

**ADVISORY OPINION
NO. 2013-007**

DATE: October 1, 2013

SUBJ: MLSC's Eligibility for Governing Body Waivers

Questions Presented

Is Micronesian Legal Services Corporation (MLSC) entitled to a mandatory or discretionary waiver of the Legal Services Corporation (LSC) governing body requirements (1) that at least 60% of its board of directors be comprised of attorney members, (2) that a majority of its board be comprised of attorneys who are appointed by a bar association representing a majority of the attorneys in the service area, and (3) that its client-eligible board members be appointed by a variety of appropriate grantee-designated groups?

Short Answer and Recommendations

Under 45 C.F.R. § 1607.6(a), MLSC is entitled to a mandatory waiver of the LSC Act's requirement that 60% of its board be comprised of attorney members (the "60% attorney requirement") because MLSC was receiving funding from the Office of Economic Opportunity (OEO) and had a non-attorney majority board when LSC was established on July 25, 1974. Although MLSC will always meet these prerequisites (*i.e.*, its historical circumstances as of July 25, 1974 will not change), it may not always need or want a waiver, especially if future circumstances permit full compliance. Thus, to implement the Act's directive that the waiver only be available "upon application," we recommend that the President of LSC grant MLSC a mandatory waiver, but require MLSC to reapply every ten years.

MLSC is also entitled to a mandatory waiver of the first of two requirements that a majority of its board (51%) be comprised of attorneys (the "51% attorney-majority requirement") who are appointed by a bar association representing a majority of the attorneys in the service area (the "manner of appointment requirement"). These additional requirements derive from a provision of LSC's annual appropriations act commonly referred to as "the McCollum Amendment." Although the McCollum Amendment, unlike the LSC Act, does not expressly provide for a waiver of its provisions, standard canons of statutory construction require that it be construed narrowly and, if possible, harmonized with the LSC Act to avoid an implied repeal of the Act's waiver provision. A reasonable construction of the McCollum Amendment, reinforced by its legislative history and longstanding LSC policy and practice, supports extending the Act's waiver provisions to the McCollum Amendment's *51% attorney-majority* requirement. Accordingly, we recommend that the President of LSC grant MLSC a mandatory waiver of the McCollum Amendment's *51% attorney-majority* requirement, subject to reapplication every ten years.

There is no basis, however, for concluding that the McCollum Amendment's *manner of appointment* requirement is subject to mandatory waiver. The LSC Act does not contain a manner of appointment requirement, making any extension of its waiver provisions to McCollum's manner of

appointment requirement unnecessary to reconcile the statutes. Thus, *mandatory* waivers are unavailable for the McCollum Amendment's manner of appointment requirements

Discretionary waivers are also unavailable for the McCollum Amendment's manner of appointment requirement. That requirement is "mandated by applicable law" and, therefore, cannot be waived under LSC's regulations at 45 C.F.R. § 1607.6(b). Thus, MLSC must comply with LSC's manner of appointment requirements at 45 C.F.R. § 1607.3(b)(1). MLSC's current practice of allowing the MLSC Board itself to collectively appoint its second attorney member does not comply with 45 C.F.R. § 1607.3(b)(1). We therefore recommend that the President of LSC refer this matter to LSC's Vice President for Grants Management for additional follow-up.

MLSC's request for a discretionary waiver of LSC's client-eligible appointment requirements is unnecessary. MLSC's currently designated appointing authorities – the legislative bodies of the jurisdictions within its service area – reasonably reflect the variety of interests within the client community, and thereby comply with the appointment requirements of 45 C.F.R. § 1607.3(c).

Background

I. MLSC's Waiver Request

MLSC has requested mandatory and discretionary waivers of the LSC governing body requirements of 45 C.F.R. §§ 1607.3(b) and (c) (which include the attorney and client-eligible board composition and manner of appointment requirements, respectively) on the grounds that "MLSC preceded the creation of Legal Service Corporation and its board composition requirements have long been designed to ensure representation on the board for each of the separate governmental jurisdictions that comprise the unique area served by the program."¹ Specifically, MLSC seeks a waiver from the requirements that (1) at least 60% of its board of directors be comprised of attorney members, (2) that a majority of its board be comprised of attorneys who are appointed by the majority bar association in the service area, and (3) that its client-eligible board members be appointed by a variety of appropriate grantee-designated groups.²

On at least two occasions, LSC has granted MLSC waivers of the majority-attorney board composition requirement.³ On at least one occasion, LSC granted MLSC a *mandatory* waiver of the

¹ Letter from Ben Weber, Acting Executive Director, MLSC, to Janet LaBella, Director of LSC's Office of Program Performance (December 28, 2011) ("2011 Governing Body Waiver Request").

² MLSC submitted supplemental information in support of its waiver request of the client-eligible board member appointment requirements. Letter from Lee Pliscou, Executive Director, MLSC, to Stephanie Edelstein, Program Counsel in LSC's Office of Program Performance (December 27, 2012) ("MLSC's Supplemental Information").

³ See Letter from Don Bogard, President of LSC, to Ted Mitchell, Executive Director of MLSC (May 6, 1983) ("1983 Waiver") (This letter cannot be located so it is unclear whether the 1983 waiver was a mandatory or a discretionary waiver. It was drafted prior to the enactment of the McCollum Amendment and, therefore, likely did not contain a discussion of the interplay between the governing body requirements of the LSC Act, McCollum Amendment, and § 1607 of the LSC regulations); see also, Letter from John P. O'Hara, President of LSC, to Ronald Kirschenheiter, Executive Director of MLSC (October 9, 1991) ("1991 Waiver"). LSC's historical records on this point are not complete, so additional waivers may have been granted.

attorney manner of appointment requirement.⁴ It does not appear that LSC has previously granted MLSC a waiver of the client-eligible appointment requirements.

II. The Challenge of Providing Legal Services in Micronesia

Established on April 3, 1970 under the Trust Territory Code, and later as a non-profit corporation of the Commonwealth of the Northern Mariana Islands (CNMI), MLSC provides free legal assistance in civil matters to low-income Micronesians.⁵

MLSC's geographic service area is larger than the continental United States, spanning approximately 3,000 miles from east to west and 1,000 miles from north to south.⁶ This area encompasses three sovereign nations – the Republic of the Marshall Islands (“the Marshalls” or “RMI”), the Federated States of Micronesia (“FSM”), and the Republic of Palau (collectively the “Freely Associated States”) – and one American territory, the CNMI.⁷ Together, these four entities comprise the island region known as Micronesia.⁸

The permanent population of Micronesia is about 232,000.⁹ Almost 90% of Micronesians qualify for MLSC services (*i.e.*, are living below 125% of the federal poverty line).¹⁰ Eighteen

⁴ See 1991 Waiver at 2.

⁵ 2011 Governing Body Waiver Request, *supra* at 1; MLSC, *501(c)(3) Status!*, Day in Court, Oct. 16, 2012, <http://mlsc-marianas.blogspot.com/2012/10/501c3-status.html> (last visited December 14, 2012).

⁶ Cynthia Kagidawa, *State Justice Report for the Community of Micronesia*, at 1 (May 8, 2002); see also 2011 Governing Body Waiver Request, at 2.

⁷ *Id.* at 1-2. The Freely Associated States and CNMI were formerly part of the Trust Territory of the Pacific Islands, a United Nations trusteeship administered by United States Department of the Interior from 1941 to 1994. The LSC Act defined the Trust Territory of the Pacific Islands as a “State” for the purposes of the Act. 42 U.S.C. § 2996a(8) (“‘State’ means ... the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.”). The Act thus conferred eligibility for LSC-funded legal services on Trust Territory residents to the same extent as residents of any other state of the United States. See 42 U.S.C. § 2996e(a)(1)(A)(ii) (“[T]he Corporation is authorized ... to make grants to and contracts with State ... governments ... for the purpose of providing legal assistance to eligible clients under this title.”).

In 1976, Congress approved the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, which entitled CNMI to “the full range of federal programs and services available to territories of the United States.” See Pub. L. No. 94-241, § 703(a) (codified at 48 U.S.C. § 1801 *et seq.*). Because the LSC Act applies to territories of the United States, 42 U.S.C. § 2996a(8), CNMI is eligible for LSC funding as a matter of law.

In 1986, FMS and the Marshalls became sovereign nations after entering into a Compact of Free Association with the United States. Pub. L. No. 99-239 (codified at 48 U.S.C. § 1901, *et seq.*) The Compact expressly required that LSC programs and services be made available to the Marshalls and FSM. Pub. L. No. 99-239, § 105(h)(1)(A); 48 U.S.C. § 1905(h)(1)(A). This Compact was amended in 2003, ensuring LSC funding to low income citizens of the Marshalls and FSM until 2023. See Pub. L. No. 108-188, § 105(f)(1)(C); 48 U.S.C. § 1921(d)(f)(1)(C). Palau receives LSC funding pursuant to a separate Compact of Free Association, which makes Section 105 of the Marshall’s and FMS’ Compact of Free Association Act of 1983 and its 2003 amendment applicable to Palau. Pub. L. No. 99-658, title I, § 102, 100 Stat. 3675 (codified at 48 U.S.C. 1932(b)).

⁸ *Id.* at 1.

⁹ Wikipedia, *List of Countries by Population*, http://en.wikipedia.org/wiki/List_of_countries_by_population (last visited Dec. 14, 2012), and U.S. Census Bureau Releases 2010 Census Population Counts for the Northern Mariana Islands, Aug. 24, 2011, <http://www.census.gov/2010census/news/releases/operations/cb11-cn178.html> (last visited Dec. 14, 2012).

¹⁰ Kagidawa, at 7.

languages are spoken throughout the culturally diverse region.¹¹ Tribal traditions and customs (including caste systems) continue to permeate many aspects of public life, including the developing governmental systems in each country.¹² Throughout Micronesia, a very strong emphasis is placed on “traditional” or “customary” law in contrast to United States common law.¹³

Very few lawyers practice in Micronesia. There are no attorneys on three of the seven islands where MLSC has offices (Ebeye, Kosrae, and Chuuk), and there are only about 5 private attorneys practicing in the Marshalls, 7 in FMS, and 16 in Palau (down from 17 in 2010).¹⁴ While the number of private attorneys in CNMI is slightly higher, the number remains relatively low at 51 (down from 56 in 2010).¹⁵ The private bar is supplemented by local “trial counselors” (essentially paralegals, whose education and roles are akin to tribal advocates in Native American service areas), but they have no formal legal training, are unlicensed, and customarily work on a part-time basis, making them ill-suited for complex civil matters.¹⁶ For these reasons, LSC has granted MLSC a complete Private Attorney Involvement (PAI) waiver for the past fifteen years.¹⁷

Micronesia has just four bar associations: the Law Society in RMI, the Yap State Bar Association in FMS, the Palau Bar Association, and the CNMI Bar.¹⁸ Only two bar associations, CMNI and Palau, remotely resemble the U.S. model.¹⁹ But even these bar associations have low membership, many of which are in inactive status, are located outside MLSC’s service area (in Guam or Hawaii, for example), or are unlicensed trial counselors.²⁰

Just two other non-profit organizations operate within Micronesia: an abused women’s shelter in CNMI and a woman’s association in FSM (in the more industrialized and economically developed CNMI, however, U.S. federal assistance programs are available).²¹

III. MLSC’s Current Governing Board Composition and Appointment Mechanisms

MLSC’s bylaws require that its board of directors be comprised of nine members, two of which must be attorneys.²² The legislative bodies of the Freely Associated States select six of the board members.²³ Customarily, these members are non-attorney legislators and community

¹¹ Ethnologue: Languages of the World, Seventeenth Edition (M. Paul Lewis et al. eds., 2013), available at <http://www.ethnologue.com> (last visited August 16, 2013).

¹² Kagidawa, at 2.

¹³ *Id.*

¹⁴ Letter from Benjamin Weber, Acting Executive Director of MLSC, to Lora Rath, Acting Director of LSC’s Office of Compliance & Enforcement, LSC (April 2, 2012) (requesting a PAI Waiver for 2012) (“2012 PAI Waiver Request”).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Email from Charles Crittenden, Program Analyst in LSC’s Office of Compliance & Enforcement, to Rebecca Weir, Assistant General Counsel with LSC’s Office of Legal Affairs (December 6, 2012) (on file with OLA).

¹⁸ 2012 PAI Waiver Request, at 2.

¹⁹ *Id.*

²⁰ See CNMI Bar Association, Members, <http://www.cnmibar.net/members.asp> (last visited Dec. 14, 2012); Palau Bar Association, Members, <http://www.palaubar.com/barapp/Members.pba> (last visited Dec. 14, 2012).

²¹ 2011 Governing Body Waiver Request, at 2.

²² Corporate Bylaws, Micronesian Legal Services Corporation, Art. I, Sec. 2 (2011).

²³ *Id.*

leaders.²⁴ The seventh member, a licensed attorney, is selected by the CNMI Bar.²⁵ These seven members, in turn, select two at-large members, one of whom must be a licensed attorney.²⁶ Due to the unique structure and geographic circumstances of the MLSC service area, LSC expressly agreed to this governing board composition and selection policy.²⁷

Currently, five of MLSC's nine board members (56%) are client-eligible.²⁸ Pursuant to its bylaws, four of its current board members were selected by the FSM and Palau state legislatures, and one was appointed by the board itself to serve as an at-large member.²⁹

From its inception in 1971 to 1975, all of MLSC's board members were non-attorneys.³⁰ MLSC operated with OEO funding until LSC was established in 1974, at which time MLSC applied for and received LSC funding.³¹

Analysis

I. Applicable Law

A. Section 1007(c) of the LSC Act

LSC's governing body requirements originate from the LSC Act and LSC's annual appropriation statutes. In relevant part, § 1007(c) of the Act provides:

In making grants or entering into contracts for legal assistance, the Corporation shall insure that *any recipient organized solely for the purpose of providing legal assistance to eligible clients is governed by a body at least 60 percent of which consists of attorneys* who are members of the bar of the State in which legal assistance is to be provided (except that the Corporation (1) shall, upon application, grant waivers to permit a legal services program, supported under section 2809(a)(3) of this title, which on July 25, 1974, has a majority of persons who are not attorneys on its policy-making board to continue such a non-attorney majority under the provisions of this subchapter, and (2) may grant, pursuant to regulations issued by the Corporation, such a waiver for recipients which, because of the nature of the population they serve, are unable to comply with such requirement) *and at least one-third of which consists of persons who are, when selected, eligible clients* who may also be representatives of associations or organizations of eligible clients. Any such attorney, while serving on such board, shall not receive compensation from a recipient.

42 U.S.C. § 2996f(c) (emphasis added). Thus, under the LSC Act, absent a waiver, grantee governing bodies must be composed of a majority of attorneys (at least 60%) and a minority of eligible clients (at least 33%). *Id.* This requirement leaves only 7% of the board for "other"

²⁴ 2011 Governing Body Waiver Request, at 1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Memorandum from Kathy Watson, Research Analyst in LSC's Office of Field Services (OFS), to Ellen J. Smead, Director of OFS, (April 8, 1991).

²⁸ MLSC's Supplemental Information, note 1, *supra* at 1.

²⁹ *Id.*

³⁰ Affidavit of Herman R. Guerrero, ¶¶ 2 and 3 (February 2, 2012) ("Guerrero Affidavit").

³¹ *Id.* ¶ 6.

members, such as accounting, fundraising, or business management experts. The 60% attorney requirement *must* be waived for former recipients of OEO funding that had non-attorney majority boards when LSC was established, and *may* be waived, in LSC's discretion, when the nature of the service area makes grantee compliance with the 60% attorney requirement impossible. *Id.*

B. The McCollum Amendment

Section 502 of LSC's FY 1983 appropriations act, commonly referred to as "the McCollum Amendment" after its sponsor Rep. William McCollum (R-FL), imposed additional governing body requirements on LSC grantees. Pub. L. 97-377, 96 Stat. 1874 (1982). Congress has included some version of the McCollum Amendment in all of LSC's subsequent appropriations, including at Section 502 of LSC's 1996 appropriations act, which has been incorporated by reference every year thereafter.³² Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, Title V, § 502(2)(B), 110 Stat. 1321 (April 26, 1996) ("1996 Appropriation Act"), incorporated by reference in subsequent appropriations, *see, e.g.*, Commerce, Justice, Science, and Related

³² The original text of the McCollum Amendment appeared in LSC's 1981 reauthorization bill, H.R. 3480, to amend Section 1006(a)(1) of the LSC Act (relating to corporate grantmaking powers, not governing bodies). It read:

Section 1006(a)(1) of the Legal Services Corporation Act is amended to read as follows: "(1) to provide financial assistance to and to make grants to and contracts with (A) qualified nonprofit organizations chartered under the laws of one of the States for the sole purpose of furnishing legal assistance to eligible clients, the majority of the board of directors or other governing body of which organization is comprised of attorneys who are admitted to practice in one of the States and who are appointed to terms of office on such board or body by the governing bodies of State, county, or municipal bar associations the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance, and (B) private attorneys for the sole purpose of furnishing legal assistance to eligible clients pursuant to the provisions of section 1007(a)(12).

188 Cong. Rec. H12569 (daily ed. June 16, 1981). When it became clear that the reauthorization bill was not going to pass, the McCollum Amendment was added as a rider to LSC's FY 1983 appropriation statute (a Continuing Resolution):

Provided further, that none of the funds appropriated in this Act for the Legal Services Corporation shall be used by the Corporation in making grants or entering into contracts for legal assistance unless the Corporation insures that the recipient is either (1) a private attorney or attorneys (for the sole purpose of furnishing legal assistance to eligible clients) or (2) a qualified nonprofit organization chartered under the laws of one of the States furnishing legal assistance to eligible clients, the majority of the board of directors or other governing body of which organization is comprised of attorneys who are admitted to practice in one of the States and who are appointed to terms of office on such board or body by the governing bodies of State, county, or municipal bar associations the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance

Pub. L. 97-377, 96 Stat. 1874 (1982). The text of the McCollum Amendment was revised in 1984 to broaden the scope of organizations that would be eligible for LSC funding:

Provided further, that none of the funds appropriated in this Act for the Legal Services Corporation shall be used by the Corporation in making grants or entering into contracts for legal assistance unless the Corporation insures that the recipient is either (1) a private attorney or attorneys (for the sole purpose of furnishing legal assistance to eligible clients) or (2) a qualified nonprofit organization chartered under the laws of one of the States, *a purpose of which* furnishing legal assistance to eligible clients, the majority of the board of directors or other governing body of which organization is comprised of attorneys who are admitted to practice in one of the States and who are appointed to terms of office on such board or body by the governing bodies of State, county, or municipal bar associations the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance. Pub. L. 98-166, 97 Stat. 1092 (1983) (emphasis added); *Compare with* Pub. L. 97-377, 96 Stat. 1874 (1982) ("for the sole purpose of").

Agencies Appropriations Act, 2012, Pub. L. 112-55, Div. B, Title IV, 125 Stat. 629 (2011). The McCollum Amendment, in its current form and relevant part, provides that:

None of the funds appropriated in this Act to the Legal Services Corporation shall be used by the Corporation to make a grant, or enter into a contract, for the provision of legal assistance unless the Corporation ensures that the person or entity receiving funding to provide such legal assistance is—

...

- (2) a qualified nonprofit organization, chartered under the laws of a State or the District of Columbia, that-
 - (A) furnishes legal assistance to eligible clients; and
 - (B) is governed by a board of directors or other governing body, the majority of which is comprised of attorneys who--
 - (i) are admitted to practice in a State or the District of Columbia; and
 - (ii) are appointed to terms of office on such board or body by the governing body of a State, county, or municipal bar association, the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance;

...

Pub. L. 104-134, § 502(2)(B), 110 Stat. 1321 (April 26, 1996). Thus, by its plain language, the McCollum Amendment addresses both board composition *and* the manner of appointment for attorney board members.³³ First, it requires a majority-attorney board (at least 51%).³⁴ *Id.* § 502(2)(B). Second, a qualified bar association must appoint the 51% attorney-majority. *Id.* § 502(2)(B)(2)(ii). Unlike the LSC Act, the McCollum Amendment provides no waiver provision for its board composition requirements. Accordingly, there is a question of how to reconcile the McCollum Amendment, which requires majority-attorney boards without exception, and the Act, which requires mandatory waivers of majority-attorney boards for certain grantees, like MLSC, that have historically had non-attorney majority boards.³⁵

³³ By imposing these requirements on recipient boards, Rep. McCollum intended to de-politicize LSC recipients and prevent self-selecting and self-perpetuating governing bodies by ensuring that local bar associations, not special interest groups, would “control” them. *See* 188 Cong. Rec. H2969; 2986 (daily ed. June 16, 1981) (remarks of Rep. McCollum).

³⁴ Since its inclusion in LSC’s FY 1983 appropriations statute (which was a Continuing Resolution), there have been conflicting calculations of what constitutes “a majority” for purposes of the McCollum Amendment. For example, the preamble to the 1982 rulemaking implementing the McCollum Amendment and 1983 rulemaking defined the term as “51%.” But in a later rulemaking and at least one OLA internal opinion, it was defined as “50%.” *See* Legal Services Corporation Final Rule on Governing Bodies, 59 Fed. Reg. 65,249, 65,251 (Dec. 19, 1994); OLA Internal Opinion No. IN-2009-2001, at 3. Because a majority is greater than 50%, and we believe that 51% is a more apt definition, and will refer to that calculation throughout this opinion.

³⁵ There is also a potential conflict between the McCollum Amendment and the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (“Covenant”) and RMI, FMS, and Palau’s Compacts of Free Association with the United States (“Compacts”). *See* Background, *supra*, at Sec. II, n.3. If the McCollum Amendment’s board composition requirements were non-waivable, and MLSC was unable to assemble a 51% attorney-governing board, then MLSC could be rendered ineligible for LSC funding under § 502(2)(B) of LSC’s appropriation act. This would place the McCollum Amendment in direct conflict with the Covenant and Compacts, which expressly require LSC-funded legal services to be made available to low-income Micronesians. *See* Pub. L. No. 99-239, *supra* note 4; *see also* Pub. L. No. 94-241, *supra*, note 4.

C. LSC Governing Body Regulations

LSC regulations at 45 C.F.R. §1607.3 implement the governing body requirements of both the LSC Act and the McCollum Amendment:

- (b) At least sixty percent (60%) of a governing body shall be attorney members.
 - (1) A majority of the members of the governing body shall be attorney members appointed by the governing body(ies) of one or more State, county or municipal bar associations, the membership of which represents a majority of attorneys practicing law in the localities in which the recipient provides legal assistance.
 - (i) Appointments may be made either by the bar association which represents a majority of attorneys in the recipient's service area or by bar associations which collectively represent a majority of the attorneys practicing law in the recipient's service area.
 - (ii) Recipients that provide legal assistance in more than one State may provide that appointments of attorney members be made by the appropriate bar association(s) in the State(s) or locality(ies) in which the recipient's principal office is located or in which the recipient provides legal assistance.
 - (2) Any additional attorney members may be selected by the recipient's governing body or may be appointed by other organizations designated by the recipient which have an interest in the delivery of legal services to the poor.
 - (3) Appointments shall be made so as to insure that the attorney members reasonably reflect the diversity of the legal community and the population of the areas served by the recipient, including race, ethnicity, gender and other similar factors.
- (c) At least one-third of the members of a recipient's governing body shall be eligible clients when appointed. The members who are eligible clients shall be appointed by a variety of appropriate groups designated by the recipient that may include, but are not limited to, client and neighborhood associations and community-based organizations which advocate for or deliver services or resources to the client community served by the recipient. Recipients shall designate groups in a manner that reflects, to the extent possible, the variety of interests within the client community, and eligible client members should be selected so that they reasonably reflect the diversity of the eligible client population served by the recipient, including race, gender, ethnicity and other similar factors.

45 C.F.R. §§ 1607.3(b) and (c). Thus, under the regulations, LSC grantee governing bodies must have a membership of at least 60% attorneys, *id.* § 1607.3(b), 51% of whom must be appointed under McCollum Amendment terms. *Id.* § 1607.3(b)(1). Thirty-three percent of each grantee's governing body must be composed of eligible clients, *id.* § 1607.3(c), who must be appointed by grantee-designated groups reflecting the variety of interests within the client community. *Id.* The grantee's governing body may appoint the remaining 7% of the board, which may, but need not, be attorneys. *Id.* § 1607.3(d). As a result of these competing requirements, grantee board members are sometimes referred to as "McCollum attorneys," "attorneys," "eligible clients," and "other members."

D. Governing Body Waivers: The Interplay between the Act, the McCollum Amendment, and Part 1607

LSC regulations, in accordance with the Act, authorize the LSC president to waive some governing body requirements when certain conditions are met:

- (1) Upon application, the president *shall* waive the requirements of [Part 1607] to permit a recipient that was funded under § 222(a)(3) of the Economic Opportunity Act of 1964 and, on July 25, 1974, had a majority of persons who were not attorneys on its governing body, to continue such non-attorney majority.
- (2) Upon application, the president *may* waive any of the requirements of [Part 1607] which are not mandated by applicable law if a recipient demonstrates that it cannot comply with them because of:
 - (1) The nature of the population, legal community or area served; or
 - (2) Special circumstances, including but not limited to, conflicting requirements of the recipient's other major funding source(s) or State law.

45 C.F.R. §§ 1607.6(a) and (b) (emphasis added). Thus, § 1607.6(a) implements the Act's *mandatory* waiver provision,³⁶ exempting certain grantees from the majority-attorney board composition requirements.³⁷ The breadth of this regulation raises a question of how to reconcile it with the McCollum Amendment, because that legislation does not provide for a waiver of its provisions. We address this question below.

Section 1607.6(b), on the other hand, implements the Act's *discretionary* waiver provision, exempting any grantee that is unable to comply with a governing body requirement "not mandated by law" due to the nature of its population, legal community, service area, or other special circumstances.³⁸ The McCollum Amendment requirements, which derive from appropriation acts, are "mandated by law" and are not, therefore, waivable under § 1607.6(b).

II. Reconciling the McCollum Amendment with the Act

As previously discussed, section 1007(c) of the LSC Act, implemented at 45 C.F.R. § 1607.6(a), imposes a *mandatory* obligation on LSC to waive the Act's 60% attorney board composition requirement for certain grantees. The McCollum Amendment – an appropriations rider – requires LSC to ensure that all grantees, without exception, have 51% majority-attorney boards. MLSC's entitlement to a waiver depends on whether the LSC Act's waiver provision applies to the McCollum Amendment's 51% attorney requirement.

In considering this question, we turn to well-established canons of statutory construction. "While appropriations acts are 'Acts of Congress' which can substantively change existing law,

³⁶ Compare 45 C.F.R. § 1607(a) ("Upon application, the president shall waive the requirements of [Part 1607] to permit a recipient that was funded under § 222(a)(3) of the Economic Opportunity Act of 1964 and, on July 25, 1974, had a majority of persons who were not attorneys on its governing body, to continue such non-attorney majority") with 42 U.S.C. 2996f(c), LSC Act §1007(c) ("[T]he Corporation (1) shall, upon application, grant waivers to permit a legal services program, supported under section 2809(a)(3) of this title, which on July 25, 1974, ha[d] a majority of persons who are not attorneys on its policy-making board to continue such a non-attorney majority under the provisions of this subchapter ...").

³⁷ Mandatory waivers do not apply to manner of appointment requirements because they bear no relation to a recipient's ability "to continue [its] non-attorney majority." 45 C.F.R. § 1607.6(a).

³⁸ Compare 45 C.F.R. § 1607(b) ("Upon application, the president may waive any of the requirements of [Part 1607] which are not mandated by applicable law if a recipient demonstrates that it cannot comply with them because of: (1) The nature of the population, legal community or area served; or (2) Special circumstances, including but not limited to, conflicting requirements of the recipient's other major funding source(s) or State law.") with 42 U.S.C. 2996f(c), LSC Act §1007(c) ("[T]he Corporation ... (2) may grant, pursuant to regulations issued by the Corporation, such a waiver for recipients which, because of the nature of the population they serve, are unable to comply with such requirement.").

there is a very strong presumption that they do not.” *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000). “[T]he established rule [is] that, when appropriations measures arguably conflict with the underlying authorizing legislation, their effect must be construed narrowly; such measures have the limited and specific purpose of providing funds for authorized programs.” *Id.* (citing *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984)); *see also*, *Andrus v. Sierra Club*, 442 U.S. 347, 361 (1979) (“The distinction between appropriations and substantive legislation is maintained ... to enable the Appropriations Committees to concentrate on financial issues and to prevent them from trespassing on substantive legislation.”).

It is also a “cardinal rule” of statutory construction that the repeal of statutes by implication is disfavored. Courts presume that Congress, in passing a new statute, ordinarily does not intend to displace laws already in effect in the absence of expressed intent. *Calloway*, 216 F.3d at 10 (“The legislature’s intention to repeal must be clear and manifest.”) (citing *Tennessee Valley Authority (TVA) v. Hill*, 437 U.S. 153, 190 (1978)). This policy applies with even greater force when the claimed repeal rests solely on an appropriations act. *TVA*, 437 U.S. at 189.

A court may examine legislative history to determine whether a repeal was intended. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-55 (1976) (examining the legislative history of the Securities and Exchange Act and concluding that no repeal of the conflicting National Bank Act was intended). Absent an affirmative intent to repeal, “the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable,” in which case, the latter statute prevails. *TVA*, 437 U.S. at 190. Courts go to great lengths, however, to harmonize conflicting statutes *by any reasonable construction* in order to avoid a finding of irreconcilability. *See Radzanower*, 426 U.S. at 164 (J. Stevens, dissenting) (“When acts can be harmonized by a fair and liberal construction it must be done.”).

A. Congress Did Not Express Intent to Repeal the Act’s Mandatory Waiver Provision

In light of the “very strong presumption” that appropriation acts do not amend underlying authorizing law, and the “cardinal rule” against implied repeals, a straightforward question is presented: Did Congress express intent for the McCollum Amendment to amend or repeal the Act’s mandatory waiver provision?

The plain language of the McCollum Amendment makes no reference to the LSC Act,³⁹ nor does it suggest an intention to limit LSC’s waiver authority; it is simply silent on this point. This is not surprising given that the McCollum Amendment was originally introduced to amend section 1006(a)(1)(A) of the LSC Act (relating to LSC’s corporate grantmaking powers, not grantee governing body requirements) as part of LSC’s 1981 reauthorization bill, H.R. 3480. *Legal Services Corporation Amendment Act*, H.R. 3480, 97th Cong. (1981). It was only when the reauthorization failed that Congress attached the McCollum Amendment, without any reference to section 1006(a)(1)(A), as a rider to LSC’s FY 1983 appropriation and every appropriation thereafter. *See McCollum Amendment*, *supra* note 32.

³⁹ The McCollum Amendment does refer to “this Act,” but it was a reference to Pub. L. 104-134, the omnibus appropriation act within which the McCollum Amendment was included.

The lack of any express intent to repeal the LSC Act waiver provisions is significant. When Congress wants to amend or repeal the LSC Act via appropriations act, it knows precisely how to do so. The rider *directly following* the McCollum Amendment (relating to the implementation of a competitive grant system) *explicitly repealed* two provisions of the Act that otherwise would have given grantees the right to interim funding and due process during competitive grant transition periods: “[f]or purposes of the funding provided in this act, *rights under §§ 1007(a)(9) and 1011 of the Legal Services Corporation Act shall not apply.*” Consolidated Appropriations Act, 2000, Pub. L. 106-113, § 503(f), 113 Stat. 1501, 1537 (Nov. 29, 1999) (emphasis added). A subsequent section of the same appropriations act *explicitly repealed* the Act’s requirements that State and local governments submit an application and obtain a special board determination prior to being awarded funding:

“None of the funds appropriated in this Act ... shall be used by the Corporation to make a grant ... unless the Corporation ensures that the ... entity receiving funding to provide such legal assistance is ... (3) a State or local government (*without regard to section 1006(a)(1)(A)(ii) of the Legal Services Corporation Act.*)”

Pub. L. 104-134, § 502(3) (April 26, 1996) (emphasis added).

The legislative history of the McCollum Amendment⁴⁰ also undermines any suggestion that Congress intended to amend or repeal the LSC Act waiver provisions.⁴¹ The legislative history expressly acknowledges and confirms that section 1007(c) of the Act will “continue to apply.” This necessarily includes the mandatory waiver provision of § 1007(c). The Committee Report summarized the McCollum Amendment as follows:

LOCAL BAR SELECTION OF GOVERNING BODIES: Additional assurances of local accountability of program operations are provided by section 3 of the committee bill, which provides for *bar association selection* of a majority of the members of the governing bodies of legal services programs. ... The committee change requires that *relevant bar associations be permitted to appoint attorneys* to a majority of the seats on the governing body of a legal services program. ***This change does not affect the requirements of section 1007(c) which continue to apply.*** The committee recognizes that there will be certain procedural problems in implementation of the provision, for example, there will often not be a direct correlation between the geographic scope of bar associations and of programs, there may be multiple bar associations relevant to the service area, and *it expects the Corporation to set out a process for appointment* which will include means to deal with such problems consistent with the committee’s intent that *appointments* be made by the most relevant bar associations, those representing a majority of attorneys in the service area of the program. It is also expected the process will also provide for inclusion of minority bar associations, such as organizations of black, Hispanic, or women lawyers, and

⁴⁰ There is little to no legislative history on the McCollum Amendment’s inclusion in the FY 1983, 1984, or 1996 appropriation acts. The bulk of Congress’ substantive discussion of the McCollum Amendment occurred in support of LSC’s 1981 reauthorization bill, H.R. 3480. See Memorandum from Linda Hanten, Staff Attorney in LSC’s Office of General Counsel (OGC), to Alan Swendiman, LSC’s General Counsel (June 1, 1983). When it was added to the FY 1983 appropriation act, it was voted on without discussion. However, discussions by the LSC Board of Directors on the 1996 appropriation riders reveal that the McCollum revisions were intended for clarification, not substantive, purposes. See LSC Board of Directors, Operations and Regulations Committee Meeting, pp. 27-28 and 32-36 (March 11, 1994).

⁴¹ To be sure, eliminating LSC’s mandatory waiver authority almost ten years after the Act’s initial passage would have been one way for Congress to ensure that all such waivers, which were available only upon application, had been sought and obtained by that time. But the legislative history of the McCollum Amendment does not support this theory. Instead, it reveals that Congress was primarily focused on increasing grantee accountability through manner of appointment requirements.

consider the diverse situations of all current grantees to insure an opportunity for all to conform to this new requirement.

188 Cong. Rec. H2969 (daily ed. June 16, 1981) (emphasis added).

In addition to negating any suggestion that the waiver provisions of section 1007(c) had been amended or repealed, this legislative history supports the conclusion that, in passing the McCollum Amendment Congress was primarily focused on increasing grantee accountability through manner of appointment requirements. The history's title, "Local Bar Selection of Governing Bodies," suggests that Congress intended for the McCollum Amendment to provide primarily for the manner of appointment of attorney board members. Indeed, the majority-attorney board composition requirement is mentioned only insofar as it informs how many attorneys are to be selected by the bar. Thus, the thrust of the amendment concerns the manner of attorney members' appointment, not board composition.

Congressional debate on the McCollum Amendment supports this limited reading. Rep. Kastenmeier described the McCollum Amendment as "deal[ing] with *the role the bar associations should play* in the Government's legal services program." 188 Cong. Rec. H2986 (daily ed. June 16, 1981) (emphasis added). Rep. McCollum echoed that description when explaining his motivations for proposing the amendment:

The purpose of ... the [amendment] as it is now worded in section 3 was to delineate those organizations which were to receive funds from the Legal Services Corporation and to in fact assure that all recipient organizations providing legal assistance were controlled by local or State bar associations ... [W]e as a Congress must come to grips with the fact that if this Corporation is to survive in any form, it must be responsible and it must be held accountable to the individuals in the areas served, and there is no better group representative of the localities being served ... than the local bar associations.

...

Right now the provision [under the LSC Act] is for 60 percent of the board members to be lawyers. There is no provision that lawyers be nominated or appointed by local or state bar associations, and I would submit ... that the only way people are served now is through a haphazard procedure whereby mostly bureaucrats in Legal Services go out and seek out organizations that have social interests and then have lawyers nominated who are sympathetic to those interests, and they are not representative of the broad community that should be controlling the activities of that association locally.

...

Mr. Chairman, *my concern with respect to this is simply that we do not have a broad section of bar represented [on recipient boards] presently, and because we do not have a broad section of the bar represented and because bar associations do not have control over these organizations, we have the controversy that we have today, and the needs of the poor are not being served, but the objectionable interest of going about and getting into the politics of the day are being served.*

Id. at H2987-89 (emphasis added).

Even the Corporation focused on the manner of appointment requirement when it first implemented the McCollum Amendment:⁴²

The changes [to Part 1607 of the LSC regulations] are made in response to new provisions contained in the continuing resolution appropriating funds for the Corporation during the 1983 fiscal year [the McCollum Amendment]. The amendments provide new mechanisms and requirements for *selection of attorney members of recipients' governing bodies*.

48 Fed. Reg. 1971 (Jan. 17, 1983) (emphasis added).

For all these reasons, we believe that Congress did not intend for the McCollum Amendment to amend or repeal the Act's mandatory waiver provision. It merely sought *to supplement* the Act with additional governing body requirements. Any other conclusion would be contrary to the Congress' expressed intent that it "not affect the requirements of section 1007(c) which continue to apply." 188 Cong. Rec. H12569 (daily ed. June 16, 1981).

This conclusion is squarely supported by LSC's prior interpretations of the LSC Act and McCollum Amendment. LSC's long-standing practice has been to extend the Act's waiver provisions to the McCollum Amendment's board composition requirements. In 1983, shortly after the McCollum Amendment was initially passed, LSC issued "Guidance on the Composition of Recipient Governing Bodies." See 48 Fed. Reg. 36820 (Aug. 15, 1983). This guidance implied that the Act's waiver provisions, implemented by what was then section 1607.5, would cover the McCollum Amendment's board composition requirements:

Section 1607.7(c) permits the President of the Legal Services Corporation to extend the time for compliance with the [McCollum Amendment's board composition requirements] in the event that compliance by September 15, 1983 would be impossible or unduly burdensome (*in addition, the waiver provisions of § 1607.5 still apply to recipients which had a non-attorney majority on their Board as of July 25, 1974*).

Id. at 36821(emphasis added). In addition, LSC's current waiver regulations expressly apply to all of "the requirements of [Part 1607] [] permit[ing] ... continu[ation] of such non-attorney majorit[ies]," including section 1607.3(b)(1), which implements the McCollum Amendment. 45 C.F.R. § 1607.6(a). Under this provision, LSC has previously waived the McCollum board composition requirements for grantees serving tribal communities, including MLSC. See *e.g.*, OLA Internal Opinion No. IN-2009-2001 (January 14, 2009) (identifying Dakota Plains Legal Services and California Indian Legal Services as receiving waivers of McCollum board composition requirements in 1983, 1995, and 1997, respectively.); 1991 Waiver ("Within the service area of MLSC there are approximately 20 attorneys. The remaining members of the legal community are trial counselors. ... Based on th[ese] facts, it is impossible for MLSC to comply with [the McCollum Amendment's board composition requirement].").

⁴² The Corporation subsequently issued "informal guidance" on the McCollum Amendment's board composition requirement. See 48 Fed. Reg. 36820 (August 15, 1983) (Guideline on Composition of Recipient Governing Bodies).

B. The Act and the McCollum Amendment Can Be Harmonized by a Reasonable Construction

Extending the Act's waiver provisions to the McCollum Amendment's board composition requirement is not only consistent with past practice and interpretations, but also represents a fair and reasonable harmonization of the statutes. It preserves their respective integrity: the Act's grandfather provision is still available to grantees, like MLSC, that have historically had non-attorney majority boards, and the McCollum Amendment's bar association selection requirements remain in full force. It also avoids the potentially absurd result of constructively defunding an otherwise compliant legal services program – a program that must be funded as a matter of international treaty law⁴³ – because its unique geographic service area, tribal history, and shortage of practicing attorneys makes its compliance with governing body requirements impossible. And it gives effect to Congress' intent, as garnered from the relevant legislative history, that the Act's waiver provisions be unaffected by the McCollum Amendment.

For these reasons, we conclude that the McCollum Amendment should not be construed as impliedly repealing the Act's waiver requirements. This construction harmonizes the statutes by reasonably extending the Act's waiver provisions to the McCollum Amendment's board composition requirement. Thus, if a grantee is eligible for a mandatory or discretionary waiver of the Act's 60% majority-attorney board requirement, it is necessarily eligible for a waiver of the McCollum 51% majority-attorney board requirement. Without this extension, the Act's waiver provisions would be of limited effect in contravention of clear congressional intent, and could potentially lead to absurd results.

C. The Act's Waiver Provisions Do Not Apply to the McCollum Amendment's Manner of Appointment Requirement

The LSC Act's waiver provisions do not extend to the McCollum Amendment's *manner of appointment* requirement, for several reasons. First, even when construing statutes to achieve harmony, courts may not enlarge or alter their plain meaning. 3 Sutherland Statutory Construction § 58:1 (7th ed.). Because the Act does not contain a manner of appointment requirement, extending its waiver provisions to cover McCollum's manner of appointment requirement would necessarily, and unreasonably, enlarge the scope of the Act's waiver provisions. It could also create an unwarranted precedent for extending the waiver to other governing body provisions.

Second, harmonization strives to give effect to both statutes. The thrust of the McCollum Amendment was to provide a mechanism for selecting attorney board members. If the Act's waiver were to be extended to McCollum's manner of appointment requirement, the Act would essentially trump McCollum, negating any harmonious construction.

Finally, even if a grantee cannot compose a majority-attorney board, it will likely still have some attorney participation on its board. LSC's primary oversight objective is full compliance; where that is not possible, partial compliance. Requiring grantees to comply with McCollum manner of appointment requirement for whatever attorneys are serving on the board appropriately reconciles the Act with the McCollum Amendment.

⁴³ See fn. 42, *supra*.

III. MLSC's Eligibility for Governing Body Waivers

A. MLSC Is Eligible for and Should Be Granted a Mandatory Waiver of the Majority-Attorney Board Composition Requirements

Under LSC regulations, former recipients of OEO funding that had non-attorney majority boards on July 25, 1972, are eligible for a mandatory waiver of board composition requirements so that they may “continue their non-attorney majority.” 45 C.F.R. § 1607.6(a); *accord* 42 U.S.C. § 2996(f)(c), LSC Act § 1007(c). For the foregoing reasons, if MLSC is eligible for a mandatory waiver under LSC regulations, the waiver would apply to the board composition requirements of both the Act and the McCollum Amendment, implemented at 45 C.F.R. §§ 1607.3(b) and (b)(1), respectively.

MLSC meets both conditions of § 1607.6(a). As evidence of its receipt of funding under section 222(a)(3) of the Economic Opportunity Act of 1964, MLSC submitted the signed affidavit of Mr. Herman Guerrero, MLSC's board president from 1971 to 1983, declaring that MLSC was created in 1971 and operated with OEO funding until LSC was established in 1974, at which point it applied for and received LSC funding.⁴⁴ A published interview with one of MLSC's initial board members, RMI Senator Tony de Brum, supports Mr. Guerrero's declaration:

It beg[an] in a hotel room in Los Angeles. It was 1970, at a nation-wide Headstart Convention. I represented the Marshall's Community Action Agency as the Executive Director. Herman R. Guerrero, Executive Director of the CAA program in the Northern Marianas, was there too, along with the other [CAA] directors from throughout Micronesia. One evening, Herman and I were [having beers] with Gary Wiseman from the Office of Economic Opportunity. Gary brought up the subject of legal services. Herman and I agreed it was a program [Micronesia] could use. We went to Washington, DC, and spent three days drafting the proposal. An [OEO] grant was made and we had a CAA board meeting on Guam. The Board agreed to establish [MLSC].⁴⁵

Moreover, MLSC's initial by-laws expressly contemplate OEO funding of the program: “The executive director shall have the authority to expend funds received from the Office of Economic Opportunity, ... but shall not have authority to expend any other corporate funds without additional authorization from the board.”⁴⁶ For these reasons, it is reasonable to conclude that MLSC was funded under § 222(a)(3) of the Economic Opportunity Act of 1964.

MLSC also submitted evidence establishing that a majority of non-attorneys were serving on its board as of July 25, 1974. Mr. Guerrero declared

It is my recollection that during my first term as Board President, there were no attorney members on the Board. At that time, MLSC's service area was still the Trust Territory of the Pacific, which was made up of the districts of the Marshalls, Ponape (now Pohnpei), Truk (now Chuuk), the Marianas, Yap, and Palau. Each district had a representative on the initial MLSC Board.

⁴⁴ Guerrero Affidavit, at ¶ 6.

⁴⁵ *Micronesian Legal Services Celebrates 25 Years of Legal Assistance to the People of Micronesia*, 9 (October 9, 1996).

⁴⁶ Corporate Bylaws, Micronesian Legal Services Corporation, Art. IV, Sec. 2(f).

...

My recollection is that all of these [representatives] were in government service during the time they served on the Board.⁴⁷

Taken together, this evidence establishes that MLSC meets the conditions of 45 C.F.R. § 1607.6(a), thus requiring the LSC president to grant MLSC a mandatory waiver of the majority-attorney board composition requirements of both the Act and the McCollum Amendment. Having concluded that MLSC is eligible for a mandatory waiver of the board composition requirements, we need not consider MLSC's eligibility for a discretionary waiver.

B. Waivers are Unavailable for the Manner of Appointment Requirements

MLSC also seeks a waiver of the McCollum Amendment's manner of appointment requirements implemented at 45 C.F.R. § 1607.3(b)(1). But because mandatory waivers are only available for *board composition* requirements,⁴⁸ and because we have concluded that the Act's waiver provisions need not be extended to McCollum's manner of appointment requirement in order to reconcile the statutes, MLSC must establish eligibility, if at all, for a *discretionary* waiver of the manner of appointment requirements.

Under LSC regulations, the LSC President may, upon application, grant a discretionary waiver of any governing body requirement *not mandated by applicable law* if a grantee demonstrates that, despite diligent efforts, it cannot comply with the requirement because of the nature of its population, legal community, or area served; special circumstances, including conflicting requirements of other major funding sources; or state law. 45 C.F.R. §§ 1607.6(b) and (c); *accord* 42 U.S.C. § 2996f(c), LSC Act § 1007(c). LSC regulations governing the manner by which a majority of attorney board members are to be appointed to grantee boards, *see* 45 C.F.R. §§ 1607.6(b)(1), are "mandated by applicable law" because they derive, in part, from LSC's annual appropriations acts, specifically the McCollum Amendment. *See* 1996 Appropriations Act, Pub. L. No. 104-134, Title V, § 502(2)(B), 110 Stat. 1321 (April 26, 1996), incorporated by reference in subsequent appropriations, *see, e.g.*, 2012 Appropriations Act, Pub. L. 112-55, Div. B, Title IV, 125 Stat. 629 (2011). Accordingly, discretionary waivers are unavailable for LSC's attorney manner of appointment requirements, and MLSC must appoint its attorney members in accordance with LSC's governing body requirements at 45 C.F.R. § 1607.3(b)(1).

We note that MLSC's current practice of allowing the MLSC Board itself to collectively appoint its second attorney member does not comply with LSC's attorney manner of appointment requirements at 45 C.F.R. § 1607.3(b)(1).⁴⁹ We therefore recommend that the President of LSC refer this matter to LSC's Vice President for Grants Management for additional follow-up.

⁴⁷ Guerrero Affidavit, at ¶¶ 2 and 3.

⁴⁸ *See* 45 C.F.R. § 1607.6(a) ("The president *shall* waive the requirements of this part to permit a recipient that ... *had a majority of persons who were not attorneys on its governing body, to continue such nonattorney [sic] majority.*"); *accord* 42 U.S.C. § 2996f(c), LSC Act § 1007(c).

⁴⁹ Currently, the CNMI Bar Association, which represents a majority of the practicing attorneys in Micronesia, appoints one attorney to MLSC's board, and the MLSC Board itself appoints the other. Surely, if the CNMI Bar Association has the organizational capacity to appoint one attorney, it could appoint the second, especially since MLSC may suggest attorney-candidates for the appointing bar's consideration. *See id.* at § 1607.3(h) ("Recipients may recommend candidates for governing body membership to the appropriate bar associations and other appointing groups

C. MLSC's Request for a Waiver of the Client-Eligible Board Appointment Requirements Should be Denied as Unnecessary

LSC regulations, in accordance with the Act, require that at least one-third of grantee board members be eligible clients when appointed. 45 C.F.R. § 1607.3(c); *accord* 42 U.S.C. § 2996f(c), LSC Act § 1007(c). The regulations also provide for their manner of appointment:

The members who are eligible clients shall be appointed by *a variety of appropriate groups* designated by the recipient that *may include, but are not limited to*, client and neighborhood associations and community-based organizations [that] advocate for or deliver services or resources to the client community served by the recipient. *Recipients shall designate groups in a manner that reflects, to the extent possible, the variety of interests within the client community*

45 C.F.R. 1607.3(c) (emphasis added).

The LSC president has discretion to waive the manner by which eligible clients are appointed – a requirement that is not mandated by applicable law – “if a recipient demonstrates that it cannot comply with them because of ... the nature of the population, legal community, or area served.” 45 C.F.R. § 1607.6(b)(1); *accord* 42 U.S.C. § 2996(f)(c), LSC Act § 1007(c). A recipient seeking a discretionary waiver on this basis must demonstrate that it has made diligent efforts to comply with the requirement in question. *Id.* § 1607.6(c).

Pursuant to § 1607.6(b)(1), MLSC is seeking a discretionary waiver of the client-eligible appointment requirements because “social service organizations of the kind envisioned by the LSC [governing body] regulations are sorely lacking throughout Micronesia.”⁵⁰ But the regulations do not require that client-eligible appointments be made by “social service organizations.” Instead, eligible clients “shall be appointed by *a variety of appropriate groups*” designated by MLSC. 45 C.F.R. § 1607.6(c) (emphasis added). This could potentially include the legislative bodies of the four jurisdictions within Micronesia or the two women’s organizations serving the client communities of Saipan and Yap,⁵¹ but it need not. The regulation vests the selection of the appointing groups in the grantee, subject only to the requirement that the groups “reflect, to the extent possible, the variety of interests within the client community.” *Id.*

It appears to us that MLSC’s explanation of its client-eligible appointment process complies with the requirements of the regulation, thereby obviating the need for a waiver. Currently, five of MLSC’s nine board members (56%) are client-eligible.⁵² In accordance with its bylaws, four of MLSC’s client-eligible members (45%) are selected by the FSM and Palau state legislatures, and one (12%) is appointed by the board itself.⁵³ “By designating state legislatures as the appointing

... .”) MLSC could also comply by allowing, for example, the CNMI and Palau Bar Associations to jointly appoint the second attorney member, *id.* at § 1607.3(b)(1)(i), or one of the bar associations of the three “States” in which MLSC provides legal assistance – the Law Society in RMI, the Yap State Bar in FMS, or the Palau Bar Association in Palau – to appoint the member. *Id.* at § 1607.3(b)(1)(ii). In short, there are a number of ways by which MLSC could comply with LSC’s attorney manner of appointment requirements.

⁵⁰ 2011 Governing Body Waiver Request, at 3.

⁵¹ The question of whether the appointing legislative bodies are appropriate groups, reflecting the variety of interests within the client community,” is largely a question of policy, not law.

⁵² MLSC’s Supplemental Information, at 1.

⁵³ *Id.*

bodies, MLSC has a uniform, consistent way of ensuring that its client-eligible members are representative of the regions served and their unique linguistic, cultural, and historical perspectives.”⁵⁴ A significant number of legislators are either personally eligible for MLSC services or are former MLSC attorneys, making them knowledgeable about a variety of interests within the client community.⁵⁵ In sum, the legislators and the legislative bodies are representative not only of the Micronesian people generally, but of MLSC’s client-eligible communities specifically, and they tend to be well-versed on MLSC and its role in the communities.⁵⁶

Based on the information MLSC has provided, we conclude that MLSC’s client-eligible appointment process is compliant with § 1607.3(c), and its waiver request should be denied as unnecessary.

CONCLUSION

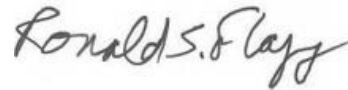
For the foregoing reasons, we conclude that, under 45 C.F.R. § 1607.6(a), MLSC is eligible for and must be granted a mandatory waiver of the Act’s and the McCollum Amendment’s majority-attorney board composition requirements, implemented at 45 C.F.R. § 1607.3(b). We recommend that the President of LSC require MLSC to reapply for a mandatory waiver every ten years.

Neither a mandatory nor a discretionary waiver is available for the McCollum Amendment’s attorney manner of appointment requirements; MLSC must appoint its attorney members in accordance with LSC’s governing body requirements at 45 C.F.R. § 1607.3(b)(1). Because MLSC’s current attorney-appointment process does not comply with § 1607.3(b)(1), we recommend that the President of LSC refer this matter to LSC’s Vice President for Grants Management for additional follow-up.

MLSC’s request for a discretionary waiver of LSC’s client-eligible appointment requirements is unnecessary, because its current client-eligible appointment process complies with 45 C.F.R. § 1607.3(c).



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⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

⁵⁶ *Id.*