure its subrecipient's proper use of, accounting, and auditing of LSC resources. Lastly, LSC proposed to add a new paragraph (f) establishing the requirements for accounting for in-kind subgrants. LSC received no comments on these proposed changes.

Revisions to accounting and auditing requirements. In response to the FNPRM and during the opportunity for public comment at the Committee's October meeting, stakeholders expressed concerns about the scope of LSC's oversight of subgrants to bar associations to engage in pro bono work. In its response to the FNPRM, the Denver Bar Association described LSC's oversight as "overreaching" and stated that "As a private non-profit, the Denver Bar Association will not allow LSC the same oversight rights and audit requirements as it has with CLS [Colorado Legal Services, an LSC recipient], as set forth in 45 CFR 1627.4." During the

Committee's October meeting, both Ms. Schoen of the Denver Bar Association and Ms. Murphy of NLADA stated that the audit requirements of part 1627 are burdensome, particularly for bar associations that have their own audits done under different auditing standards. Ms. Murphy further stated that the current version of part 1627 provides for very broad oversight of subrecipients, although she acknowledged that LSC historically has not conducted extensive oversight into operations of an organization that receives a subgrant.

LSC understands from the substance of their comments that the commenters object to proposed § 1627.4(f) and (g). Paragraph (f) governs accounting for funds or property or services acquired in whole or in part with LSC funds that are used to support a subgrant. Paragraph (g) requires subgrant agreements to include terms providing the same oversight rights for LSC with respect to subrecipients as apply to recipients. 80 FR 21692, 21700, Apr. 20, 2015. LSC proposed no substantive changes to paragraph (g) in either the NPRM or the FNPRM. LSC did, however, propose to make one change in the final rule intended to address the commenters' objections to the FNPRM.

LSC proposed one salient change to paragraph (f) in the NPRM, which received no comments. 80 FR 21697. The current version of proposed § 1627.4(f) is located at § 1627.3(c). The last two sentences of this paragraph permit recipients and subrecipients, in lieu of accounting for subgranted funds in either of their audit reports, to negotiate a means of ensuring that subrecipients appropriately used the subgrants during the life of the subgrant. LSC must approve such alternative arrangements.

This language has been in part 1627 since 1983. 48 FR 28485, June 22, 1983. During the course of this rulemaking, LSC has proposed two substantive changes to this language. The first, explained and proposed in the NPRM, was to eliminate the option to enter into alternative

auditing arrangements because, in LSC's extensive experience administering this rule, the option had never been used. 80 FR 21697. The second change, proposed in the FNPRM, was to include language reflecting the expansion of the rule to include in-kind subgrants. 81 FR 24548, 24550.

It is clear from the plain text of part 1627 that LSC does not require all subrecipients to submit to an audit that complies with LSC's Audit Guide. Since at least 1983, when this section of part 1627 was last revised, LSC explicitly has permitted recipients and subrecipients to develop alternative procedures for auditing the proper use of subgrant funds. LSC has not proposed to change the auditing provisions in any significant form except to extend them to subgrants supported by property or services acquired in whole or in part with LSC funds. Although LSC believes that the language proposed in the NPRM and the FNPRM provides recipients with sufficient flexibility to negotiate the accounting and auditing responsibilities appropriate to any particular subgrant, LSC proposes to reinstate the language that it proposed to remove. LSC believes that reinstating this language will ensure that recipients and subrecipients, whether bar associations or other legal aid providers, have ample options for negotiating a satisfactory method of demonstrating that LSC-funded resources supporting a subgrant were used appropriately. LSC will also add this language to paragraph (f)(2)(i) of this section, which governs accounting for subgrants made using property or services purchased in whole or in part with LSC funds.

LSC is making one minor modification to the reinstated language to direct recipients to submit alternative audit procedures to LSC, rather than to the Audit Division, which is no longer a functional division of LSC. To make clear that the flexibility provided by the reinstated language applies to the auditing requirements, LSC is also restructuring the language pertaining to the accounting requirements and the language governing auditing requirements into separate

paragraphs. LSC does not intend the restructuring to have any substantive effect; rather, it is intended solely to distinguish between the accounting and auditing provisions of this section.

LSC is making one additional change to § 1627.4(f) to address the concerns raised by NLADA and the Denver Bar Association. LSC is adding paragraph (f)(2)(iii), which explicitly exempts from the Accounting Guide and the Audit Guide bar associations, pro bono programs, law firms or private attorneys who receive property or services acquired in whole or in part with LSC funds for the sole purpose of providing legal information or legal assistance on a pro bono or reduced fee basis to eligible clients, whether the costs allocated with the activity are allocated to the PAI requirement or not. These subrecipients must, however, have financial management systems in place that LSC deems sufficient to determine that any resources the subrecipient receives or uses under the subgrant are used consistent with 45 CFR part 1610.

With respect to the general oversight provision, currently at § 1627.3(e), LSC proposed in the NPRM to relocate the provision to § 1627.4 with no changes. 80 FR 21700. The provision currently requires that LSC have the same oversight rights with respect to subrecipients as LSC has with respect to its direct recipients. *Id.*; see also 45 CFR 1627.3(e).

In response to the comments provided by the Denver Bar Association during the FNPRM comment period, LSC proposed to revise this language to clarify that its oversight rights apply to the subgrant. LSC proposed to revise the language to state that subgrant agreements must provide the same oversight rights for LSC with respect to subgrants as apply to recipients. In other words, LSC must be able to visit subrecipients and review records and practices pertinent to the subgrant, including the financial management systems described in § 1627.4(f)(2)(iv).

The Office of Inspector General expressed concerns that the revised provision could be interpreted as limiting OIG's and LSC's access to subrecipients' financial, accounting, and

timekeeping records. The revised language does not limit OIG's or LSC's authority to access a subrecipient's records, policies, and procedures when review of those documents is needed to carry out their oversight responsibilities under the Inspector General Act and the LSC Act. OIG and LSC must be able to ensure that resources related to a subgrant supported with LSC funding are used consistent with LSC's governing statutes and regulations. For example, under the proposed revision to § 1627.4(e), LSC and OIG must still have access to financial records when necessary to determine that a subrecipient is spending its non-LSC funds consistent with the restrictions or that the subrecipient is properly allocating costs across its sources of funding. As another example, if LSC or OIG has reason to believe that a subrecipient is conducting restricted activities in LSC-funded space, the oversight provision authorizes them to review the subrecipient's operations and records to determine whether the LSC-funded space is being used consistent with LSC's governing statutes and the terms of the subgrant.

Throughout the course of this rulemaking, LSC has been sensitive to the fact that subgrants of LSC funds or property or services acquired in whole or in part with LSC funds come with obligations to comply with the statutes under which those funds were appropriated. LSC considered whether options such as a de minimis rule for relatively small contributions of property or services from an LSC recipient to another organization to carry out legal assistance activities or an exception to the subgrant rule for bar associations receiving only property or services to carry out private attorney involvement activities were consistent with its statutory obligations. Because several restrictions placed on LSC recipients by Congress extend to all of the recipients' operations, rather than just to their use of LSC funds, LSC determined that it was inappropriate to enact a rule that would allow an organization benefiting from the expenditure of LSC funds, either by receipt of such funds by the organization itself or by the recipient providing

property or services to the organization to carry out legal assistance activities, to operate free of the restrictions. LSC continues to believe that its obligations to ensure that its resources are used consistent with Congress' intent are the same regardless of whether the item of value being exchanged is property or services funded with LSC funds, and regardless of the amount of funds or the value of the LSC-funded property or services. LSC believes that the additional modifications to part 1627 proposed here fulfill that obligation while creating flexibility for recipients and subrecipients to meet the requirements of the regulation.

§ 1627.5 Applicability of restrictions, recordkeeping, and recipient priorities; private attorney involvement subgrants. In the NPRM, LSC proposed to transfer existing 45 CFR 1610.7—Transfers of LSC funds to part 1627 and redesignate it as § 1627.5. LSC also proposed to revise the timekeeping requirement in current § 1610.7(c) to adopt the timekeeping standards applicable to recipients in part 1635. LSC received no comments on the proposal to transfer § 1610.7.

Timekeeping. As explained more fully in the FNPRM, NJP and NLADA opposed the proposal to require part 1635-compliant timekeeping for subgrants on three related grounds. 81 FR 24544, 24549, Apr. 10, 2016. The first was that private attorneys and other legal aid providers that recipients enter into subgrants with often have their own timekeeping systems, so it is inefficient and burdensome to require them to invest in timekeeping systems that comply with part 1635. Another reason was that private attorneys would be unwilling to allocate their time according to LSC's prescribed categories of cases, matters, and supporting activities and to agree to make their personal time records and timekeeping systems subject to examination by auditors and LSC representatives. Finally, they expressed concern that the costs associated with

implementing part 1635-compliant timekeeping would be a disincentive for private attorneys, bar associations, and other legal aid providers to enter into subgrants with LSC recipients.

LSC considered three options for responding to the comments. The first was to keep the proposed language without change. The second was to draft a rule providing minimum standards for timekeeping that LSC believed would provide it with the information it needed to ensure that subgrant funds are properly accounted for, but that would not prescribe how the recipient or subrecipient keeps time. The third option was to adopt part 1635-compliant timekeeping as the default, but allow recipients to seek approval from LSC for an alternate timekeeping method that will ensure accountability for the use of subgrant funds. This option was similar to language LSC proposed to delete from existing § 1627.3(c) that authorized recipients and subrecipients to propose alternative auditing methods. LSC proposed deleting that language simply because it had never been used, rather than because it was ineffective.

LSC proposed to adopt the second option in the FNPRM. LSC proposed that, consistent with part 1635, recipients should be able to show how much time subrecipient attorneys and paralegals spent on cases and matters and aggregate information on pending and closed cases by legal problem type. LSC did not, however, propose to require that the subrecipient collect the information or otherwise dictate how the recipient and subrecipient collect and maintain the information. Those decisions were left to the recipient and subrecipient to negotiate as part of the subgrant agreement.

NLADA, NJP, and the Denver Bar Association (DBA) all submitted comments objecting to the revised proposal. All three commenters stated that the proposal did not grant recipients the flexibility LSC intended to grant. The comments also reflected a misunderstanding of the scope of the timekeeping requirement in that some of the commenters appeared to believe that LSC

expects private attorneys, in addition to attorneys and paralegals working for the subrecipient, to keep time in compliance with part 1635.

NJP reiterated its comment responding to the NPRM that it is unreasonable for LSC to expect private attorneys to “use timekeeping systems that assign an LSC coded problem-type to each case handled under a subgrant or that their timekeeping systems are able to aggregate time record information by legal problem code for both closed and pending cases. No private attorney has any reason to assign an LSC problem code to a case or to aggregate time for both closed and pending cases.” NJP stated that it maintains case records with assigned LSC problem codes for each case assigned to a private attorney through a subgrant, but that “NJP does not keep track of the private attorney’s time contemporaneously in its case management/timekeeping system.” NJP recommended that LSC either “drop the LSC specific timekeeping requirements for PAI subgrants or limit the requirement to the provisions of Part 1627.5(c)(1) and (c)(2), i.e. ‘the time spent on each case or matter by date and in increments of not greater than one-quarter [an] hour,’ and ‘the unique case name and identifier for each case[.]’”

NLADA similarly objected to LSC’s proposal to require recipients to provide the part 1635-specific information, stating that the requirements “leave little, if any, room for negotiation” between recipients and subrecipients about how time spent on a subgrant will be kept. NLADA recommended that LSC consider implementing a requirement that subrecipients “would need to establish time keeping methods that would account for the time spent on categories of activities. For example, a staff attorney employed by a bar foundation as a full-time pro bono coordinator responsible for making pro bono referrals could record her time showing 7 or 8 hours per day making referrals to pro bono attorneys. Likewise, a pro bono attorney could report 10 hours spent on negotiating a child support agreement.”

DBA's comments expressed concerns similar to those expressed by NLADA, NJP, and Metro Volunteer Lawyers (MVL) in their comments responding to the NPRM. DBA stated that "[l]awyers who are giving their time and expertise to provide legal assistance through MVL are not going to comply with the timekeeping required in 45 CFR 1627.5." DBA observed that its attorneys and paralegals "arguably would be subject to the same 15 minute time keeping requirements." DBA observed that "the only way a recipient would be able to verify that time was kept as required by 1627.5(c) would be to insure the subgrantee maintains detailed timekeeping records as indicated in 1627.5(c)." They recommended that LSC "revise 1627.5(c) to allow the flexibility intended by its comments and, if necessary, allow CLS and MVL to negotiate a timekeeping arrangement to maintain accountability without requiring the level of detail called for by the proposed regulation."

In the version of the final rule presented to the Committee in October, LSC clarified the scope of the timekeeping requirement as applied to subgrants. By its terms, the requirement applies to attorneys and paralegals working for subrecipients of LSC funds or property or services acquired in whole or in part with LSC funds. The timekeeping requirement does not extend to private attorneys who accept cases on a pro bono or reduced fee basis from a subrecipient, nor does it apply to private attorneys who receive a subgrant from an LSC recipient to provide legal assistance to eligible clients on a fee-for-service basis. Private attorneys who accept cases from subrecipients on a pro bono basis are not being compensated. Although an accounting of these hours could be useful to recipients for effective volunteer management, recipients need not collect hours contributed by these attorneys to track the expenditure of funds allocated to the PAI requirement. Private attorneys who accept cases on a reduced fee basis, either from the LSC recipient itself or from a subrecipient, must enter into contracts "that set

forth payment systems, hourly rates, and maximum allowable fees.” 45 CFR 1614.7(a)(2). They must submit bills or invoices to the recipient or subrecipient demonstrating that they have incurred the fees before the recipient or subrecipient can pay them for services rendered to an eligible client. *Id.* To avoid continued confusion about the application of the timekeeping requirement, LSC added paragraph (d)(4), which states that the timekeeping requirement does not apply to private attorneys providing legal assistance on a pro bono or reduced fee basis.

LSC also proposed to retain the language of the timekeeping requirement from the FNPRM for several reasons. Section 504(a)(10) of LSC’s fiscal year 1996 appropriations statute prohibits LSC from making awards to organizations unless the organizations agree “to maintain records of time spent on each case or matter with respect to which the person or entity is engaged[.]” Sec. 504(a)(10)(A), Pub. L. 104-134, 110 Stat. 1321, 1321-54, incorporated annually in LSC’s annual appropriations thereafter. LSC believed that proper accountability for funds requires a more rigorous level of timekeeping than the current rule provides. LSC’s position was supported by findings reported by OIG in its 2015 Subgrant Capstone Report. In that report, OIG reported that four subrecipients used LSC funds to pay the salaries of staff who engaged in restricted activities. LSC Office of Inspector General, “Report of Investigation: Subgrant Capstone Report” at 6, Sept. 30, 2015, [available at https://www.oig.lsc.gov/images/pdfs/Subgrant_Capstone_Report_Final.pdf](https://www.oig.lsc.gov/images/pdfs/Subgrant_Capstone_Report_Final.pdf). Timekeeping records that show what subrecipient attorneys and paralegals are working on are necessary to ensure that attorneys and paralegals working on the subgrant are working on LSC-eligible activities and being compensated from the LSC-funded subgrant only for time spent on subgrant activities. LSC also proposed to allow recipients and subrecipients to negotiate an agreement that best enables them to use the information maintained in their respective systems to tell LSC how

subrecipient attorneys and paralegals are using subgranted LSC funds or property or services acquired in whole or in part with LSC funds.

LSC continues to believe that some level of recordkeeping is essential to show that LSC-funded resources are being used for only LSC-permissible activities, regardless of whether the actor is employed by the recipient or a subrecipient and the resources being used are LSC funds or property or services acquired in whole or in part with LSC funds.

LSC will respond to the public comments by reframing the timekeeping requirement in § 1627.5 as a recordkeeping requirement. LSC is making two main changes:

1. Separating the timekeeping requirements for cases and for matters. LSC believes that separately stating this information will eliminate concern about the types of information LSC expects subrecipients to provide and the burdens associated with each.

2. Explicitly stating what information LSC expects subrecipients and recipients to provide for cases and for matters. LSC proposes that, with respect to matters, subrecipients must maintain adequate records to show that attorneys and paralegals used subgrant resources to carry out the purposes of the subgrant consistent with the restrictions contained in LSC's governing statutes. This is a more flexible provision than § 1635.3(b)(2), which requires recipient paralegals and attorneys to identify the category of action on which they spent time for each matter handled. For cases, LSC proposes to eliminate the requirements that subrecipients record time contemporaneously and in 15-minute increments. Instead, subrecipients must maintain records for each case that show the amount of time spent by an attorney or paralegal on each case by date, the type of activity conducted by date, and a unique client name or case number. LSC believes that attorneys and paralegals who handle cases routinely maintain these types of information on the cases that they handle, so any burden incurred in providing that information to the recipient is minimal. Subrecipients handling both cases and matters must provide the required information for cases and the required information for matters.

LSC will continue to allow recipients and subrecipients to negotiate which party will maintain records for each case that show the problem type and closing code for the case. This provision will allow recipients to maintain that information for subgrants to subrecipients whose

case management systems do not keep track of the same types of information that LSC recipients' systems do. It will also allow recipients and subrecipients who both receive LSC funds to track and provide this information in a way that is most efficient for both parties. This requirement does not apply to subrecipients described in § 1627.5(d)(2)(ii), described in more detail below, who do not handle cases as part of the recipient's PAI program.

Subgrants for engaging private attorneys. In the FNPRM, LSC proposed one technical change to the NPRM version of § 1627.5(d). To reflect LSC's decision to allow in-kind subgrants, LSC proposed to include language stating that the prohibitions and requirements of part 1610 apply only to the subgranted funds, goods, or services when the subgrant is for the sole purpose of funding private attorney involvement activities.

NLADA and DBA submitted written comments responding to the FNPRM and participated in the public comment portion of the October Committee meeting. DBA expressed concern that because Colorado Legal Services (CLS) does not allocate any of the costs CLS incurs in providing office space to DBA's pro bono program, MVL, this proposed change to the rule would prohibit DBA itself from engaging in restricted activities. DBA stated that "all the [Access to Justice] committee clinics and other projects would have to comply with LSC regulations and subject other DBA programs to LSC timekeeping and audit requirements. This would severely limit the assistance the DBA provides, outside of CLS offices, by requiring additional administration and limiting the types of cases that can be handled and the populations that can be served." DBA further expressed concern that it would be prohibited from engaging in lobbying and other activities that LSC's governing statutes prohibit LSC funding recipients from undertaking. DBA recommended that LSC "carve out a cooperative agreement exception for bar associations, clearly indicating that . . . a bar association program that receives no direct LSC

funding, whose cases are screened in compliance with LSC regulations, and is not counted towards recipients' private attorney involvement requirements, would not be a subgrant and would not be subject to the requirements of a subrecipient.”

NLADA concurred with DBA's comments on this proposal. NLADA stated that it had learned through discussions with LSC recipients that “there are private attorneys and local bar associations willing to offer pro bono services to eligible clients who do not want to be bound by the administrative requirements in LSC's subgrant regulation.” NLADA recommended that LSC adopt a second exception to the definition of subgrant for bar associations that “would set out criteria so that a recipient's agreement, with a bar association, pro bono program, or law firm, to provide pro bono services to LSC-eligible clients would be exempted from the subgrant regulatory requirements.”

NLADA again proposed an exception to part 1627 at the November 22, 2016 Committee meeting and in a subsequent letter to LSC. NLADA proposed rule text that would require a recipient and a bar association or pro bono program, in lieu of being subject to part 1627, to enter into an agreement that would 1) bind the subrecipient to comply with the recipient's policies and client acceptance rules and regulations and to refrain from engaging in restricted activities when using the LSC-funded property or services; 2) require the subrecipient to maintain the records described in LSC's revised proposal for each case and matter handled by its attorneys and paralegals; 3) allow LSC to access “records for all matters and cases handled at the location”; and 4) grant the recipient and LSC “access to the state or local bar association or pro bono organization's annual audit.”

LSC understood the concerns raised by DBA and NLADA in response to the NPRM. As proposed, § 1627.5(d)(2) stated that the LSC restrictions listed in 45 CFR part 1610 apply “only

to the subgranted funds or property or services” that a recipient provides to a subrecipient for the sole purpose of carrying out private attorney involvement (PAI) activities. If CLS were to allocate the costs associated with housing MVL to its PAI requirement, the prohibitions in part 1610 would only affect MVL – not DBA as a whole – because only MVL uses the space and resources provided by CLS.

Although LSC encourages recipients to allocate all costs they expend on engaging private attorneys to provide legal information and legal assistance to eligible clients to the PAI requirement, LSC understands that some recipients choose not to do so. LSC does not see a reason to treat subgrant activities that would constitute permissible PAI activities under 45 CFR part 1614 if a recipient chose to consider them part of the recipient’s PAI program differently for purposes of applying the restrictions. LSC did not create a wholesale exception to the definition of subgrant for these types of arrangements. LSC did, however, extend the “PAI exception” to the application of the restrictions to projects like MVL.

LSC understands that subrecipients who are receiving only space and overhead from an LSC funding recipient to provide pro bono assistance do not want to be bound by the same restrictions and requirements applicable to subrecipients who are receiving LSC funds. LSC is also aware from its experience administering subgrants that subawards to organizations to provide pro bono assistance take many forms. An arrangement like the one MVL has with CLS, in which resources acquired in whole or in part with LSC funds are used on an ongoing basis to support another organization, is one that requires more oversight by LSC to ensure that the resources are being used consistent with LSC’s governing statutes and regulations. For this reason, LSC believes that limiting the application of part 1627 and the restrictions in § 1627.5 to

activities carried out using those resources is a more appropriate way to address the concerns raised by MVL than a blanket exception to the application of the subgrant rule as a whole.

§ 1627.6 Subgrants to other recipients.

LSC proposed only non-substantive editorial changes to this section in the NPRM. In the FNPRM, LSC proposed to include language in paragraph (b) stating that subrecipients must audit any funds, or property or services acquired in whole or in part with LSC funds, that a recipient provides as a subgrant in the subrecipient's annual audit. LSC made this change to reflect its decision to permit recipients to make in-kind subgrants. LSC received no comments on those changes.

§ 1627.7 Recipient policies, procedures, and recordkeeping.

In the NPRM, LSC proposed to redesignate existing § 1627.8 as § 1627.7 without revision. LSC received no comments on this proposal.

In the NPRM, LSC proposed to redesignate existing § 1627.7 regarding recipient payments to tax-sheltered annuities, retirement accounts, and pensions, to part 1630. LSC also proposed to redesignate existing § 1627.8 as § 1627.7 without revision. LSC received no comments on this proposal.

C. Part 1630

In the NPRM, LSC proposed to move three sections of part 1627 to part 1630: §§ 1627.4—Membership fees or dues, 1627.5—Contributions, and 1627.7—Tax sheltered annuities, retirement accounts and pensions. LSC proposed to relocate these provisions to part 1630, which governs cost allocation. Through this transfer, LSC proposed to limit part 1627 to governing subgrants. LSC received no comments on this proposal.

List of Subjects

45 CFR Parts 1610 and 1627

Grant programs—law, Legal services.

45 CFR Part 1630

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

For the reasons stated in the preamble, the Legal Services Corporation amends 45 CFR chapter XVI as follows:

PART 1610—USE OF NON-LSC FUNDS, TRANSFERS OF LSC FUNDS, PROGRAM INTEGRITY

1. The authority citation for part 1610 is revised to read as follows:

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

§ 1610.7 [Removed]

2. Remove § 1610.7.

§§ 1610.8 and 1610.9 [Redesignated as §§ 1610.7 and 1610.8]

3. Sections 1610.8 and 1610.9 are redesignated as §§ 1610.7 and 1610.8, respectively.

4. Revise newly redesignated § 1610.7(a)(2) to read as follows:

§ 1610.7 Program integrity of recipient.

(a) * * *

(2) The other organization receives no LSC funds from the recipient, and LSC funds do not subsidize restricted activities; and

* * * * *

PART 1630—COST STANDARDS AND PROCEDURES

5. The authority citation for part 1630 is revised to read as follows:

Authority: 5 U.S.C. App. 3, 42 U.S.C. 2996e, 2996f, 2996g, 2996h(c)(1); Pub. L. 105-119, 111 Stat. 2440; Pub. L. 104-134, 110 Stat. 1321.

PART 1627 – SUBGRANTS AND MEMBERSHIP FEES OR DUES

6. The authority citation for part 1627 continues to read as follows:

Authority: 42 U.S.C. 2996e(b)(1), 2996f(a), and 2996g(e); Pub. L. 104-208, 110 Stat 3009; Pub. L. 104-134, 110 Stat 1321.

§ 1627.4 [Transferred to Part 1630 and Redesignated as § 1630.14]

7. Section 1627.4 is transferred to part 1630 and redesignated as § 1630.14.

§ 1627.5 [Transferred to Part 1630 and Redesignated as § 1630.15]

8. Section 1627.5 is transferred to part 1630 and redesignated as § 1630.15.

§ 1627.7 [Transferred to Part 1630 and Redesignated as § 1630.16]

9. Section 1627.7 is transferred to part 1630 and redesignated as § 1630.16.

10. Revise part 1627 to read as follows:

PART 1627 – SUBGRANTS

Sec.

- 1627.1 Purpose.
- 1627.2 Definitions.
- 1627.3 Characteristics of subgrants.
- 1627.4 Requirements for all subgrants.
- 1627.5 Applicability of restrictions, recordkeeping, and recipient priorities; private attorney involvement subgrants.
- 1627.6 Transfers to other recipients.
- 1627.7 Recipient policies, procedures and recordkeeping.

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

§ 1627.1 Purpose.

The purpose of this part is to establish the requirements for subgrants of LSC funds from recipients to third parties to assist in the recipient’s provision of legal assistance to eligible clients.

§ 1627.2 Definitions.

(a) Private attorney has the meaning given that term in 45 CFR 1614.3(i).

(b) Procurement contract means an agreement between a recipient and a third party under which the recipient purchases property or services that does not qualify as a subgrant as defined in paragraph (e)(1) of this section.

(c) Property means real estate or personal property.

(d) Recipient as used in this part means any recipient as defined in section 1002(6) of the Act and any grantee or contractor receiving funds from LSC under section 1006(a)(1)(B) of the Act.

(e) Subgrant. (1) Subgrant means an award of LSC funds or property or services purchased in whole or in part with LSC funds from a recipient to a subrecipient for the subrecipient to carry out part of the recipient's legal assistance activities. A subgrant has the characteristics set forth in § 1627.3(b).

(2) Subgrant includes fee-for-service arrangements, such as those provided by a private law firm or attorney representing a recipient's clients on a contract or judicare basis, only when the cost of such arrangements exceed \$60,000.

(f) Subrecipient means any entity receiving a subgrant. A single entity may be a subrecipient with respect to some activities it conducts for a recipient while not being a subrecipient with respect to other activities it conducts for a recipient.

§ 1627.3 Characteristics of subgrants.

(a) In determining whether an agreement between a recipient and another entity should be considered a subgrant or a procurement contract, the substance of the relationship is more important than the form of the agreement. All of the characteristics listed in paragraph (b) of this section may not be present in all cases, and the recipient must use judgment in classifying each agreement as a subgrant or a procurement contract. The recipient must make case-by-case

determinations whether each agreement that it makes with another entity constitutes a subgrant or a procurement contract.

(b) Characteristics that support the classification of the agreement as a subgrant include when the other entity:

(1) Determines who is eligible to receive legal assistance under the recipient's LSC grant;

(2) Has its performance measured in relation to whether objectives of the LSC grant were met;

(3) Has responsibility for programmatic decision-making regarding the delivery of legal assistance under the recipient's LSC grant;

(4) Is responsible for adherence to applicable LSC program requirements specified in the LSC grant award; and

(5) In accordance with its agreement, uses the LSC funds or property or services acquired in whole or in part with LSC funds, to carry out a program for a public purpose specified in LSC's governing statutes and regulations, as opposed to providing goods or services for the benefit of the recipient.

§ 1627.4 Requirements for all subgrants.

(a) Threshold. (1) A recipient must obtain LSC's written approval prior to making a subgrant when the cost of the subgrant is \$20,000 of LSC funds or greater.

(2) Valuation of in-kind subgrants. (i) If either the actual cost to the recipient of the subgranted property or service or the fair market value of the subgranted property or service exceeds \$20,000 of LSC funds, the recipient must seek written approval from LSC prior to making a subgrant.

(ii) The valuation of the subgrant, either by fair market value or actual cost to the recipient of property or services, must be documented and to the extent feasible supported by the same methods used internally by the recipient.

(b) Corporation approval of subgrants. Recipients must submit all applications for subgrants exceeding the \$20,000 threshold to LSC in writing for prior written approval. LSC will publish notice of the requirements concerning the format and contents of the application annually in the Federal Register and on LSC's website.

(1) Basic Field Grants. (i) Recipients should submit applications for subgrants of Basic Field Grant funds along with the recipient's proposal for funding, including applications for renewal of funding.

(ii) LSC will notify a recipient of its decision to approve, disapprove, or suggest modifications to an application for subgrant approval prior to, or at the same time as LSC provides notice of its decision with respect to the applicant's proposal for Basic Field Grant funding.

(2) Special grants. (i) Recipients of special grants (e.g., Technology Initiative Grants, Pro Bono Innovation Fund grants, emergency relief grants), should submit their subgrant applications following notification of approval of special grant funds.

(ii) A subgrant application must be submitted at least 45 days in advance of its proposed effective date. Within 45 days of the date of receipt, LSC will notify the recipient in writing of its decision to approve, disapprove, or suggest modifications to the subgrant; or, if LSC has not made a decision, the date by which LSC expects to make a decision. A subgrant that is disapproved or to which LSC has suggested modifications may be resubmitted for approval.

(3) Mid-year subgrant requests. A recipient may apply for prior approval of a subgrant outside of the periods prescribed in paragraphs (a)(1) and (2) of this section as needed. LSC will follow the time periods prescribed in paragraph (a)(2)(ii) of this section to consider and notify a recipient of its decision to approve, disapprove, or suggest modifications to the subgrant.

(4) Failure to comply. Any subgrant not approved according to paragraphs (a)(1) through (3) of this section will be subject to disallowance and recovery of all funds expended under the subgrant.

(5) Changes to subgrants requiring prior approval. (i) If a recipient needs to make substantial changes to the scope or objectives, or increase or decrease the amount of funding of more than 10%, of a subgrant approved under paragraph (b) of this section, the recipient must obtain LSC's prior written approval. Minor changes in the scope or objectives or changes in support of less than 10% do not require prior approval, but the recipient must notify LSC of such changes in writing.

(ii) If a subgrant did not require prior approval, and the recipient proposes a change that will cause the total value of the subgrant to exceed the threshold for prior approval, the recipient must obtain LSC's prior written approval before making the change.

(c) Duration of subgrant. (1) For Basic Field grants, a subgrant may not be for a period longer than one year. All funds unexpended at the end of the subgrant period will be considered part of the recipient's available LSC funds.

(2) For special grants (e.g., Pro Bono Innovation Fund grants, Technology Initiative Grants, emergency relief grants), a subgrant may not be for a period longer than the term of the grant. Absent written approval from LSC, all unexpended funds must be returned to LSC at the end of the subgrant period.

(d) Provisions for termination and suspension of subgrants. All subgrants must contain provisions for their orderly termination in the event that the recipient is no longer an LSC recipient, and for suspension of activities if the recipient's funding is suspended.

(e) Recipient responsibilities. (1) Recipients must ensure that subrecipients comply with LSC's financial and audit provisions to the extent required by this part.

(2) The recipient must ensure that the subrecipient properly spends, accounts for, and audits funds or property or services acquired in whole or in part with LSC funds received through the subgrant.

(3) The recipient must repay LSC for any disallowed expenditures by a subrecipient. Repayment is required regardless of whether the recipient is able to recover such expenditures from the subrecipient.

(f) Accounting and auditing requirements--(1) Subgrants of funds. (i) Any LSC funds paid by a recipient to a subrecipient through a subgrant are subject to the audit and financial requirements of the Audit Guide for Recipients and Auditors and the Accounting Guide for LSC Recipients. The relationship between the recipient and subrecipient will determine the proper method of financial reporting following generally accepted accounting principles.

(ii) Subgranted funds may be separately disclosed and accounted for, and reported upon in the audited financial statements of a recipient; or such funds may be included in a separate audit report of the subrecipient. A subgrant agreement may provide for alternative means of assuring the propriety of subrecipient expenditures, especially in instances where an organization receives a small subgrant. Any request to use an alternative means of assuring propriety of subrecipient funds must be submitted to LSC for consideration as part of the subgrant approval

process. If LSC approves a request to use an alternative means, the information provided thereby shall satisfy the recipient's annual audit requirement with regard to the subgrant funds.

(2) In-kind subgrants. (i) The value of property or services funded in whole or in part with LSC funds provided by a recipient to a subrecipient through a subgrant is subject to the audit and financial requirements of the Audit Guide for Recipients and Auditors and the Accounting Guide for LSC Recipients. The relationship between the recipient and subrecipient will determine the proper method of financial reporting following generally accepted accounting principles.

(ii) Subgrants involving in-kind exchanges of property or services may be separately disclosed and accounted for, and reported upon in the audited financial statements of a recipient. A subgrant agreement may provide for alternative means of assuring the propriety of subrecipient expenditures and use of property or services acquired in whole or in part with LSC funds, especially in instances where an organization receives a small subgrant. Any request to use an alternative means of assuring propriety of subrecipient funds must be submitted to LSC for consideration as part of the subgrant approval process. If LSC approves a request to use an alternative means, the information provided thereby shall satisfy the recipient's annual audit requirement with regard to the subgrant funds.

(iii) If accounting for in-kind subgrants is not practicable, a recipient may convert the subgrant to a cash payment and follow the accounting procedures in paragraph (f)(1) of this section.

(iv) Subrecipients described in § 1627.5(d)(2) are not subject to the audit and financial requirements of the Audit Guide for Recipients and Auditors and the Accounting Guide for LSC Recipients. Such subrecipients must have financial management systems in place that would

allow the recipient and LSC to determine that any resources the subrecipient receives or uses under the subgrant are used consistent with 45 CFR part 1610.

(g) Oversight. To ensure subrecipient compliance with the LSC Act, LSC's appropriations statutes, Congressional restrictions having the force of law, and LSC's regulations, guidelines, and instructions, agreements between a recipient and a subrecipient must provide the same oversight rights for LSC with respect to subgrants as apply to recipients.

§ 1627.5 Applicability of restrictions, recordkeeping, and recipient priorities; private attorney involvement subgrants.

(a) Applicability of restrictions. The prohibitions and requirements set forth in 45 CFR part 1610 apply both to the subgrant and to the subrecipient's non-LSC funds, except as modified by paragraphs (b), (c), and (d) of this section.

(b) Priorities. Subrecipients must either:

(1) Use the subgrant consistent with the recipient's priorities; or

(2) Establish their own priorities for the use of the subgrant consistent with 45 CFR part 1620.

(c) Recordkeeping. A recipient must be able to account for how its subrecipients spend LSC funds or use property or services funded in whole or in part with LSC funds. A subrecipient must provide to the recipient records as described in paragraphs (c)(1) and (2) of this section.

(1) A subrecipient that handles matters as defined at 45 CFR 1635.2(b) must maintain adequate records to demonstrate that its attorneys and paralegals used the LSC funds or property or services funded in whole or in part with LSC funds:

(i) To carry out the activities described in the subgrant agreement; and

(ii) Consistent with the restrictions set forth at 45 CFR part 1610.

(2) A subrecipient that handles cases as defined at 45 CFR 1635.2(a):

(i) Must require its attorneys and paralegals to maintain records for each case that show the amount of time spent on the case and the activity conducted by date, and a unique client name or case number; and

(ii) Either the subrecipient or the recipient must maintain records for each case that show the problem type and the closing code for the case.

(iii) This requirement does not apply to subrecipients described in paragraph (d)(2)(ii) of this section.

(3) A subrecipient who handles both cases and matters must maintain the types of records described in paragraphs (c)(1) and (2).

(d) Subgrants for engaging private attorneys--(1) Subgrants of funds. The prohibitions and requirements set forth in 45 CFR part 1610 apply *only* to the subgranted funds when the subrecipient is a bar association, *pro bono* program, private attorney or law firm, or other entity that receives a subgrant for the sole purpose of funding private attorney involvement activities (PAI) pursuant to 45 CFR part 1614.

(2) In-kind subgrants. The prohibitions and requirements set forth in 45 CFR part 1610 apply *only* to the subgranted property or services acquired in whole or in part with LSC funds when the subrecipient is a bar association, *pro bono* program, private attorney or law firm, or other entity that receives a subgrant for the sole purpose of:

(i) Conducting private attorney involvement activities (PAI) pursuant to 45 CFR part 1614; or

(ii) Providing legal information or legal assistance on a *pro bono* or reduced fee basis to individuals who have been screened and found eligible to receive legal assistance from an LSC recipient.

(3) Treatment of non-LSC funds. Any funds or property or services acquired in whole or in part with LSC funds and used by a recipient as payment for a PAI subgrant are deemed LSC funds for purposes of this paragraph (d).

(4) Recordkeeping exception. The recordkeeping requirement in paragraph (c) of this section does not apply to private attorneys providing legal assistance on a pro bono or reduced fee basis.

§ 1627.6 Transfers to other recipients.

(a) The requirements of this part apply to all subgrants from one recipient to another recipient.

(b) The subrecipient must audit any funds or property or services acquired in whole or in part with LSC funds provided by the recipient under a subgrant in its annual audit and supply a copy of this audit to the recipient. The recipient must either submit the relevant part of this audit with its next annual audit or, if an audit has been recently submitted, submit it as an addendum to that recently submitted audit.

(c) In addition to the provisions of § 1627.4(c)(3), LSC may hold the recipient responsible for any disallowed expenditures of subgrant funds. Thus, LSC may recover all of the disallowed costs from either the recipient or the subrecipient or may divide the recovery between the two. LSC's total recovery may not exceed the amount of expenditures disallowed.

§ 1627.7 Recipient policies, procedures and recordkeeping.

Each recipient must adopt written policies and procedures to guide its staff in complying with this part and must maintain records sufficient to document the recipient's compliance with this part.

PART 1630—COST STANDARDS AND PROCEDURES

11. In newly transferred and redesignated § 1630.16, revise the section heading to read as follows:

§ 1630.16 Tax sheltered annuities, retirement accounts, and pensions.

* * * * *

February 6, 2017.

Stefanie K. Davis,

Assistant General Counsel.

[FR Doc. 2017-02718 Filed: 2/9/2017 8:45 am; Publication Date: 2/10/2017]