



LEGAL SERVICES CORPORATION  
REGULATIONS REVIEW TASK FORCE  
FINAL REPORT

August 24, 2001

# Regulations Review Task Force Final Report

## Introduction

### *Regulations Review Task Force - Mission*

The mission of the Task Force was to conduct a comprehensive review of LSC's regulations to support the Operations & Regulations Committee in the development of a Regulatory Agenda for 2001 and beyond. The Task Force has developed this Report for the Committee:

- ♦ reviewing our regulations to make sure that they properly implement current law;
- ♦ conducting an analysis to determine whether any of our regulations are confusing, unduly burdensome or pose interpretation or enforcement problems;
- ♦ suggesting basic prioritization categories for action.

### *Task Force Composition*

The members of the Task Force are as follows: Victor Fortuno, Vice President for Legal Affairs & General Counsel, Co-Chair; Randi Youells, Vice President for Programs, Co-Chair; John Idleman, Program Counsel – Office of Program Performance; John Meyer, Acting Director – Office of Information Management; Bertrand Thomas, Program Counsel III - Office of Compliance and Enforcement and Mattie Condray, Senior Assistant General Counsel - Office of Legal Affairs. Laurie Tarantowicz, Assistant Inspector General and Legal Counsel, serves as the OIG Liaison to the Task Force.

### *Summary of Activity*

The Task Force began its work at an initial meeting on October 16, 2000. The Task Force, consonant with the direction of the Board solicited written comments from LSC grant recipients and other interested parties. The Task Force received six sets of comments. The Task Force considered the public comments, along with performing its own internal review and analysis of LSC's regulations. The conclusions of the Task Force, as embodied in this report, have been reviewed and endorsed by LSC senior management.<sup>1</sup>

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<sup>1</sup> In addition, at its November, 2000, meeting, the Operations and Regulations Committee asked the Task Force to provide an interim report at the January, 2001, meeting. Specifically, the Task Force was asked to suggest a few regulations which the Committee might consider recommending to the Board as

## The LSC Rulemaking Protocol

On September 28, 2000, the Board of Directors adopted a new Rulemaking Protocol. A copy of the protocol can be found at Attachment A. The Protocol provides for increasing public participation in the manner and method in which LSC promulgates rules by formalizing LSC's policies governing rulemaking and adopting procedures that reflect the best practices in rulemaking as articulated in the Administrative Procedures Act, the Negotiated Rulemaking Act of 1990 and Executive Order 12866. Specifically, the Protocol provides for the use of both Negotiated Rulemaking and Notice and Comment rulemaking, as appropriate. In addition, the Protocol ensures that the Board, through the Operations and Regulations Committee, provides direction on LSC regulatory policy and establishes priorities for LSC rulemaking activities, while providing the authority to the staff to effectuate LSC rulemaking policies and priorities.

## Summary of LSC Regulations and Task Force Analysis

This section contains a brief description of each Part within Chapter 16 of Title 45 of the Code of Federal Regulations, the most recent action taken with respect to each part and a summary of the Task Force's analysis relative to that Part. The Task Force has divided the regulations into four broad classifications:

- ♦ those for which the Task Force does not consider action necessary at this time (except in connection with amendment of Part 1600 – Definitions, as discussed below);
- ♦ those regulations which the Task Force considers unnecessary and/or obsolete and which the Task Force believes should be deleted in their entirety;
- ♦ those regulations which the Task Force considers higher priority items; and
- ♦ those regulations which the Task Force considers lower priority items.

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appropriate subjects for rulemaking, in advance of the completion of the Task Force's Final Report. The Task Force met specifically on this issue and, responding to the request of both CLASP and the Committee, the Task Force Co-Chairs also met with Alan Houseman and Linda Perle on December 18, 2000, to get input from the field on this matter.

At the January 27, 2001, meeting of the Board of Directors, the Task Force recommended that the Board identify the following regulations as appropriate subjects for rulemaking at that time:

- ♦ 45 CFR Part 1611 - Eligibility
- ♦ 45 CFR Part 1626 - Restrictions on Legal Assistance to Aliens

The Board voted to identify those regulations as appropriate subjects for rulemaking and action on those regulations is now proceeding in accordance with the LSC rulemaking protocol.

Within the latter two categories, the Task Force believes that there are regulations that could benefit from substantive changes and certain regulations which require only administrative changes and/or clarifications. In some cases, the Task Force thinks the regulations, as a whole, would be easier to use if certain parts, currently separate, were combined. In these cases, the Task Force does not necessarily consider substantive changes to the rules necessary. Attachments B and C set forth in tabular form a summary of the Task Force's analysis.

#### ***45 CFR Part 1600 – Definitions***

Part 1600 sets forth definitions for terms used throughout the remainder of the LSC Title 45, Chapter 16 regulations. The last major revisions to Part 1600 were adopted in 1984, with one additional change being added in 1986.

The definitions section needs to be revised, particularly in light of other revisions which may be made to other sections. Currently, in some cases a term defined in Part 1600 is not used elsewhere in the regulations in the exact form as it exists in Part 1600. In other cases, there are terms which are used in several regulations which are not defined or which are defined only in one substantive Part, rather than in the definition section.

All terms requiring a definition should be defined in Part 1600, unless a specific definition, applicable only in the context of a specific regulation, is required. In addition, as rulemakings are undertaken on other parts of the regulations, any necessary changes to defined terms or the addition of new terms and definitions should be made to Part 1600 contemporaneously.

**The Task Force considers Part 1600 a higher priority item.**

#### ***45 CFR Part 1601 – Reserved***

There is no current Part 1601 in the regulations. Until 1994, Part 1601 contained the By-laws for the Corporation. In 1994, it was determined, however, that publication of the By-laws in the Code of Federal Regulations was neither legally necessary, nor desirable. Accordingly, Part 1601 was withdrawn.

**The Task Force is of the opinion that no action is necessary relative to Part 1601.**

***45 CFR Part 1602 – Procedures for Disclosure of Information Under the Freedom of Information Act.***

The regulations at Part 1602 contain the rules and procedures the Corporation follows in making agency records available to the public under the Freedom of Information Act. The 1602 regulations were substantially revised in 1998 to incorporate then-new statutory requirements relating to electronic records, time limits and standards for processing requests. Additional changes regarding procedures for Office of the Inspector General records requests were also made.

Notwithstanding the relatively recent revisions, some additional amendments to LSC's FOIA regulation are in order. First, there are a few nomenclature references (i.e., the regulation makes reference to the Office of the General Counsel, which is now the Office of Legal Affairs) which should be fixed. Second, pursuant current LSC practice if a request is received for the records of third party (i.e., a grant application submitted by a current or prospective recipient), LSC provides that party with an opportunity to request that some or all of the records requested be withheld under one (or more) of the exemptions listed in the regulation, prior to LSC sending its response to the requestor. This practice, which is consistent with current FOIA law, is not mentioned in the regulations, but should be.

**The Task Force considers Part 1602 to be a lower priority item.**

***45 CFR Part 1603 – State Advisory Councils***

Part 1603 provides authority for the appointment of state advisory councils in accordance with section 1004(f) of the LSC Act. This regulation has not been amended since it was first adopted in 1975. Although this regulation is little used today, the statutory language underpinning the regulation remains in effect. Moreover, it may be appropriate to consider the relevance of state advisory councils in the context of the development of state justice communities.

**The Task Force believes that no action is necessary relative to Part 1603 at this time, except in connection with possible amendment of Part 1600.**

***45 CFR Part 1604 – Outside Practice of Law***

Part 1604 contains a general prohibition on the outside practice of law by LSC recipient attorneys and sets forth the conditions under which certain practices, including the outside practice of law, is permissible. The current version of this regulation dates from 1976. Proposed revisions were published in 1995, but no final action was ever adopted. The proposed revisions were intended to clarify the exact scope of the

restrictions on compensated and uncompensated outside practice of law and allow for the separate treatment of court appointments.

The issues outstanding in 1995 are still important today. In addition, since that time a significant number of Office of Legal Affairs opinions interpreting 1604 have been issued. It is appropriate to clarify the regulations to incorporate some of these interpretations so as to improve the utility of the regulation in the field.

**The Task Force considers Part 1604 a lower priority item.**

#### ***45 CFR Part 1605 – Appeals on Behalf of Clients***

Under this Part, recipients are required to have a policy to review cases before taking appeals. This is intended to promote efficient and effective use of LSC funds. This regulation has not been amended since it was adopted in 1976.

**The Task Force believes that no action is necessary relative to Part 1605 at this time, except in connection with possible amendment of Part 1600.**

#### ***45 CFR Part 1606 – Termination and Debarment Procedures; Recompensation***

This Part sets forth procedures for action to deal with incidents of substantial non-compliance by recipients with LSC statutory or regulatory requirements and other policies, instructions or grant terms and conditions, (including due process requirements which must be followed before LSC may terminate and/or debar a recipient). This regulation was substantially revised in 1998. Those revisions implemented major changes imposed by the 1996 LSC appropriations legislation allowing LSC to terminate funding, deny refunding, recompute service areas and to debar recipients for good cause.

One issue which was not broached in the 1998 revisions is that of "lesser sanctions" – that is, the ability of LSC to impose a sanction of something less than full suspension or termination. There is nothing in the LSC's governing statutes (the LSC Act or current appropriations act) which would indicate that LSC lacks the authority to apply lesser sanctions, but, in the absence of procedures therefor, LSC has been reluctant to do so. Indeed, the Board has directed that LSC not impose lesser sanctions absent a formal rulemaking. However, the Office of Compliance and Enforcement has expressed an interest in being able to impose a lesser sanction in cases where there is a non-compliance, but in which the severity of the violation is such that a full suspension or termination of funding is a disproportionate penalty. In addition, the Office of Inspector General has recommended that LSC develop procedures for the imposition of lesser sanctions. The adoption of standards for the imposition of lesser

sanctions would provide LSC with needed flexibility in enforcement mechanisms and relieve recipients of the risk of total funding revocation for relatively minor violations.

**The Task Force considers Part 1606 a higher priority item.**

#### ***45 CFR Part 1607 - Governing Bodies***

Part 1607 requires recipients to have governing or policy bodies comprised of attorneys appointed by State and/or local bar associations and eligible clients. The current version of the rule was adopted in 1994. This revision included a number of clarifying changes along with some policy revisions and interpretations.

Part 1607 was the subject of discussion at the LSC/NLADA joint conference on diversity in the legal services community, held on May 30 – June 1, 2001, in Washington, DC. The conferees discussed the current lack of diversity among recipient governing bodies and identified the requirements of 1607 as a contributing factor to this state of affairs. Accordingly, it appears appropriate to examine Part 1607 to see how any barriers to diversity within the legal services community may be ameliorated.

**The Task Force considers Part 1607 a higher priority item.**

#### ***45 CFR Part 1608 – Prohibited Political Activities***

The Part 1608 regulations set forth the general prohibitions on engaging in political activities applicable to Corporation employees and recipient staff attorneys. These provisions are designed to ensure that LSC resources are not used to promote or support political activities or interests, consistent with the first amendment and professional responsibilities applicable to LSC employees and recipient staff attorneys. Part 1608 was last amended in 1978.

A Notice of Proposed Rulemaking proposing to update the regulation was published in 1994, but no final action on the proposal was ever taken. The 1994 NPRM proposed to substantively expand the scope of certain prohibitions, as well as make a number of clarifying and structural changes intended to make the rule easier to use and apply. The need for these changes still exists.

**The Task Force considers Part 1608 a lower priority item.**

#### ***45 CFR Part 1609 – Fee Generating Cases***

Part 1609 contains a general prohibition on recipients taking fee-generating cases and provides instruction on the circumstances under which a recipient may take such cases. This Part was last revised in 1997 in connection with the rulemakings

implementing the various restrictions imposed by the 1996 Appropriations Act. Specifically, among the restrictions imposed was a ban on the claiming or acceptance of attorney's fees. Prior to this time, while recipients were generally prohibited from taking cases likely to generate fees, recipients were not prohibited from accepting attorney's fees when such were awarded (pursuant to fee-shifting statutes and the like). With the new restriction, LSC removed the previously existing provisions on attorney's fees from 1609 and created a new regulation (Part 1642) setting forth the attorney's fee ban. In addition, some other aspects of the rule were changed. A clarification of what is not considered a fee-generating case was added, and some additional latitude was provided to recipients regarding when a fee-generating case may be taken.

Although the determination was made at the time that the subjects of fee-generating cases and attorneys' fees were sufficiently separate to warrant separate regulatory parts, it now appears that the issues are, in fact, interrelated. Accordingly, it may be appropriate to consider moving the provisions of 1609, without substantive change, into Part 1642.

**The Task Force considers Part 1609 a higher priority item.**

#### ***45 CFR Part 1610 – Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity***

Part 1610 implements the statutory restriction on the use of non-LSC funds for any purpose for which use of LSC funds is prohibited. Part 1610 was amended in 1997, following litigation challenging the first version of 1610 promulgated after the passage of the FY 1996 appropriations act. In that litigation, the regulatory regime was deemed improper in not allowing adequate alternative channels for LSC funded organizations to undertake their constitutionally protected client representational activities with non-LSC funds. The revised rule allows an LSC grantee to transfer non-LSC funds free of LSC restrictions and created an avenue for constitutionally protected expression through 'interrelated organizations' that are 'physically and financially separate' from LSC grantees. Under the final rule, an LSC program may transfer non-LSC funds to a third party non-LSC grantee, and such recipient entity may use the funds so transferred for the purposes for which they were initially granted, provided that there is complete program integrity between the LSC program and the non-LSC recipient entity.

**The Task Force is of the opinion that no action is necessary on Part 1610 at this time, except in connection with possible amendment of Part 1600.**



### ***45 CFR Part 1611 – Eligibility***

Part 1611 sets forth the requirements relating to determination and documentation of client eligibility. The current version of 1611 (a copy of which is attached to this Interim Report) was adopted in 1983. There have been two proposed revisions to 1611 published since then, one in 1989 and another in 1995, but neither rulemaking was completed and the proposed rules were each withdrawn.

The 1989 proposed revision would have added a provision to prohibit the representation of ineligible clients with non-LSC derived funds. Although the Board of Directors approved this proposed revision in 1989, no final rule adopting the change was published, largely due to a proviso in the FY 1990 LSC appropriations bill, P.L. 101-162, prohibiting LSC from subjecting LSC grant recipients to any amendments to regulations relating to the use of private funds which were not in effect as of October 1988. The proposed rule was eventually formally withdrawn in 1993.

The 1995 proposed revision represented a major overhaul of the regulation. 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. However, no further action was taken on this proposed rule, again because of Congressional action restricting LSC's authority to engage in rulemaking. Since that time, both of those Congressional limitations on LSC rulemaking activity have been lifted.

Part 1611 has previously been identified by staff and field representatives as still in need of improvement. The outstanding issues prompting the 1995 proposed rulemaking remain extant and there are other issues, particularly related to documentation requirements, which may now be appropriate for discussion. In addition, there is a FY1998 statutory change which needs to be incorporated into the regulation.

In light of the above, the Board identified Part 1611 as an appropriate subject for rulemaking at the January, 2001 meeting. A Negotiated Rulemaking has been instituted to consider revisions to Part 1611.

**Due to the ongoing rulemaking, no additional action by the Board is necessary on Part 1611 at this time.**

### ***45 CFR Part 1612 – Restrictions on Lobbying and Certain Other Activities***

Part 1612 prohibits LSC recipients and their employees from engaging in (with limited exceptions) representation before legislative bodies or other direct lobbying, grassroots lobbying, participation in rulemaking, public demonstrations, advocacy

training and certain organizing activities. Although certain restrictions on the use of LSC funds to engage in lobbying have always applied to LSC recipients, this regulation was revised significantly in 1997 to implement additional restrictions contained in the FY 1996 appropriations act. The revised Part 1612 extended the prohibition on lobbying and related activities to include activities conducted with non-LSC funds as well as LSC funds, and provided greater guidance on the exceptions to the basic prohibitions, related to occasions in which recipients may participate in public rulemaking activities, respond to requests for legislative and administrative bodies, and engage in self-interest lobbying.

**The Task Force is of the opinion that no action is necessary on Part 1612 at this time, except in connection with possible amendment of Part 1600.**

#### ***45 CFR Part 1613 – Restrictions on Legal Assistance with Respect to Criminal Proceedings***

Part 1613 is designed to ensure that Corporation funds are not used to provide legal assistance with criminal proceedings unless such assistance is required as part of an attorney's responsibilities as a member of the bar. Adopted in 1978, the regulation has not been amended since then. While the substantive elements of the regulation are clear and not in need of revision, the Task Force notes that Part 1613 is closely related to Part 1615, Restrictions on actions collaterally attacking criminal convictions. There does not appear to be a compelling reason for having these issues covered in separate regulations. Rather, consolidating the two Parts into one regulation would serve to simplify LSC's overall regulatory scheme.

**The Task Force considers Part 1613 a lower priority item.**

#### ***45 CFR Part 1614 – Private Attorney Involvement***

Part 1614 sets forth the requirements related to the involvement of private attorneys in the delivery of legal assistance to eligible clients. Under the regulation recipients must devote an amount equal to at least 12½% of the recipient's annualized basic field award to efforts to recruit and refer cases to private attorneys. Last amended in 1985, there are substantive questions about what may be properly counted toward the PAI requirement and LSC is concerned about accountability for PAI activity under the current regulations. In addition, aspects of the rule are inconsistent with LSC regulations at Part 1611 and 1626.

**The Task Force considers Part 1614 a lower priority item.**

### ***45 CFR Part 1615 – Restrictions on Actions Collaterally Attacking Criminal Convictions***

Part 1615 prohibits the provision of legal assistance in an action in the nature of habeas corpus seeking to collaterally attack a criminal conviction. This regulation is rooted in a similar prohibition contained in the LSC Act. Originally adopted in 1976, the regulation has not been amended since then. While the substantive elements of the regulation are clear and not in need of revision, the Task Force notes that Part 1615 is closely related to Part 1613, Restrictions on legal assistance with respect to criminal proceedings. There does not appear to be a compelling reason for having these issues covered in separate regulations. Rather, consolidating the two Parts into one regulation would serve to simplify LSC's overall regulatory scheme.

**The Task Force considers Part 1615 a lower priority item.**

### ***45 CFR Part 1616 – Attorney Hiring***

Part 1616 requires recipients to establish hiring qualifications for the attorneys they hire and to seek recommendations for candidates from the local Bar. The Part 1616 regulations also require recipients to adopt equal employment and affirmative action policies, to provide preferences for local applicants, and have employment policies to ensure that clients can get legal assistance in languages other than English, where necessary. Part 1616 was first adopted in 1976 and has not been amended since then.

Part 1616 has its roots in section 1007(a)(8) of the LSC Act which requires recipients to solicit the recommendations of the organized bar in the community being served before filling staff attorney and to give preference in filling such positions to qualified persons who reside in the community to be served. This was intended to promote a cooperative relationship between the recipient and the local Bar and community.

While the goals of Part 1616 remains appropriate, there are specific aspects of Part 1616 which deserve a fresh review. For example, while the regulation requires compliance with all applicable equal employment laws, the regulations also require recipients to engage in "affirmative action" and permit recipients to consider the "cultural similarity" of applicants to the client community. In the 25 years since the original promulgation of these rules, developments in equal employment law and policy may have put these aspects of the regulations somewhat at odds with each other and terms which may have had one meaning when the regulation was promulgated may have another now. Thus, it is appropriate to review the regulation to see if there are modifications which will permit LSC and recipients to continue to pursue cooperative relationships with the local Bar and community, to promote equal employment

opportunity, to value diversity in the workplace and to provide appropriate, high quality service to clients, while, at the same time, better reflect the current state of the law.

**The Task Force considers Part 1616 a higher priority item.**

#### ***45 CFR Part 1617 – Class Actions***

Part 1617 implements the prohibition on recipient's initiating or participating in class action lawsuits contained in the FY 1996 appropriations act. This prohibition, adopted in 1996, has not been amended since then.

**The Task Force is of the opinion that no action is necessary on Part 1617 at this time, except in connection with possible amendment of Part 1600.**

#### ***45 CFR Part 1618 – Enforcement Procedures***

Part 1618 establishes procedures for LSC enforcement of recipient compliance with the LSC Act and regulations. The regulations require recipients to have procedures for processing complaints that employees have committed violations of the Act or regulations and for determining appropriate sanctions to be imposed for violations. In addition, Part 1617 sets forth the Corporation's obligations to investigate allegations of violations by recipients. This regulation was adopted in 1976 and has not been amended since then.

While the substantive elements of the regulation are clear and not in need of revision, the Task Force notes that Part 1618 is related to Part 1606, Termination and Debarment Procedures, and Part 1623, Suspension, as all three Parts deal with LSC enforcement of the regulations. There does not appear to be a compelling reason for having these issues covered in separate regulations. Rather, consolidating the three Parts into one regulation would serve to simplify LSC's overall regulatory scheme. In addition, none of the LSC regulations provide for the imposition of penalties short of suspension, termination or debarment. Both LSC and recipients would benefit from additional flexibility in enforcement options. In the context of a review of 1606, 1618 and 1623, it would be appropriate to consider adoption of a program for application of lesser sanctions.

**The Task Force considers Part 1618 a lower priority item.**

#### ***45 CFR Part 1619 – Disclosure of Information***

Part 1619 requires recipients to adopt procedures, subject to LSC approval, for affording appropriate public access to the LSC Act and regulations, to recipient policies,

procedures and guidelines. This regulation has not been amended since it was first adopted in 1977.

**The Task Force believes that no action is necessary relative to Part 1619 at this time, except in connection with possible amendment of Part 1600.**

#### ***45 CFR Part 1620 – Priorities in Use of Resources***

Part 1620 requires recipients to adopt written priorities regarding the types of cases and matters to which the recipient will devote its resources and provides guidance to recipients on the factors to be used in developing the required priorities. The regulations require that the priorities be reviewed annually and provide for reporting (both the recipient's governing board and to LSC) on compliance with the priority policy and the review of priorities. Adopted in its final form in 1997, Part 1620 implements a prohibition first contained in the FY 1996 appropriations legislation which prohibits recipients from expending resources on activities outside their specific priorities. The regulation had not been amended since it became final.

**The Task Force is of the opinion that no action is necessary on Part 1620 at this time, except in connection with possible amendment of Part 1600.**

#### ***45 CFR Part 1621 – Client Grievance Procedure***

Part 1621 requires recipients to establish a grievance committee and procedures for receiving and investigating complaints that service was improperly denied or that service provided was inadequate. The purpose of Part 1621 is to ensure that recipients are accountable to those persons they are expected to serve. This regulation was adopted in 1977 and has not been amended since then. A NPRM was published in 1994 which would have instituted some more specific requirements for the grievance process and clarified the situations in which access to the grievance process is appropriate. No final action was ever taken on the 1994 NPRM, however, and the original regulation remains in effect. The issues from the NPRM are extant and the regulation should be revisited.

**The Task Force considers Part 1621 a lower priority item.**

#### ***45 CFR Part 1622 – Public Access to Meetings under the Government in the Sunshine Act.***

Under the terms of the LSC Act, notwithstanding that LSC is not a department, agency or instrumentality of the Federal Government, LSC is subject to the Government

in the Sunshine Act. The regulations at Part 1622 implement the open meetings requirement of that Act for LSC. First adopted in 1978, the rules stated the basic requirement that meetings of the Board and Committees are to be open to the public, except under limited circumstances set forth in the regulations, and that timely public notice of meetings must be provided. Part 1622 was revised in 1984 and again in 1985. The 1984 revisions made four principle changes to the regulations: definitions for "public observation" and "publicly available" were adopted; the public notice requirement was amended to provide that notices of meeting must be provided to recipient governing boards rather than to recipients; the language of the section on procedures for closing meetings was amended to more closely track the language of the Sunshine Act; and a new section, 1622.9, was added to provide for emergency proceedings whereby meetings could be moved to new locations if disruptive persons were impeding the Directors from conducting business. The 1985 final rule completely revised emergency proceedings section to permit the Board have persons disrupting public meetings removed rather than moving the meeting. This revision was intended to ensure that the business of the Board and Committees can be carried out without interruption by disruptive persons, but in a manner consistent with the Sunshine Act requirements.

One notable aspect of 1622 is that it exceeds the requirements of the Sunshine Act in one important respect. The Sunshine Act requires that meetings of the Board be publicly noticed and open to public observation. The Corporation, however, in implementing the open meetings requirement, extended it to include meetings of non-Executive Committees. Thus, under Part 1622, meetings of non-Executive Committees must each be publicly noticed and open to public observation, even though the Sunshine Act does not require such a result. While changing the regulations to remove non-Executive Committees from the public notice and open meeting requirements would afford such Committee's considerably greater flexibility in conducting their business, it would very likely be vigorously opposed by the field which would interpret such a move as an attempt by LSC to shut the public out of the business of the Corporation.

**The Task Force considers Part 1622 a lower priority item.**

#### ***45 CFR Part 1623 – Suspension Procedures***

Part 1623 sets forth procedures for the suspension by LSC of a recipient's funding in situations in which it is necessary to protect LSC funds or to ensure the recipient's compliance with applicable laws, regulations, policies and instructions of LSC or the grant conditions applicable to the recipient's grant. When Part 1623 was first adopted in 1978, LSC's authority to suspend a recipient's funding was restricted by the LSC Act and could only be exercised after the recipient had been provided reasonable notice and an opportunity to show cause why the action should not be taken.



Reflecting this position that suspension should only be used as a last resort, the original Part 1623 limited the Corporation to instituting suspensions for only "substantial" failures to comply with the law, and then only for a maximum of 30 days.

The landscape changed significantly in the mid-1990's. First, in 1996, LSC moved to a competitive grant system, ending the right of recipients to automatic refunding. Second, the FY 1998 appropriations act reflected Congress' intent to strengthen the ability of LSC to ensure that recipients are in full compliance with the law. Consequently, LSC adopted significant revisions to Part 1623 in 1998. These revisions streamlined the hearing procedures for suspensions of funding and included provisions for longer periods of suspension in certain circumstances.

While the substantive elements of the regulation are clear and not in need of revision, the Task Force notes that Part 1623 is related to Part 1606, Termination and Debarment Procedures, and Part 1618, Enforcement Procedures, as all three Parts deal with LSC enforcement of the regulations. There does not appear to be a compelling reason for having these issues covered in separate regulations. Rather, consolidating the three Parts into one regulation would serve to simplify LSC's overall regulatory scheme. In addition, none of the LSC regulations provide for the imposition of penalties short of suspension, termination or debarment. Both LSC and recipients would benefit from additional flexibility in enforcement options. In the context of a review of 1606, 1618 and 1623, it would be appropriate to consider adoption of a program for application of lesser sanctions.

### **The Task Force considers Part 1623 a higher priority item.**

#### ***45 CFR Part 1624 – Prohibition Against Discrimination on the Basis of Handicap***

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §706), as amended, prohibits discrimination on the basis of handicap by recipients of Federal assistance. As recipients of federal assistance, LSC grant recipients are subject to the non-discrimination requirements of Section 504. At the same time, while the Corporation is not obligated to enforce Section 504 of the Rehabilitation Act (since it is not an agency, department or instrumentality of the Federal government), it does have the authority to ensure that LSC grant recipients comply with its provisions. LSC chose to exercise this authority and adopted the Part 1624 regulations implementing the non-discrimination requirements in Section 504 in 1979. The regulations have not been amended since that time.

Although Section 504 remains applicable to LSC recipients, the passage of the Americans with Disabilities Act of 1991 (ADA) has imposed a host of independent requirements relating to non-discrimination in services and employment on LSC

grantees. Specifically, LSC recipients are directly subject to the non-discrimination provisions of Title I of the ADA, relating to discrimination in employment, and Title III of the ADA, relating to public accommodations, and the respective implementing Equal Employment Opportunity Commission and Department of Justice regulations.

The Part 1624 regulations do not address the ADA and there is widespread agreement that the regulations are in need of updating to account for the ADA. Moreover, in light of the themes and concerns raised by the LSC-NLADA Diversity Conference, the issues of the provision of legal services to persons with disabilities and employment by legal services programs of persons with disabilities suggest that a thorough review of Part 1624 is overdue.

**The Task Force considers Part 1624 a higher priority item.**

#### ***45 CFR Part 1625 - Reserved***

There is no current Part 1625 in the regulations. Until 1998, Part 1625 contained the regulations governing denial of an application for the refunding of a grant. After the institution of the competitive grant system in 1996, whereby grant recipients no longer have a right to refunding and must reapply for a new grant at the end of each grant term, the rules at Part 1625 were rendered both superfluous and inconsistent with applicable law. Accordingly, Part 1625 was rescinded in 1998 in connection with the adoption of new rules relating to termination and debarment procedures, recompetition and denial of refunding at Part 1606.

**The Task Force is of the opinion that no action is necessary relative to Part 1625.**

#### ***45 CFR Part 1626 – Restrictions on Legal Assistance to Aliens***

Part 1626 sets forth the basic requirement that recipients are prohibited from providing legal assistance to ineligible aliens, and the circumstances and conditions under which services to eligible aliens may be provided. The original Part 1626 regulation was adopted in 1983, in compliance with Congressional directives limiting services to aliens. The current version of this rule dates to 1997 and incorporates additional conditions imposed by Congress, as contained in the FY1996 and FY1997 LSC appropriations bills.

Although Part 1626 was amended relatively recently, this regulation has been identified both by staff and field representatives as in need of additional amendment. In the years since its last amendment, several practical issues have emerged, such as issues relating to documentation requirements, representation of groups of aliens, and representation of legal aliens not currently covered by the rule. In addition, recent



amendments to the Violence Against Women Act need to be incorporated into the 1626 regulations. The Task Force also notes that the Board has already identified 1626 as an appropriate subject for rulemaking as it relates to the incorporation of the findings of the Erlenborn Commission as adopted by the LSC Board of Directors in 1999.

In light of the above, the Board identified Part 1626 as an appropriate subject for rulemaking at the January, 2001 meeting. A Negotiated Rulemaking has been instituted to consider revisions to Part 1626.

**Due to the ongoing rulemaking, no additional action by the Board is necessary on Part 1626 at this time.**

#### ***45 CFR Part 1627 - Subgrants and Memberships Fees or Dues***

Part 1627 sets forth rules under which Corporation funds may be transferred by recipients to other organizations, including other recipients. First adopted in 1983, Part 1627 is intended to promote accountability for LSC funds and compliance with the LSC Act and regulations by requiring LSC approval of subgrants and limiting the amount of LSC funds which could be spent on fees and dues for membership organizations.

Part 1627 was amended in 1996 and 1997 to incorporate changes required by the FY 1996 LSC appropriations legislation. That legislation prohibited the use of LSC funds to pay membership dues to any private or non-profit organization. Under the revised rule, recipients may not use any LSC funds to pay for membership fees or dues for the recipient or any of its employees to belong to a private or non-profit organization, except for fees or dues mandated by a governmental organization to engage in a profession (i.e., mandatory bar dues). Recipients may use non-LSC funds for the payment of membership fees or dues.

Although there are no pressing issues from the field relative to Part 1627, staff has raised some questions about the interaction of Part 1627 and Part 1610 (relating to the transfer of funds). Accordingly, it may be appropriate to revisit this regulation.

**The Task Force considers Part 1627 a lower priority item.**

#### ***45 CFR Part 1628 – Recipient Fund Balances***

Part 1628 prescribes the amount of a recipient's grant which may be carried over from one year to the next and provides procedures for LSC waiver of the carryover ceilings. First adopted in 1984 in response to GAO criticism that LSC was permitting recipients to maintain excess fund balances, Part 1628 is intended to ensure the timely expenditure of LSC funds for the effective and economical provision of high quality legal

services. The rule was just revised in November, 2000, to provide LSC with more discretion in granting waivers of the carryover ceilings.

**The Task Force is of the opinion that no action is necessary on Part 1628 at this time, except in connection with possible amendment of Part 1600.<sup>2</sup>**

#### ***45 CFR Part 1629 – Bonding of Recipients***

Part 1629 requires bonding of recipients which are not governmental entities to insure against losses resulting from fraud on the part of recipient directors, officers and employees. Part 1629 was adopted in 1984 in response to several instances of misuse and misappropriation of funds and embezzlement. The rule has not been amended since that time.

**The Task Force is of the opinion that no action is necessary on Part 1629 at this time at this time, except in connection with possible amendment of Part 1600.**

#### ***45 CFR Part 1630 – Cost Standards and Procedures***

Part 1630 sets forth the cost standards and procedures applicable to LSC grants and contracts. Prior to the promulgation of Part 1630 in 1986, this information was contained in the LSC Audit Guide and Instruction 83-8. As part of an effort to revise the Audit Guide, LSC decided that it would be better to set forth comprehensive guidance in regulatory form. Consequently, Part 1630 established a comprehensive set of standards and procedures for use in determining which costs are allowable, which costs require prior LSC approval, how such approval is obtained and how disallowed cost decisions are made and reviewed.

Part 1630 was substantially revised in 1997 to bring it into conformance with the Inspector General Act (5 U.S.C. App.3), and the then-current LSC Audit Guide. In addition, the revisions brought the rule into conformance with several relevant Office of Management and Budget Circulars (OMB). The FY 1996 appropriations legislation required LSC to develop audit follow-up procedures that meet the requirements of OMB Circular A-50, Audit Follow-Up. LSC determined that adopting pertinent provisions of

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<sup>2</sup> The VP for Programs dissents from this recommendation. She recommends that the LSC Board Of Directors give serious consideration to amending Part 1628 to permit LSC, under carefully controlled circumstances, to consider and approve waivers of the 25% excess fund balance cap in cases where two or more programs are undergoing consolidation or merger and can demonstrate that the excess fund balance dollars are needed to defray some of the costs of the consolidation/merger (i.e. the need to equalize salaries, the need to ensure a common technology platform, the need to address the relative equity requirements of Program Letter 2000-7, etc).

other OMB Circulars applicable to Federally funded non-profit organizations, although not required, would also be appropriate.

**The Task Force is of the opinion that no action is necessary on Part 1630 at this time, except in connection with possible amendment of Part 1600.**

#### ***45 CFR Part 1631 – Expenditure of Grant Funds***

Part 1631 was promulgated in 1986 in response to Congressional concerns that significant amounts of pre-1982 funds were being stockpiled by recipients and spent on activities which were not prohibited at the time the funds were appropriated, but which were later prohibited (and on which the recipients could not spend currently appropriated funds). Part 1631 requires that no LSC funds may be expended, except as in accordance with the restrictions contained in the Corporation's FY 1985 appropriations measure (P.L. 99-180). The general staff consensus is that Part 1631 no longer has any continuing viability and should be eliminated.

**The Task Force believes that Part 1631 should be deleted in its entirety.**

#### ***45 CFR Part 1632 – Redistricting***

Part 1632 prohibits recipients from engaging in political redistricting activities. The original version of the rule, adopted in 1989, contained a general prohibition but allowed the use of some non-LSC funds for redistricting activities. Part 1632 was revised in 1996 to prohibit recipients from engaging in any redistricting activities, regardless of the source of the funds for such efforts. The amendment stemmed from a restriction on all redistricting activities contained in the FY 1996 appropriations act. Part 1632 has not been amended since that time.

**The Task Force is of the opinion that no action is necessary on Part 1632 at this time, except in connection with possible amendment of Part 1600.**

#### ***45 CFR Part 1633 – Restriction on Representation in Certain Eviction Proceedings***

Part 1633 prohibits recipients from defending persons in public housing eviction proceedings when the person is facing eviction due to that persons illegal drug activity. Adopted in 1996, Part 1633 implements a restriction on such representation contained in the FY 1996 appropriations act. Part 1633 has not been amended since that time.

**The Task Force is of the opinion that no action is necessary on Part 1633 at this time, except in connection with possible amendment of Part 1600.**

#### ***45 CFR Part 1634 – Competitive Bidding for Grants and Contracts***

Part 1634 enunciates the competitive bidding process used by LSC to award grants to recipients. Responding to Congressional interest, the Corporation began considering the adoption of a competitive bidding process in 1989. LSC issued a proposed rule to institute competitive bidding for grants in 1995, this time in anticipation of legislation directing the adoption of a competitive grant system, finalizing the rule in 1996 just prior to the passage of the FY 1996 appropriations law which required such a system. Part 1634 has not been revised since that time.

After several years of experience with the competitive grant process, an internal staff effort is being undertaken to review the process generally to see how it can be improved. This effort may result in some recommendations for changes in the regulation, along with other improvements to the process not necessarily tied to the requirements in Part 1634.

**The Task Force is of the opinion that no action on part 1634 is appropriate at this time, pending the outcome of the review of the competition process currently underway.**

#### ***45 CFR Part 1635 – Timekeeping***

Part 1635 requires each recipient to keep time records for all attorneys and paralegals employed by the recipient. Originally adopted in 1996 in anticipation of legislation containing a recipient timekeeping requirement, Part 1635 is intended to improve the accountability for LSC fund expenditures by providing for a system of accurate and contemporaneous records of cases, matters and supporting activities for which the funds have been expended.

In February of 1998, the LSC's Office of Inspector General (OIG) issued a Summary Report on Audits of Selected Grantees for Compliance with Selected Regulations which found that timekeeping records could not demonstrate that recipients' part-time attorneys and paralegals do not work on restricted activities during any time for which they are compensated by the recipient for their services. The OIG recommended that the LSC revise its timekeeping rule to require that part-time attorneys and paralegals maintain timekeeping records for all hours worked for the recipient by date and time of day. In response to this Report, LSC published a Notice of Proposed Rulemaking (NPRM) for public comment in October 1998.

After considering the comments received on the NPRM, along with the recommendations of the OIG and staff, LSC decided to retain certain elements of the NPRM, revise others, and to republish the proposed rule for further public comment. The new proposed rule ("republished NPRM"), issued in April 1999 (64 FR 16383), replaced the previous proposal that part-time attorneys and paralegals be required to record the exact date and time for time worked with a certification requirement and retained the previously proposed requirement that all attorney and paralegal time records provide the date for each timekeeping entry. Finally, LSC deleted the previously proposed requirement that time keeping records be consistent with payroll records. Although LSC did not agree with the comments that the proposal would require recipients to run afoul of the Fair Labor Standards Act, LSC determined that the proposed recordkeeping consistency requirement was not necessary. LSC made a number of additional revisions to the rule and published it as a final rule in July 2000.

**The Task Force is of the opinion that no action is necessary on Part 1635 at this time, except in connection with possible amendment of Part 1600.**

#### ***45 CFR Part 1636 – Client Identity and Statement of Facts***

Part 1636 implements a restriction contained in the FY 1996 appropriations law that requires recipients to identify by name each plaintiff they represent in any litigation and to have each plaintiff sign a written statement of facts on which the complaint is based before undertaking the representation on the plaintiff's behalf. Published in 1997, Part 1636 has not been revised since that time. Since being published, questions regarding the interpretation of Part 1636 have arisen and staff believes that the language of the regulation is in need of clarification.

**The Task Force considers Part 1636 a lower priority item.**

#### ***45 CFR Part 1637 – Representation of Prisoners***

Part 1637 prohibits recipients from participating in any civil litigation on the behalf of prisoners. Adopted in 1997 in response to a directive in the FY 1996 appropriations bill, Part 1637 also prohibits recipients from providing representation to prisoners in any administrative proceeding challenging the conditions of the incarceration. Part 1637 has not been amended since that time.

**The Task Force is of the opinion that no action is necessary on Part 1637 at this time, except in connection with possible amendment of Part 1600.**

### ***45 CFR Part 1638 – Restriction on Solicitation***

Part 1638 prohibits recipients from representing clients as a result of in-person, unsolicited advice. Part 1638 was promulgated in 1997 to adopt a prohibition on soliciting clients contained in the FY 1996 appropriations bill. Part 1638 has not been amended since it was first issued.

**The Task Force is of the opinion that no action is necessary on Part 1638 at this time, except in connection with possible amendment of Part 1600.**

### ***45 CFR Part 1639 – Welfare Reform***

Part 1639, issued in 1997, implements a restriction contained in the FY 1996 appropriations act that prohibits LSC recipients from initiating legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except for representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.

On February 28, 2001, the United States Supreme Court issued a decision in *Legal Services Corporation v. Velazquez, et al.*, Nos. 99-603 and 99-960, 121 S. Ct. 1043, 2001 WL 193738 (U.S.), striking down as unconstitutional the restriction prohibiting LSC grantees from challenging welfare reform laws when representing clients seeking specific relief from a welfare agency. The Supreme Court invalidated that portion of the underlying statute which provides that representation of an individual eligible client seeking specific relief from a welfare agency may not involve an effort to amend or otherwise challenge existing law because such a qualification constitutes impermissible viewpoint discrimination under the First Amendment. At the same time, the Supreme Court also upheld the lower court's decision that the general restriction on litigation, lobbying, and rulemaking involving an effort to reform a Federal or State welfare system, since these restrictions prohibit recipient involvement in such activities regardless of "the side of the issue" the recipient advocates.

The effect of the *Velazquez* decision is to render the stricken language null and void. This means that the limitation on representation of an individual eligible client seeking specific relief from a welfare agency which prohibits any such representation from involving an effort to amend or otherwise challenge existing law is not valid and may not be enforced or given effect. Thus, notwithstanding that the language of 1639 has yet to be changed, as of the date of the decision, an individual eligible client seeking relief from a welfare agency may be represented by a recipient without regard

to whether the relief involves an effort to amend or otherwise challenge existing welfare reform law.

Although the decision has the effect of rendering that portion of Part 1639 which reflects the stricken provision of the statute void and unenforceable with no further action on the part of LSC, it is appropriate to conform the text of the regulation to the applicable law.

**The Task Force considers Part 1639 a higher priority item and notes that Part 1639 has already been identified as an appropriate subject for rulemaking, and action is being taken in accordance with the LSC Rulemaking Protocol.**

#### ***45 CFR Part 1640 – Application of Federal Law to LSC Recipients***

Part 1640 implements a provision from the FY 1996 appropriation law that subjects LSC recipients to Federal law relating to the proper use of funds. Specifically, Part 1640 provides, that as a condition of receipt of LSC funds, recipients will be subject to Federal civil and criminal statutes relating to fraud, false claims and bribery. Adopted in 1997, the rule has not been amended since.

The OIG is interested in considering revisions to the this rule to include Federal laws not currently listed in the regulation. The FY 1996 appropriations act required that all recipients contractually agree to be subject to “all provisions of Federal law relating to the proper use of Federal funds.” Because the legislative history of the appropriations act provision made clear that Congress meant laws governing “waste, fraud and abuse”, LSC management worked in close consultation with the OIG (which has a statutory mandate to prevent and detect misuse of Federal funds) in devising the list of laws set out in Part 1640. Experience since the promulgation of the rule, however, is such that it now appears that Congress’ intent would be better served by expressly including in the rule additional Federal laws relating to the use of Federal funds.

**The Task Force considers Part 1640 a lower priority item.**

#### ***45 CFR Part 1641 – Debarment, Suspension and Removal of Recipient Auditors***

Part 1641 sets out the authority of the LSC Office of Inspector General to debar, suspend or remove independent public accountants from performing audit services for recipients upon a showing of good cause. The regulations also describes the rights of IPAs and the standards and procedures applicable to debarments, suspensions and removals, respectively. Part 1641 implements a provision in the FY 1996 appropriations



act intended to ensure the reliability of recipient audits. Promulgated in 1999, the rule has not since been amended.

**The Task Force is of the opinion that no action is necessary on Part 1641 at this time, except in connection with possible amendment of Part 1600.**

#### ***45 CFR Part 1642 – Attorneys’ Fees***

Part 1642 prohibits recipients from claiming, collecting or retaining attorneys’ fees. Compensation to an attorney pursuant to court appointments, payments by a governmental agency or other third party to a recipient to represent clients, sanction imposed by court rules and practices or authorized by statute and reimbursement of costs and expenses from an opposing party or from a client are not considered attorneys’ fees under the rule.

Prior to the promulgation of 1642 in 1997, the issue of attorneys’ fees was covered by the Corporation’s regulations at Part 1609, Fee-generating cases. Under the original part 1609 regulations, recipients were prohibited from undertaking a fee-generating cases unless other adequate representation was unavailable, but were permitted to claim and collect attorneys’ fees if the case was a case that the recipient was permitted to take under the fee-generating case standards. The rule further provided that any fees collected could not be used for any purposes prohibited by the LSC Act. In a 1984 revision, LSC adopted some more specific standards relating to the acceptance of and accounting for attorneys’ fees. Under that new rule, fees were required to be accounted for by crediting them to the fund from which the resources to litigate the case came. This accounting change was intended to increase accountability over such funds. The rule also imposed standards for the sharing of fees when LSC funded attorneys acted as co-counsel with private attorneys and required that the fee be recorded during the accounting period in which the program received the award. These changes reflected a concern on the part of LSC that greater accountability over such funds was necessary.

In 1988, LSC published a proposed rule that would have required any attorneys’ fees collected to be credited against the grant funds to be paid to the grantee in the following quarter. LSC justified this proposed change by noting that because any fees obtained would “constitute incidental benefits of the litigation,” they should be treated as a “windfall” to the recipient, creditable against the recipient’s grant. This proposed change was never adopted, however, due to Congressional opposition and the proposed rule was formally withdrawn in 1993.

Included in the FY 1996 statutory revisions was a ban on claiming or collecting attorneys’ fees. The reasoning behind this limitation was “fairness” to private



defendants, who, it was said, were already subsidizing LSC attorneys through the payment of federal taxes and should not, therefore, be required to pay again through the action of an attorneys' fees award. In implementing this prohibition, LSC decided that the attorneys' fees and fee-generating cases issues, although related, were sufficiently separate to warrant separate rules. The changes Although acknowledging that the issues are related, LSC considered the matters. Accordingly, LSC amended Part 1609 to remove all provisions relating to attorneys' fees and adopted a separate rule, Part 1642, dealing with attorneys' fees.

Although the determination was made at the time the subjects of fee-generating cases and attorneys' fees were sufficiently separate to warrant separate regulatory parts, it now appears that the issues are, in fact, interrelated. Accordingly, it may be appropriate to consider a combined regulation that includes the provisions of Part 1609 without substantive change, and which also covers additional fee-related issues, including fees charged by recipients to clients and private co-counsel's applications for fees.

**The Task Force considers Part 1642 a higher priority item.**

#### ***45 CFR Part 1643 – Restriction on Assisted Suicide, Euthanasia and Mercy Killing***

Part 1643 provides that no recipient may use any LSC funds for activities in support of assisted suicide, euthanasia or mercy killing. Adopted in 1997, Part 1643 implements several provisions in the Assisted Suicide Funding Restriction Act of 1997 (P.L. 105-12). The purpose of the Act and the implementing LSC regulations is to ensure that Federal funds not be used to support, assist in, or advocate for assisted suicide, euthanasia or mercy killing. The rule has not been amended since it was first promulgated.

**The Task Force is of the opinion that no action is necessary on Part 1643 at this time, except in connection with possible amendment of Part 1600.**

#### ***45 CFR Part 1644 – Disclosure of Case Information***

Part 1644 requires recipients to disclose certain information to LSC and the public regarding the cases their attorneys file in court. Specifically, Part 1644 requires the disclosure of the name and address of each party to a case, the cause of action, the name and address of the court in which the action has been filed and the case number assigned by the court. The name and address of the parties may be withheld from disclosure if the information is protected by a court rule or order or if the attorney believes that disclosure would create the risk of physical harm to the party(ies). Part

1644 was promulgated in 1998 to implement a provision in LSC's FY 1998 appropriations legislation (P.L. 105-119). The rule has not been amended since that time.

The Task Force is of the opinion that no action is necessary on Part 1644 at this time, except in connection with possible amendment of Part 1600.

## ***Attachment A***

requirements of the Administrative Procedures Act, which governs the rulemaking activities of Federal agencies. Rather, LSC is required to "afford notice and reasonable opportunity for comment to interested parties prior to issuing rules, regulations, and guidelines, and it shall publish in the **Federal Register** at least 30 days prior to their effective date all its rules, regulations, guidelines and instructions." 42 U.S.C. 2999(g).

Throughout its history, LSC has conducted its rulemaking in compliance with the statutory requirements described above, but has not had a written statement of the Board of Directors ("Board") setting forth the procedures to be followed in the course of LSC rulemaking activities. The Board determined that, while there is no legal requirement for LSC to have a written protocol related to rulemaking, having one would serve to advance LSC's policy of conducting its rulemaking activities in a spirit of cooperative dialog with our recipients and other interested parties. Accordingly, on September 18, 2000, at a meeting of its Board of Directors, the Legal Services Corporation adopted a new Rulemaking Protocol to govern its rulemaking activities. The text of the Protocol is set forth below.

It should be noted that, since this Protocol is a statement of LSC internal procedure and is not a "rule, regulation, guideline or instruction," LSC is not required by law to publish this Protocol or seek public comment. LSC is choosing to publish this Protocol in the **Federal Register** (and has also posted it on the LSC website at <http://www.lsc.gov>) in furtherance of LSC's interest in and policy of conducting its business in a fair and open manner.

#### Rulemaking Protocol

This Rulemaking Protocol is intended to reflect the policy of LSC to conduct its rulemaking activities in a spirit of cooperative dialog with our recipients and other interested parties<sup>1</sup> and has the following six objectives:

1. Enhanced implementation of the will of Congress as expressed in the LSC Act, amendments thereto and other statutory enactments;
2. Increased public participation in the manner and method in which LSC promulgates rules;

<sup>1</sup> Although this Draft Protocol reflects LSC policy, it is not intended to and shall not create or confer any rights for or on behalf of any person or party and shall not establish legally enforceable rights against LSC or establish any legally enforceable obligations on the part of LSC, its directors, officers, employees and other agents.

3. The adoption of procedures that reflect the best practices in rulemaking as articulated in the Administrative Procedures Act, the Negotiated Rulemaking Act of 1990 and Executive Order 12866;

4. Implementation of LSC's strategic initiatives as set forth in Strategic Directions, 2000–2005 (adopted January 29, 2000);

5. Formalization of LSC's policies governing rulemaking and specifically reserving specific responsibilities and authorities unto the Board; and

6. Development of a rulemaking protocol that is efficient and effective.

#### Regulatory Policy Direction

The Board, through the Operations and Regulations Committee ("Committee"), provides direction on LSC regulatory policy and establishes priorities for LSC rulemaking activities. The Committee will look to staff to effectuate LSC rulemaking policies and priorities through this Protocol. Final authority over LSC rulemaking policies and actions rests with the Board.

#### Initiation of Rulemaking

The impetus for a rulemaking<sup>2</sup> may come from any one of several sources; Congressional directive; internal LSC initiative (Board or Committee members and/or staff); or a formal request from a member of the regulated community or general public. Once the Board has agreed on a potential subject for rulemaking, LSC's Office of Legal Affairs<sup>3</sup> ("OLA"), in close consultation with appropriate Corporation staff, will develop a Rulemaking Options Paper ("ROP"). The ROP will contain a discussion of the subject for the potential rulemaking, and will include an outline of the policy and legal issues involved. The ROP shall also recommend whether the potential rulemaking should be Negotiated or accomplished by Notice and Comment Rulemaking. The appropriate rulemaking process shall be selected on a case-by-case with full recognition, however, of LSC's policy favoring open and collaborative rulemaking. It is anticipated that most rulemaking will be Negotiated.<sup>4</sup> Once the ROP is

<sup>2</sup> Rulemaking includes both the development of new rules and regulations and the amendment of existing rules and regulations.

<sup>3</sup> The Office of Legal Affairs is the office previously known as the Office of General Counsel and serves as legal advisor and corporate secretary to LSC.

<sup>4</sup> There may be instances in which use of Negotiated Rulemaking is unnecessary or inappropriate, such as for non-controversial issues or issues relating solely to LSC's internal operations. In such cases, LSC may determine that

Continued

## LEGAL SERVICES CORPORATION

### Rulemaking Protocol

**AGENCY:** Legal Services Corporation.

**ACTION:** Announcement of adoption of rulemaking protocol and establishment of new rulemakings notification mailing list.

**SUMMARY:** This notice sets forth the text of a new rulemaking protocol adopted by the LSC Board of Directors which will govern LSC rulemaking activities and announces the establishment of a mailing list for persons and organizations wishing to be notified of future LSC rulemakings.

**DATES:** This Rulemaking Protocol became effective upon its adoption at the LSC Board of Directors Meeting on September 18, 2000.

**FOR FURTHER INFORMATION CONTACT:** Mattie C. Condray, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 750 First Street, NE, Washington, DC 20002–4250; 202/336–8817 (phone); 202/336–8952 (fax); [mcondray@lsc.gov](mailto:mcondray@lsc.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

The Legal Services Corporation is authorized by Congress to issue regulations as necessary to carry out its mission. See 42 U.S.C. 2996(e). LSC, however, is not a "department, agency, or instrumentality of the Federal Government." 42 U.S.C. 2996(d). As such, LSC is not subject to the

developed, it will be submitted to the Committee. The Committee, acting through its Chair, shall consult with the President before deciding whether to proceed as recommended.

If, after consultation with the President, the Committee elects to proceed with a rulemaking, the President will officially so notify the Board. The President will also inform the Inspector General ("IG") that the rulemaking is being undertaken and communicate to the IG the general parameters of the proposed rule and the ROP. Notice that a rulemaking proceeding has begun will also be posted on the LSC website, indicating the subject matter of the rulemaking and whether the rulemaking will be Negotiated or accomplished through Notice and Comment. In addition to website notice, notice by mail will also be given those who have previously requested such notice and are included in the Corporation's mailing list dedicated to that purpose.

#### *Negotiated Rulemaking*

In a Negotiated Rulemaking, a group comprised of LSC representatives and affected and/or interested parties will meet under the direction of a trained facilitator, ("Working Group")<sup>5</sup> with the intention of developing consensus-based positions leading to regulations. The key feature of Negotiated Rulemaking is its collaborative approach, which seeks consensus where possible and decisionmaking by LSC after full dialog with the regulated community and other interested parties.

The President, in consultation with the Committee Chair, will solicit suggestions for appointment to the Working Group from the regulated community, its clients, advocates, the organized bar and other interested parties. The President, working in consultation with the Committee, acting through its Chair, will make appointments of individuals and organizations to the Working Group, including the facilitator and the OLA representative. All groups or organizations asked to participate in the Working Group shall be responsible for selecting and designating their representatives. It is expected that

such issues should be handled solely through Notice and Comment Rulemaking.

<sup>5</sup> The facilitator could be a professional facilitator hired by the LSC or could be an LSC employee who has received training in Alternative Dispute Resolution and facilitation methods (including training in areas such as recognizing leadership styles, methods for team-building, creating consensus and defusing conflict). In either case, the facilitator will be specifically assigned to act in a neutral capacity and not as an advocate of LSC policy or substantive expert in the matter at hand.

membership on the Working Group will be diverse and fully representative of the legal services community and other interested parties.

The Working Group shall meet as necessary to develop a draft Notice of Proposed Rulemaking ("NPRM"). The members of the Working Group will, drawing upon their substantive expertise, discuss the subjects prompting the need for rulemaking and work toward developing a consensus on solutions to the problems identified.

The OLA representative on the Working Group, with the assistance of a subgroup of the membership, shall draft the regulatory language consistent with achieved consensus. The Working Group will review the regulation to ensure it reflects any consensus reached, although the Corporation retains ultimate responsibility for crafting the regulatory language.

The consensus proposal of the group, once developed, must go through the formal rulemaking process as an NPRM. At this point the Notice and Comment process described below will be followed.

On occasion it may happen that no consensus can be reached by the Working Group on a regulatory proposal or some element thereof. In those instances, the President will report this to the Committee and seek direction from the Committee, acting through its Chair, on whether to continue the rulemaking using the Notice and Comment process or to terminate the rulemaking.

#### *Notice and Comment Rulemaking*

In Notice and Comment Rulemaking, LSC develops rulemaking proposals and takes comment on them in writing and at certain publicly designated meetings of the Committee. Employing this process in conjunction with Negotiated Rulemaking will ensure that LSC's policy of cooperative dialog will be carried out in a fair, open and productive manner. LSC believes the Notice and Comment process will allow for an effective dialog between LSC and its recipients and other interested parties, even in those instances in which Negotiated Rulemaking is not used.

OLA will have the primary responsibility for the drafting of the Draft NPRM, which includes both the proposed regulatory text and the proposed preamble, working with management, appropriate staff and the Office of Inspector General ("OIG").<sup>6</sup>

<sup>6</sup> Prior to the development of the NPRM, LSC may do some information gathering (either through seeking written comments or through formal or

The Draft NPRM will be shared with the OIG for review and comment. The Draft NPRM will be submitted to the President with a Statement of Issues. The President may then: approve the Draft NPRM for submission to the Committee for its consideration; return the Draft NPRM to OLA for revisions as necessary; or, jointly with the Committee, terminate the rulemaking.

Once approved, the Draft NPRM will be set for consideration by the Committee at a public meeting. The Draft NPRM and Statement of Issues will be provided to the Committee sufficiently in advance of the meeting to permit their appropriate consideration. The notice of the meeting announcing the placement of the Draft NPRM on the Committee agenda will be published in the **Federal Register** and will recite that the Draft NPRM will be publicly available and will be posted on the LSC website. Posting of the Draft NPRM to the LSC website will be sufficiently in advance of the Committee meeting to permit appropriate consideration by interested parties.

At the Committee meeting, management will present the Draft NPRM with the assistance of OLA and opportunity for public comment will be provided. The Committee will then deliberate and shall decide whether to publish the NPRM or return it to staff for revisions.

Once the NPRM has been approved, OLA will make any necessary technical revisions to document before it is published in the **Federal Register** for comment.<sup>7</sup> The comment period will be at least 30 days and, it is anticipated, in most instances will be 60 days (but could, under appropriate circumstances, be longer). However, the decision as to whether to limit the notice period to 30 days or to provide a longer comment period is a matter entirely within discretion of the Board.

Copies of all comments received will be provided to the Committee and made available to other Board Members upon request. Copies of all comments will also be placed in a public docket available for inspection and copying in the FOIA Reading Room at the Corporation's offices. Copies of comments received in electronic format, along with an index of all comments received, will be placed into an "electronic" docket on the LSC website.

Upon the close of the comment period, OLA will draft a Final Rule

informal in-person outreach other otherwise) as necessary.

<sup>7</sup> During the comment period, LSC may, in its discretion, hold a public hearing at which interested parties make oral presentations, followed by written comments.

(which consists of the regulatory text and preamble).<sup>8</sup> The draft of the Final Rule will be shared with the OIG for review and comment. The draft of the Final Rule will be submitted to the President with a Statement of Issues. The President may then: approve the draft of the Final Rule for submission to the Committee for its consideration; return it to OLA for revisions as necessary; or, jointly with the Committee, terminate the rulemaking.

Once approved, the draft of the Final Rule will be set for consideration by the Committee at a public meeting. The draft of the Final Rule and Statement of Issues will be provided to the Committee and the Board sufficiently in advance of the meeting to permit appropriate consideration. In addition, a notice of the meeting announcing the placement of the Final Rule on the Committee agenda will be published in the **Federal Register**. At the Committee meeting, management will present a summary of the Comments and the draft Final Rule with the assistance of OLA. It is anticipated that the Committee will accept public comment as needed to assist in its deliberations. The Committee will vote on whether to recommend the Final Rule to the Board or return it to staff for revisions.

If the draft Final Rule is approved by the Committee for review by the Board, the Board will consider the draft Final Rule and vote to adopt it or to return it to the Committee for further action. At its discretion, the Board may request the participation of members of the public during its deliberations. Once the Final Rule is adopted by the Board, OLA will make any necessary technical revisions to it and submit the final version for approval for publication to the Board's designee (for example, the Board Chair or the Committee Chair). The Final Rule will then be published in the **Federal Register** and placed on LSC's website.

#### **Establishment of Mailing List**

As noted above, public notice that a rulemaking proceeding has begun will be accomplished through posting a notice to that effect on the LSC website, and by sending notice by mail to those who have previously requested such notice. With this notice, LSC is formally establishing a mailing list dedicated to that purpose. Persons and organizations wishing to be notified by mail when LSC undertakes a rulemaking proceeding should submit a notice indicating such interest and providing

contact information (name, title, organization and mailing address) to Mattie C. Condray at the address listed above.

**Victor M. Fortuno,**

*General Counsel and Vice President for Legal Affairs.*

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**BILLING CODE 7050-01-P**

<sup>8</sup> On rare occasions, it may become necessary for LSC to raise additional issues for comment. In such a case, LSC may issue a Revised NPRM and repeat the comment process.

***Attachment B***

**REGULATIONS REVIEW TASK FORCE FINAL REPORT -- ATTACHMENT B**  
**SUMMARY – BY CATEGORY**

<b>Parts Considered Appropriate to be Deleted</b>	<b>Parts Considered Appropriate for Action – Higher Priority</b>	<b>Parts Considered Appropriate for Action – Lower Priority</b>	<b>Parts for Which No Action is Deemed Necessary<sup>1</sup></b>
Part 1631 – Expenditure of Grant Funds	Part 1600 - Definitions	Part 1602 - FOIA	Part 1601 – Reserved
	Part 1606 – Termination and Debarment Procedures	Part 1604 – Outside Practice of Law	Part 1603 – State Advisory Councils
	Part 1607 – Governing Bodies	Part 1608 – Prohibited Political Activities	Part 1605 – Appeals on Behalf of Clients
	Part 1609 – Fee-Generating Cases	Part 1613 – Restrictions on Legal Assistance – Criminal Proceedings	Part 1610 – Use of non-LSC Funds; Transfers of LSC Funds; Program Integrity
	Part 1611 - Eligibility <sup>2</sup>	Part 1614 – Private Attorney Involvement	Part 1612 – Restrictions on Lobbying
	Part 1616 – Attorney Hiring	Part 1615- Restrictions on Actions Collaterally Attacking Criminal Convictions	Part 1617 – Class Actions
	Part 1618 – Enforcement Procedures	Part 1621 – Client Grievance Procedures	Part 1619 –Disclosure of Information
	Part 1623 – Suspension Procedures	Part 1622 – Public Access to Meetings; Gov’t in the Sunshine Act	Part 1620 – Priorities in use of Resources

<sup>1</sup> Except as in conjunction with revision of Part 1600, to consolidate all definitions.

<sup>2</sup> Part 1611 has already been identified as an appropriate subject for rulemaking.



**REGULATIONS REVIEW TASK FORCE FINAL REPORT -- ATTACHMENT B**  
**SUMMARY – BY CATEGORY**

<b>Parts Considered Appropriate to be Deleted</b>	<b>Parts Considered Appropriate for Action – Higher Priority</b>	<b>Parts Considered Appropriate for Action – Lower Priority</b>	<b>Parts for Which No Action is Deemed Necessary<sup>1</sup></b>
	Part 1624 – Prohibition on Discrimination on the Basis of Handicap	Part 1627 – Subgrants and Membership Fees or Dues	Part 1625 - Reserved
	Part 1626 – Restrictions on Legal Assistance to Aliens <sup>3</sup>	Part 1636 – Client Identity and Statement of Facts	Part 1628 – Recipient Fund Balances
	Part 1639 – Welfare Reform	Part 1640 – Application of Federal law to LSC Recipients	Part 1629 – Bonding of Recipients
	Part 1642 – Attorneys' Fees		Part 1630 – Cost Standards and Procedures
			Part 1632 - Redistricting
			Part 1633 – Restriction on Representation in Certain Eviction Proceedings
			Part 1634 – Competitive Bidding for Grants and Contracts* *pending outcome of review
			Part 1635 - Timekeeping
			Part 1637 – Representation of Prisoners
			Part 1638 – Restriction on Solicitation

<sup>3</sup> Part 1626 has already been identified as an appropriate subject for rulemaking.

**REGULATIONS REVIEW TASK FORCE FINAL REPORT -- ATTACHMENT B**  
**SUMMARY – BY CATEGORY**

<b>Parts Considered Appropriate to be Deleted</b>	<b>Parts Considered Appropriate for Action – Higher Priority</b>	<b>Parts Considered Appropriate for Action – Lower Priority</b>	<b>Parts for Which No Action is Deemed Necessary<sup>1</sup></b>
			Part 1641 – Debarment, Suspension and Removal of Recipient Auditors
			Part 1643 – Restriction on Assisted Suicide, Euthanasia and Mercy Killing
			Part 1644 – Disclosure of Case Information

## ***Attachment C***

**REGULATIONS REVIEW TASK FORCE FINAL REPORT -- ATTACHMENT C**  
**SUMMARY – BY REGULATION**

<b>45 CFR Part Number</b>	<b>Subject</b>	<b>Task Force Analysis</b>
1600	Definitions	Appropriate for Action – Higher Priority
1601	Reserved	No Action Necessary
1602	FOIA	Appropriate for Action – Lower Priority
1603	State Advisory Councils	No Action Necessary
1604	Outside Practice of Law	Appropriate for Action – Lower Priority
1605	Appeals on Behalf of Clients	No Action Necessary
1606	Terminations and Debarment Procedures	Appropriate for Action – Higher Priority
1607	Governing Bodies	Appropriate for Action – Higher Priority
1608	Prohibited Political Activities	Appropriate for Action – Lower Priority
1609	Fee-generating Cases	Appropriate for Action – Higher Priority
1610	Use of non-LSC Funds; Transfers of LSC Funds; Program Integrity	No Action Necessary
1611	Eligibility	Negotiated Rulemaking Action in Progress
1612	Restrictions on Lobbying	No Action Necessary
1613	Restrictions on Legal Assistance – Criminal Proceedings	Appropriate for Action – Lower Priority

***REGULATIONS REVIEW TASK FORCE FINAL REPORT -- ATTACHMENT C***  
***SUMMARY – BY REGULATION***

<b>45 CFR Part Number</b>	<b>Subject</b>	<b>Task Force Analysis</b>
1614	Private Attorney Involvement	Appropriate for Action – Lower Priority
1615	Restrictions on Actions Collaterally Attacking Criminal Convictions	Appropriate for Action – Lower Priority
1616	Attorney Hiring	Appropriate for Action – Higher Priority
1617	Class Actions	No Action Necessary
1618	Enforcement Procedures	Appropriate for Action – Higher Priority
1619	Disclosure of Information	No Action Necessary
1620	Priorities in Use of Resources	No Action Necessary
1621	Client Grievance Procedures	Appropriate for Action – Lower Priority
1622	Public Access to Meetings – Gov't in the Sunshine Act	Appropriate for Action – Lower Priority
1623	Suspension Procedures	Appropriate for Action – Higher Priority
1624	Prohibition of Discrimination on the Basis of Handicap	Appropriate for Action – Higher Priority
1625	Reserved	No Action Necessary
1626	Restrictions on Legal Assistance to Aliens	Negotiated Rulemaking Action in Progress

**REGULATIONS REVIEW TASK FORCE FINAL REPORT -- ATTACHMENT C**  
**SUMMARY – BY REGULATION**

<b>45 CFR Part Number</b>	<b>Subject</b>	<b>Task Force Analysis</b>
1627	Subgrants and Membership Fees or Dues	Appropriate for Action – Lower Priority
1628	Recipient Fund Balances	No Action Necessary
1629	Bonding of Recipients	No Action Necessary
1630	Cost Standards and Procedures	No Action Necessary
1631	Expenditure of Grant Funds	Appropriate for Deletion
1632	Redistricting	No Action Necessary
1633	Restriction on Representation in Certain Eviction Proceedings	No Action Necessary
1634	Competitive Bidding for Grants and Contracts	No Action Necessary (pending outcome of review)
1635	Timekeeping Requirements	No Action Necessary
1636	Client Identity and Statement of Facts	Appropriate for Action – Lower Priority
1637	Representation of Prisoners	No Action Necessary
1638	Restriction on Solicitation	No Action Necessary
1639	Welfare Reform	Appropriate for Action – Higher Priority

**REGULATIONS REVIEW TASK FORCE FINAL REPORT -- ATTACHMENT C**  
**SUMMARY – BY REGULATION**

<b>45 CFR Part Number</b>	<b>Subject</b>	<b>Task Force Analysis</b>
1640	Application of Federal Law to LSC Recipients	Appropriate for Action – Lower Priority
1641	Debarment, Suspension and Removal of Auditors	No Action Necessary
1642	Attorney's Fees	Appropriate for Action – Higher Priority
1643	Restriction on Assisted Suicide, Euthanasia and Mercy Killing	No Action Necessary
1644	Disclosure of Case Information	No Action Necessary