

1991 Comp., p 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Appendix B—[Amended]

2. Table 1 of Appendix B to part 300 is amended by removing the site for Whitewood Creek Site, CS, South Dakota.

[FR Doc. 96-20460 Filed 8-12-96; 8:45 am]

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LEGAL SERVICES CORPORATION

45 CFR Part 1610

Use of Non-LSC Funds

AGENCY: Legal Services Corporation.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule completely revises the Legal Services Corporation's ("Corporation" or "LSC") regulation concerning the use of funds from a source other than the Corporation ("non-LSC funds"). The revisions are intended to implement the Corporation's FY 1996 appropriations act that applies most of the restrictions contained in that act to all of a recipient's funds and to make certain technical corrections to the regulation. Although this rule is effective upon publication, the Corporation solicits public comment on the interim rule in anticipation of adoption of a final rule at a later time.

DATES: The interim rule is effective on August 13, 1996. Comments must be submitted on or before September 12, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First St. NE., 11th Floor, Washington, DC 20002-4250.

FOR FURTHER INFORMATION CONTACT: Victor Fortuno, General Counsel, (202) 336-8910.

SUPPLEMENTARY INFORMATION: On May 19, 1996, the Operations and Regulations Committee ("Committee") of the LSC Board of Directors ("Board") requested the LSC staff to prepare an interim rule to implement Section 504 in the Corporation's FY 1996 appropriations act, Public Law 104-134, 110 Stat. 1321 (1996), which applies most restrictions contained therein to any person or entity receiving LSC funds, effectively restricting all of a recipient's funds to the same degree that it restricts LSC funds. The Committee held hearings on staff proposals on July 8 and 19, and the Board adopted this

interim rule on July 20 for publication in the Federal Register.

The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation that is already effective and carries severe penalties for noncompliance. Because of this great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. 553(b)(3)(B) and 553(d)(3). Accordingly, this interim rule is effective upon publication.

However, the Corporation also solicits comments on this interim rule for review and consideration by the Committee and Board. After receipt of written public comment, the Committee intends to hold public hearings to discuss the written comments and to hear oral comments. It is anticipated that a final rule will be issued which will supersede this interim rule.

Part 1610 is completely revised by this interim rule. Generally, this rule serves two purposes. First, it incorporates the restrictions imposed by the Corporation's FY 1996 appropriations act, 110 Stat. 1321 (1996), which apply to both a recipient's LSC funds and its non-LSC funds. Past appropriations acts have applied restrictions contained in those acts only to the funds appropriated thereunder. In contrast, the FY 1996 appropriations act prohibits LSC from funding any recipient that engages in certain specified activities or that fails to act in a manner consistent with certain appropriations act requirements. This rule also makes several technical revisions to the prior rule to correct those provisions that were never revised to be consistent with longstanding amendments to the LSC Act.

A section-by-section discussion of this interim rule is provided below.

Section 1610.1 Purpose

The purpose of this rule is to implement statutory restrictions on a recipient's use of non-LSC funds. The statutory restrictions are found in the LSC Act, 42 U.S.C. 2996 *et seq.*, and the Corporation's FY 1996 appropriations act, Public Law 104-134, 110 Stat. 1321 (1996).

Section 1610.2 Definitions

"Purposes prohibited by the LSC Act." The definition of "purposes prohibited by the LSC Act" has been revised in several ways. First, reference to a prohibition on the representation of

juveniles has been deleted because it is no longer in the LSC Act. Second, it is revised to reflect the fact that certain restrictions on activities in the LSC Act no longer reflect the law, because broader restrictions on those activities are included in the Corporation's FY 1996 appropriations act. Accordingly, references to the LSC Act's prohibitions on legislative and administrative representation, 42 U.S.C. 2996f(a)(5), and on advocacy training, 42 U.S.C. 2996f(b)(5), have been deleted from this definition and are incorporated instead into the definition of "activity prohibited by or inconsistent with Section 504" in § 1610.2(b). Third, the definition now references the Corporation's regulations which implement the various restrictions. Fourth, citations to the LSC Act for the restrictions on political activities, criminal proceedings, actions challenging criminal convictions, organizing activities, school desegregation, Selective Service and military desertion have been revised to correspond to the numbering changes that were made by amendments to the LSC Act. Fifth, this definition includes only those restrictions on private funds required by Section 1010(c) of the LSC Act which applies only to an activity identified as a "purpose prohibited by [the LSC Act]." Accordingly, the reference to fee-generating cases has been deleted because involvement in a fee-generating case is not a purpose prohibited by the LSC Act. Neither the LSC Act nor the appropriations act prohibits legal services programs from undertaking representation in fee-generating cases. The LSC Act simply requires that any fee-generating cases undertaken by a recipient must be "in accordance with guidelines promulgated by the Corporation." The Corporation's guidelines on fee-generating cases is 45 CFR Part 1609. With a few exceptions, this rule requires recipients to first determine whether private representation is available for any particular fee-generating case before accepting the case. This implements the Congressional intent that scarce Federal funds not be used for cases for which private representation is available. Recipients should note that the issue of attorneys' fees, which had been included in part 1609 is now the subject of section 504(a)(13) of the Corporation's FY 1996 appropriations act, and is dealt with in a new interim rule, 45 CFR Part 1642. In this rule, attorneys' fees are appropriately included in § 1610.2(b)(9).

"Activity prohibited by or inconsistent with Section 504" is a new

definition that lists the restrictions and prohibitions in Section 504(a) of the Corporation's FY 1996 appropriations act that completely restrict the listed activities, regardless of the source of funding. The definition also makes reference to subsections 504(b) and 504(e), which provide exceptions to those prohibitions on activities supported by non-LSC funds.

"IOLTA funds" is a new definition and is used in the revised section on authorized uses of non-LSC funds. IOLTA funds are defined as funds derived from programs established by State court rules or legislation that collect and distribute interest earned on lawyers' client trust accounts.

"Non-LSC funds" are defined as funds derived from a source other than the Corporation and would include both public and private funds.

"Private funds" are defined as funds derived from an individual or entity other than a governmental source or LSC.

The definition of "public funds" is similar to the definition for "public funds" in part 1600 of the Corporation's regulations. The definition clarifies that, for the purposes of this part, IOLTA funds will be treated in the same manner as public funds.

The definition of "tribal funds" is revised from the definition of "tribal funds" in part 1600 of these regulations in order to track the statutory language of section 504. "Tribal funds" are defined as funds received by a recipient from an Indian tribe or from a private nonprofit foundation or organization that are given for the benefit of Indians or Indian tribes.

The definition of "private attorney" and the corollary definition of "law firm" are included to help clarify the meaning of the applicability section of this regulation. A "private attorney" means an attorney engaged in the practice of law on a for-profit basis. A "law firm" is two or more private attorneys who have formed a partnership, corporation, or similar entity for the private practice of law on a for-profit basis.

"State or local entity of attorneys" would include a State or local bar association, a pro bono or *judicare* program, or other similar entity, such as a panel of attorneys participating in a pre-paid legal services program.

Section 1610.3 Prohibition

The prohibition section has been revised to include the restrictions on various activities in Section 504 of the Corporation's FY 1996 appropriations act.

Section 1610.4 Authorized Use of Other Funds

This section has been revised to reflect the fact that the restrictions in Section 504 apply to activities supported by all funds except tribal funds, while those restrictions in the LSC Act which are not covered by Section 504, still apply only to LSC and private funds.

Section 1610.4(a): Paragraph (a) sets out an exception included in both the LSC Act and Section 504 for tribal funds. The exception exempts tribal funds from the general prohibition on the use of non-LSC funds, as long as the tribal funds are used for the purposes for which they were provided.

Section 1610.4(b): Section 1610.4(b) continues the exception in the LSC Act for public funds which permits recipients to use public funds in accordance with the purposes for which the funds were provided. However, because the Corporation's FY 1996 appropriations act contains no exception for public funds for most of its restrictions on activities, language is added providing that public funds may not be used for any activity prohibited by or inconsistent with Section 504. In accordance with current LSC policy, the section also provides that for purposes of applying this regulation, IOLTA funds are to be treated the same as public funds.

Section 1610.4(c): Paragraph (c) states the exception that allows recipients to use private funds if they use them for the purposes for which they were provided and if they do not use their private funds for any activity prohibited by the LSC Act or prohibited by or inconsistent with section 504.

Section 1610.4(d): Section 1610.4(d) reflects section 504(d)(2)(B) of the Corporation's FY 1996 appropriations act, which provides that a recipient may use non-LSC funds to provide legal assistance to financially ineligible persons, provided that the funds are used for the specific purpose for which they were received and are not used in a manner that violates the LSC Act or Section 504.

Section 1610.5 Notification

This section incorporates the requirement of section 504(d)(1) of the Corporation's FY 1996 appropriations act that recipients may not accept funds from non-LSC sources unless they provide written notice to the funders that their funds may not be used in any manner inconsistent with the LSC Act or section 504. The requirement applies only to cash contributions; recipients are not required to notify persons or

organizations who make non-cash donations or volunteer their time or services to the recipient.

In an effort to relieve recipients of some of the administrative burden that might be imposed by this requirement, the proposed regulation contains a *de minimis* exception. The exception relieves recipients of the notice requirement for contributions of less than \$250. This exception is intended to apply to relatively small contributions made by clients, attorneys or other funders who are generally supportive of the recipient's program. The \$250 threshold was chosen because section 170(f)(8) of the Internal Revenue Code requires donors who contribute \$250 or more to a charity to obtain documentation of the contribution in the form of an acknowledgement; and the Board decided that, if the recipient had to provide an acknowledgement to the donor anyway, it did not constitute any significant additional burden to incorporate the required notification into the acknowledgement.

Section 1610.6 Applicability

The title to this section has been changed from "waiver" to "applicability" to reflect the fact that section 1010(c) of the LSC Act, upon which it is based, provides that certain types of grants are not subject to the statutory prohibition. Because by law such situations are not covered by the prohibition, there should be no need for a waiver. Indeed, it has always been LSC's practice to allow the activities covered by this section, without affirmatively granting waivers.

Section 1610.6(a): Paragraph (a) deals with the issue of criminal representation and is intended to clarify the applicability of both the LSC Act's provisions on criminal representation and Section 504's prohibition on representation of persons who are incarcerated in Federal, State or local prisons. The provision in the Corporation's FY 1996 appropriations act prohibiting recipients from representing such incarcerated persons was not intended to amend section 1010(c) of the LSC Act which permits LSC to award grants and contracts to, and LSC recipients to enter into subgrants, contracts or *judicare* arrangements with, private attorneys or law firms or legal aid organizations which handle criminal cases in their non-LSC funded practices. Accordingly, this paragraph makes it clear that the restrictions of the FY 1996 appropriations act on the representation of incarcerated persons does not apply to the non-LSC funded representation of clients in criminal cases or matters of

such private attorneys, law firms or State or local entities of attorneys. Nor does it apply to legal aid organizations that provide criminal legal services through a separately funded public defender program, regardless of whether any of their clients are prisoners. Finally, this paragraph makes it clear that a recipient may accept court appointments in criminal cases, under certain circumstances, even if the clients they are appointed to defend are incarcerated.

Section 1610.6(b). This new provision makes it clear that if recipients use non-LSC funds to contract with individuals or entities, such as bar associations, pro bono programs or other non-profit organizations to provide legal services under a recipient's PAI or similar program, the restrictions of this part would apply to the funds transferred but would not apply to the individual or entity's other non-LSC funds. This provision is consistent with current LSC policy that states that a transfer of non-LSC funds to another organization is not a subgrant under 45 CFR Part 1627. Although the non-LSC funds transferred under contract are subject to the restrictions of this part, these restrictions do not attach to any other funds of the person or entity.

Section 1610.6(c). This section clarifies that, except as provided in paragraph (a) of § 1610.6, this part does not apply to transfers of LSC funds which are already governed by 45 CFR Part 1627. It should be noted that when LSC funds are transferred to a subrecipient, the subrecipient cannot engage in any activities restricted by § 504 and the restriction attaches to both the subrecipient's LSC funds and its non-LSC funds. This ensures compliance with the Congressional intent that no funds provided by the Corporation for financial assistance are provided to a person or entity that engages in activities prohibited by Section 504.

Section 1610.7 Accounting

This section has been renumbered but has not been otherwise revised. There has been no change to this statutory accounting requirement. Currently, recipients are directed by the accounting provisions in both the 1981 and 1986 versions of the Corporation's Audit and Accounting Guide for Recipients and Auditors ("Guide") to account for their LSC and non-LSC funds separately. See page 12 in the 1986 Guide and pages 2-3 in the 1981 Guide.

List of Subjects in 45 CFR Part 1610

Grant programs—law, Legal services.

For reasons set forth in the preamble, LSC revises 45 CFR Part 1610 to read as follows:

PART 1610—USE OF NON-LSC FUNDS

Sec.

- 1610.1 Purpose.
- 1610.2 Definitions.
- 1610.3 Prohibition.
- 1610.4 Authorized use of other funds.
- 1610.5 Notification.
- 1610.6 Applicability.
- 1610.7 Accounting.

Authority: 42 U.S.C. 2996i; 110 Stat. 1321 (1996).

§ 1610.1 Purpose.

This part is designed to implement statutory restrictions on the use of non-LSC funds by LSC recipients.

§ 1610.2 Definitions.

(a) *Purpose prohibited by the LSC Act* means any activity prohibited by the following sections of the LSC Act and those provisions of the Corporation's regulations that implement such sections of the Act:

- (1) Sections 1006(d)(3), 1006(d)(4), 1007(a)(6), and 1007(b)(4) of the LSC Act and 45 CFR Part 1608 of the LSC Regulations (Political activities);
- (2) Section 1007(a)(10) of the LSC Act (Activities inconsistent with professional responsibilities);
- (3) Section 1007(b)(2) of the LSC Act and 45 CFR Part 1613 of the LSC Regulations (Criminal proceedings);
- (4) Section 1007(b)(3) of the LSC Act and 45 CFR Part 1615 of the LSC Regulations (Actions challenging criminal convictions);
- (5) Section 1007(b)(7) of the LSC Act and 45 CFR Part 1612 of the LSC Regulations (Organizing activities);
- (6) Section 1007(b)(8) of the LSC Act (Abortions);
- (7) Section 1007(b)(9) of the LSC Act (School desegregation); and
- (8) Section 1007(b)(10) of the LSC Act (Violations of Military Selective Service Act or military desertion).

(b) *Activity prohibited by or inconsistent with Section 504* means any activity prohibited by, or inconsistent with the requirements of, the following sections of 110 Stat. 1321 (1996) and those provisions of the Corporation's regulations that implement those sections:

- (1) Section 504(a)(1) and 45 CFR Part 1632 of the LSC Regulations (Redistricting);
- (2) Sections 504(a)(2) through (6), as modified by Sections 504(b) and (e), and 45 CFR Part 1612 of the LSC Regulations (Legislative and administrative advocacy);

(3) Section 504(a)(7) and 45 CFR Part 1617 of the LSC Regulations (Class actions);

- (4) [Reserved]
- (5) Section 504(a)(9) and 45 CFR Part 1620 of the LSC Regulations (Priorities);
- (6) Section 504(a)(10) and 45 CFR Part 1635 of the LSC Regulations (Timekeeping);
- (7) Section 504(a)(11) and 45 CFR Part 1626 of the LSC Regulations (Aliens);
- (8) Section 504(a)(12) and 45 CFR Part 1612 of the LSC Regulations (Public policy training);
- (9) [Reserved]
- (10) Section 504(a)(14) (Abortion litigation);
- (11) [Reserved]
- (12) [Reserved]
- (13) Section 504(a)(17) and 45 CFR Part 1633 of the LSC Regulations (Drug-related evictions); and
- (14) [Reserved]

(c) *IOLTA funds* means funds derived from programs established by State court rules or legislation that collect and distribute interest on lawyers' trust accounts.

(d) *Non-LSC funds* means funds derived from a source other than the Corporation.

(e) *Private funds* means funds derived from an individual or entity other than a governmental source or LSC.

(f) *Public funds* means non-LSC funds derived from a Federal, State, or local government or instrumentality of a government. For purposes of this part, IOLTA funds shall be treated in the same manner as public funds.

(g) *Tribal funds* means funds received from an Indian tribe or from a private nonprofit foundation or organization for the benefit of Indians or Indian tribes.

(h) *Private attorney* means any attorney who is engaged in the private practice of law on a for-profit basis. A "law firm" is a group of two or more private attorneys who are engaged in the private practice of law as a partnership, professional corporation, or similar arrangement.

(i) *State or local entity of attorneys* means a State or local voluntary or mandatory bar association, pro bono or judicare program, or other similar entity of attorneys.

§ 1610.3 Prohibition.

A recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with section 504, unless such use is authorized by §§ 1610.4 or 1610.6 of this part.

§ 1610.4 Authorized use of other funds.

(a) A recipient may receive tribal funds and expend them in accordance

with the specific purposes for which the tribal funds were provided.

(b) A recipient may receive public or IOLTA funds and use them in accordance with the specific purposes for which they were provided, if the funds are not used for any activity prohibited by or inconsistent with section 504.

(c) A recipient may receive private funds and use them in accordance with the purposes for which they were provided, provided that the funds are not used for any activity prohibited by the LSC Act or prohibited or inconsistent with section 504.

(d) A recipient may use non-LSC funds to provide legal assistance to an individual who is not financially eligible for services under part 1611 of this chapter, provided that the funds are used for the specific purposes for which those funds were provided and are not used for any activity prohibited by the LSC Act or prohibited by or inconsistent with section 504.

§ 1610.5 Notification.

(a) Except as provided in paragraph (b) of this section, no recipient may accept funds from any source other than the Corporation, unless the recipient provides written notification to the source of the funds that the funds may not be expended for any purpose or activity prohibited under this part.

(b) A recipient is not required to provide such notification for contributions of less than \$250.

§ 1610.6 Applicability.

(a) The prohibitions referred to in §§ 1610.2(a)(3) (Criminal proceedings), (a)(4) (Actions challenging criminal convictions) or (b)(11) (Prisoner litigation) of this part will not apply to the non-LSC funds of the attorney, law firm, entity of attorneys, or the public defender program or project and will not apply to funds received to support criminal or related cases accepted pursuant to a court appointment, if the Corporation or a recipient makes a contract or other arrangement for the provision of civil legal assistance with:

(1) A private attorney, law firm or state or local entity of attorneys that represents clients in criminal cases or matters,

(2) A legal aid organization that provides criminal and related legal assistance through a separately funded public defender program or project; or

(3) A legal aid organization that accepts criminal or related cases pursuant to a court appointment.

(b) If a recipient uses non-LSC funds to enter into a contract or other arrangement with another person or

entity for the provision of civil legal assistance, the restrictions referred to in this part will apply to the funds transferred, but will not apply to the other non-LSC funds of the person or entity.

(c) Except as provided in paragraph (a) of this section, this part does not apply to a transfer of LSC funds. Transfer of LSC funds is governed by 45 CFR part 1627.

§ 1610.7 Accounting.

Funds received by a recipient from a source other than the Corporation shall be accounted for as separate and distinct receipts and disbursements in a manner directed by the Corporation.

Dated: August 6, 1996.
Victor M. Fortuno,
General Counsel.
[FR Doc. 96-20414 Filed 8-12-96; 8:45 am]
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45 CFR Part 1617

Class Actions

AGENCY: Legal Services Corporation.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule completely revises the Legal Services Corporation's ("Corporation" or "LSC") regulation concerning class actions. The revisions are intended to implement a restriction contained in the Corporation's FY 1996 appropriations act which prohibits the involvement of LSC recipients in class actions. Although this rule is effective upon publication, the Corporation solicits public comment on the interim rule in anticipation of adoption of a final rule at a later time.

DATES: The interim rule is effective on August 13, 1996. Comments must be submitted on or before September 12, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First St, NE, 11th Floor, Washington, DC 20002-4250.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, (202) 336-8910.

SUPPLEMENTARY INFORMATION: On May 19, 1996, the Operations and Regulations Committee ("Committee") of the LSC Board of Directors' ("Board") requested LSC staff to prepare an interim rule to implement Section 504(a)(7), a restriction in the Corporation's FY 1996 appropriations act, Public Law 104-134, 110 Stat. 1321 (1996), which prohibits involvement of

LSC recipients in class actions. The Committee held public hearings on staff proposals on July 8 and 19, and the Board adopted this interim rule on July 20 for publication in the Federal Register.

The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation which is already effective and which carries strong penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. 553(b)(3)(B) and 553(d)(3). Accordingly, this interim rule is effective upon publication.

However, the Corporation also solicits public comment on the interim rule for review and consideration by the Committee. After receipt of written public comment, the Committee intends to hold public hearings to discuss the written comments and to hear oral comments. It is anticipated that a final rule will be issued which will supersede this interim rule.

Part 1617 is completely revised by this interim rule. Generally, this interim rule prohibits any recipient involvement in class actions. The prior regulation, which had not been revised since 1976, had allowed recipients to provide assistance in class actions as long as certain procedural requirements were met. No such involvement is allowed under this new rule.

A section-by-section discussion of this interim rule is provided below.

Section 1617.1 Purpose

The purpose of this rule is to prohibit involvement by LSC recipients in class actions.

Section 1617.2 Definitions

The definition of "class action" is revised to include only the nature of a class action. The prior definition also reached the issue of types of involvement in a class action, including involvement in various stages of a class action. Those issues are now included in the definition of "initiating or participating in a class action."

The definition of "class action" defers to widely accepted Federal and local court rules and statutory definitions. Thus, a class action for the purposes of this part is a "class action" pursuant to Rule 23 of the Federal Rules of Civil Procedure or the comparable State statute or rule of civil procedure