



Send by e-mail to: SubgrantRulemaking@lsc.gov

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Re: Use of Non-LSC Funds, Transfer of LSC Funds, Program Integrity; Subgrants and Membership Fees or Dues; Cost Standards and Procedures

This letter is submitted in response to LSC's request for comments on proposed revisions to the regulations on Use of Non-LSC Funds, Transfer of LSC Funds, Program Integrity; Subgrants and Membership Fees or Dues; Cost Standards and Procedures, 45 C.F.R. § 1610, 1627, 1630. The comments are submitted on behalf of NLADA by its Civil Policy Group, the elected representative body that establishes policy for the NLADA Civil Division, and its Regulations and Policy Committee.

Below NLADA highlights areas of the revisions that would be particularly beneficial to or negatively impact LSC funded programs, their client community and other stakeholders committed to the provision of quality legal services to people with low-incomes who cannot afford representation.

NLADA concurs with LSC management's overall concept of characterizing a transfer of funds to a third party to provide legal services to eligible clients as an award that is programmatic and distinct from purchases for goods and services that support

the operation of the program and are appropriately considered procurement contracts for goods or services.¹

This distinction is significant because the LSC Act and appropriations acts require non-LSC programs to comply with LSC restrictions when an LSC program transfers LSC funds to a non-LSC program. 45 C.F.R. 1610.7. NLADA fully concurs with LSC's and the OIG's sound rationale that it does not make sense to apply program restrictions to an entity that does not provide legal services to eligible clients such as a web site developer. Non-programmatic awards for good and services that aid in the operation of the program, such as a contract with a web designer not engaged in the delivery of legal services should be, as LSC proposes, designated as procurement contract which would be governed by provisions in 45 C.F.R. § 1630. Below are comments to specific sections of the proposed regulations.

1. 1627.2 (b) Definition of Programmatic

LSC's preamble comments state that "LSC proposes to simplify the existing definition of *subrecipient* currently located at 1627.2(b)(1)..." and "...move relevant portions of the current definition to the definitions of *programmatic* and *subgrant* to improve clarity."² LSC also proposes adding a new section to the regulation - 1627.3 which lists characteristics of a subgrant "...stating the factors that recipients should consider in determining whether a potential award is a subgrant..." and to "...make clear that subgrants are awards to third parties that support a recipient's delivery of legal assistance to eligible clients, consistent with Management's interpretation of part 1627."³

Unfortunately, LSC's proposed definition of programmatic is still ambiguous as to what activities which involve the provision of legal services to eligible clients fall within LSC's definition of programmatic in order to be considered a subgrant rather than a procurement contract for goods and services. The definition as proposed by

¹ *Use of Non-LSC Funds, Transfer of LSC Funds, Program Integrity; Subgrants and Membership Fees or Dues; Cost Standards and Procedures* (2015); available at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

² 80 FR 21695, 21,695; Proposed Regulation: § 1627.2(e) *Subrecipient* (2015); available at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

³ 80 FR 21695, 21,695; Proposed Regulation: § 1627.3 *Characteristics of subgrants*; available at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

LSC states: “Programmatic means activities or functions carried out to provide legal assistance, as defined in § 1002 of the LSC Act, [42 U.S.C. 2996a\(5\)](#). Programmatic activities do not include the provision of goods or services by vendors or consultants in the normal course of business that the recipient would not be expected to provide itself.”⁴

This proposed definition is broad enough to encompass activities and services that do not involve the direct provision of legal services to eligible clients. For example, activities such as lease agreements with landlords are carried out in order to provide legal assistance, recipients must have space in order to provide legal services to eligible clients. Thus, although a recipient’s lease agreement would not entail the provision of direct legal services, a lease agreement certainly could be characterized as activities or functions carried out to provide legal assistance and meet LSC’s definition of programmatic. If LSC intended to define programmatic to clarify that LSC considers only services and activities that involve the direct delivery of legal services to eligible clients then the current definition should be revised to make this clear.

NLADA recommends the following revisions to the definition of programmatic in 1627.2 (b):

(b) Programmatic means the delivery of legal assistance to eligible clients, as defined in § 1002 of the LSC Act, 42 U.S.C. 2996a (5), including the provision of services under a special LSC grant project. Programmatic does not include the provision of goods and services provided by vendors, consultants in the normal course of business that the recipient would not be expected to provide itself, and activities conducted by entities not directly involved in the delivery of legal assistance to eligible clients.

2. 1627.2(d) (2) Contracts with Private Attorneys and Judicare Arrangements

LSC is seeking comments on whether the \$25,000 threshold amount established in 1983 for private attorney and judicare arrangements or contracts for the direct delivery of legal services to a recipient’s clients should be raised, and if so, what amount should LSC set for the new threshold. 80 FR 21692, April 20, 2015. Fee for

⁴ 80 Fed. Reg. 21699, 21,699; Proposed Regulation: *§ 1627.2 Definitions*. (2015); available at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

service contracts for private attorneys and judicare arrangements or contracts provide a valuable tool to help recipients meet the pressing needs of eligible clients. Since this \$25,000 threshold was published over 32 years ago, NLADA strongly supports revising this regulation to account for inflation. This threshold also sets an appropriate limit for when the expenditure of LSC funds on a fee for service basis are to be considered a contract governed by the requirements of a subgrant; this serves to increase recipients' capacity to provide prompt services for eligible clients while conserving recipient and LSC resources in order to focus on using the subgrant process for larger contracts.

One measure that can be used to gauge the equivalent value of \$25,000 today is the U.S. Bureau of Labor Statistics inflation calculator that uses the average Consumer Price Index (CPI) for a given calendar year.⁵ Based on the CPI index, the equivalent value today of \$25,000 in 1983 would be \$ 59,387.20, which may be rounded to \$60,000. The regulation could also be changed so that the threshold figure could be annually revised using an inflation calculator, such as the CPI, in a manner similar to the methods used to annually update the poverty guidelines to establish financial eligibility in 1611.⁶

3. 1627.3 Characteristics of Subgrants

The definition of subgrant requires, as indicated in the preamble, a program to exercise judgment in determining whether an award should be considered a subgrant or a procurement contract. In Section 1627.3, LSC has provided a framework for making this determination by providing a list of five characteristics, substantially taken from the OMB Uniform Grants Guidance.⁷ However, the regulation indicates that the decision on how to characterize an award is based on an analysis of these factors and all of the five listed characteristics need not be present in all cases.

LSC provides two examples to illustrate how a program may analyze the proposed regulatory criteria to make a determination on how to characterize an award. The

⁵ http://www.bls.gov/data/inflation_calculator.htm.

⁶ NLADA notes that the CPI is based on the value of consumer goods, there may be other more accurate measures of inflation for attorney salaries.

⁷ 80 FR 21695, 21,695; Proposed Regulation: *§ 1627.3 Characteristics of subgrants*; available at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

first example of what would meet the definition of a subgrant using the five criteria describes an award by a recipient to another legal services organization to conduct intake. The second example of an award that should be considered a procurement contract, rather than a subgrant using the five criteria, describes an award to a web designer to develop an online portal for clients. Despite LSC's expressed intent to revise the regulations to provide clarity in making these distinctions LSC's comments regarding the second example indicate that "...there is room for debate about whether the web designer's work is for the public purpose of providing legal information to eligible clients, or is instead technical services for the benefit of the recipient." LSC further states, "On balance this type of award **appears (emphasis added)** to be considered more appropriately as a procurement contract."⁸

Thus LSC's proposed revisions do not provide a definitive framework. Recipients are required to exercise their judgment in applying and balancing the application of five criteria that need not all be present. Grantees should not be penalized for using their judgement in determining that an award is a procurement contract if LSC determines that *on balance* the award should have been characterized as a subgrant.

NLADA recommends that LSC reconsider implementing these revisions. If the revisions are submitted for approval, NLADA urges that language be added to 1627.3 stating that:

A good faith determination, based on the criteria listed in 1627.3, that an award is not a subgrant complies with the requirements of this section and the recipient will not be subject to a questioned cost finding or other sanction.

4. 1627.3(c) Language that any subgrant must only be supported by LSC funds

NLADA urges LSC to carefully consider the possible adverse consequences the framework set out in this section may have on the ability of LSC funded programs to effectively carry out their mission to promote equal access to justice and provide high-quality civil legal assistance to low-income Americans.

⁸ 80 Fed. Reg. 21695, 21695. Proposed Regulation: § 1627.3 *Characteristics of subgrants* (2015) available at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

The revisions, as proposed, appear to indicate that recipients must treat any agreement with a third party that involves the use of goods or services paid for in part or in whole by LSC funds, which has characteristics of a subgrant as defined in the newly proposed section 1627.3, as a subgrant. The proposed revision also adds a confusing provision that appears to prohibit the recipient from using any goods or services paid for in whole or in part with LSC funds to fulfill part of the recipient's agreement with the third party. "Any award to a third party that is determined to be a subgrant based on an analysis of these factors must be supported using LSC funds. Recipients may not use goods and services paid for in whole or in part with LSC funds as payment for a subgrant."⁹ However, if the agreement does not fall within the 1627 subgrant definition, according to LSC's comments, the agreement is to be considered a procurement contract governed by the provisions of 1630.

In its comments regarding proposed 1627(c) LSC indicates that:

LSC has learned that some recipients have entered into agreements with other entities in which the recipients provided goods, including office space and office supplies, in exchange for the other entities' carrying out PAI activities on behalf of the recipient. The recipients in question did not seek prior approval of these agreements because they were exchanges of goods and services, rather than funds; therefore, the recipients did not consider the arrangements to be subgrants subject to the requirements of part 1627.

LSC further states:

In order to ensure the proper use of LSC funds by any entity receiving those funds or resources supported by those funds, LSC believes that any arrangement qualifying as a subgrant under § 1627.3(b) must be paid for with actual funds and not with goods or services.

NLADA assumes that the provisions in 1627.3(c) do not apply to agreements with third parties that use non-LSC funds or that provide any goods or services paid for with non-LSC funds.

⁹ 80 Fed. Reg. 21695, 21695. Proposed Regulation: § 1627.3 *Characteristics of subgrants* (2015) available at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

However, what appears to be, based on LSC's comments a blanket prohibition on the provision of goods and services by recipients, that are in part or fully funded by LSC, to support an agreement with a third party to provide programmatic services conflicts with the purpose, intent and provisions of the Private Attorney Involvement (PAI) regulation, particularly 1614.4(b)(3)¹⁰. If this is what is intended, it would (1) hinder, not advance longstanding, beneficial collaborative relationships with community members, including private attorneys and the bar; (2) prevent the development of similar relationships in the future; and (3) marginalize recipients' visibility and presence in the community. Prohibiting the exchange of goods and services in this matter would deny recipients appropriate flexibility to be innovative and creative in expanding access to legal services which has been a top priority of LSC.

If LSC intends to impose an all-out prohibition on a recipient's use of goods and services to support an agreement with third parties that would fall within the 1627.3 characteristics of subgrant, a number of LSC funded programs would be prevented from using one of their most valuable assets – property they have invested in to provide economical office space for their operations. In a time of severe fiscal constraints this non-monetary asset could be used in innovative ways to partner with community organizations, particularly pro bono programs, to enhance the availability of legal services for people who are poor and in need of legal services.

LSC's proposed revisions and comments regarding revised sections 1627.2 and 1627.3 appear to be directly contrary to LSC's strong encouragement of and support for recipients' collaboration with third parties in the community and robust and sustained support for PAI. LSC's promotion of recipient collaboration with third parties, is illustrated by inclusion in the opening page of its website which states: "LSC encourages programs to leverage limited resources by partnering and collaborating with other funders of civil legal aid, including state and local governments, Interest on Lawyers' Trust Accounts (IOLTA), access to justice commissions, the private bar, philanthropic foundations, and the business community."¹¹

¹⁰ Support provided by the recipient in furtherance of activities undertaken pursuant to this section including the provision of training, technical assistance, research, advice and counsel or the use of recipient facilities, libraries, computer assisted legal research systems or other resources. 45 CFR 1614(b)(3).

¹¹ <http://www.lsc.gov/about/what-is-lsc#sthash.mL138y0a.dpuf>

Beginning in 2011, LSC spent almost two years considering recommendations from its Pro Bono Taskforce (PTF) to “identify and recommend to the Board new and innovative ways in which to promote and enhance pro bono initiatives throughout the country.”¹² In 2014, LSC then implemented many of the recommendations of the taskforce report issued in October 2012 by revising the PAI regulation to encourage and expand PAI activities. The revised PAI regulation, 1614. 4 (b)(3) specifically allows an LSC recipient to provide goods and services such as training, technical assistance, research, advice and counsel or the use of recipient facilities, libraries, computer assisted legal research systems or other resources to support private attorney involvement.

Is the proposed revision intended to require that all partnership agreements between recipients and third parties to provide programmatic services, with the characteristics listed in 1627.3, are supported solely using LSC funds and that all in-kind support by a recipient, specifically permitted to be allocated to PAI in 1614, is now prohibited? Are recipient agreements with social service providers/agencies or other professionals in the community who use a recipient’s LSC office space and supplies to assist the recipient in their provision of legal assistance to eligible clients now to be characterized as subgrant agreements that can no longer involve in kind exchanges of goods and services? If so, this would impede recipients in maintaining or developing partnerships with organizations who operate pro bono programs, including local or state bar associations and Access to Justice Commissions, by prohibiting the use of LSC funded goods and services in exchange for the pro bono programs’ services to refer LSC eligible clients to private attorneys.

LSC does not define the term entity which is used in the revised regulation, so it is unclear who or what entities would fall within the definition of subgrantee in this proposed regulation. Are law firms considered entities in the proposed regulations?

Does an agreement with the private attorney providing programmatic services while using LSC funded space become a subgrant under the new regulations? Activities conducted by a private attorney volunteering at a recipient’s office to conduct intake would meet the characteristics of a subgrant as set out 1627.3(b). Under 1627.3(b) (1) the attorney determines who is eligible to receive legal assistance under the grant; under 1627.3(b) (3) the attorney may have

¹² <https://www.federalregister.gov/articles/2014/10/15/2014-24456/private-attorney-involvement>

responsibility for programmatic decision making such as determining the type and level of service an applicant is provided; and while volunteering in an LSC funded office the attorney would need to be responsible for adhering to applicable LSC program requirements specified in the LSC grant awards 1627.3(b) (4).

Under the proposed regulations, would recipients be prohibited from allowing private attorney whose activities fall within the definition of a subgrant in 1627.3, to use office space and supplies paid for in part or in whole by LSC? Does the recipient now have to support the agreement with LSC funds and the attorney, then in turn return the funds to pay the recipient for the use of the recipient's space? If the private attorney would not be considered an entity, would a law firm that participates in providing private attorneys from its firm to conduct intake be considered an entity?

If LSC did not intend to prohibit the activities posited in the examples above, the regulation needs substantial revision so that the language accurately reflects LSC's intent and clearly indicates what entities should be considered subgrantees, what activities should be considered subgrants and to clarify how goods and services funded in part or wholly by LSC may be used and accounted for.

NLADA understands LSC's responsibility for ensuring accountability for the use of appropriated public funds, and that LSC must be able to determine that the funds it awards are spent consistent with the terms of its governing statutes and regulations. However, if LSC actually did intend to prohibit agreements (regardless of whether they meet the definition of a "subgrant as defined in 1627.2") where a recipient provides LSC funded goods and services to a third party assisting the recipient in the delivery of legal services to eligible clients, NLADA urges LSC to carefully consider the ramifications of this proposed revision and alternative methods to insuring accountability for the situations that raise LSC's concerns that will not sever existing relationships or stifle further development based on in kind exchanges of goods and services funded in part or wholly by LSC.

5. 1627.4 Corporation approval process - Requirements for all subgrants - proposed rule 1627.4(a)(2)(ii) to replace current section 1627.3(a) (2)

This current regulatory provision was published in 1983. Section 1627.3(a) (2) requires LSC to act upon a recipient's request to enter into a subgrant agreement within 45 days, either by approving, disapproving or suggesting modifications to the subgrant. If LSC disapproves or suggests modifications to the subgrant it may be resubmitted to LSC. LSC then has another 45 days to approve, disapprove or suggest modifications to the subgrant. If LSC fails to take action on the request for 45 days, the recipient may notify LSC that the recipient has not received a response. LSC then has 7 days to respond or the subgrant agreement is deemed approved. The preamble from 1983 indicates that LSC determined the 45-day window with a 7-day post-notification grace period to be a "realistic deadline which can be met, even in complicated cases."¹³

In LSC's proposed revision to this section, LSC eliminates any required time frame for LSC to take action on a request for subgrant approval. LSC placed these protections in the original publication of this section of the regulation for the benefit of recipients. LSC's proposal to omit providing any time frame for LSC to take action on subgrants leaves programs in a state of fiscal uncertainty as to subgrant agreements. There is no reason to change an approval process that has been in place for over 30 years. The current framework preserves the integrity of the process and the confidence that all parties have in that process. It allows for a greater measure of certainty for the recipients and subrecipients involved. Affording recipients and subrecipients reasonable time periods to plan for operational continuity to the greatest extent possible is essential for LSC funded programs.

The current language providing time frames for LSC approval of subgrants should be kept in the final rule, since it preserves an important backstop for recipients and subrecipients who depend on LSC-funding and who, without hearing in a timely fashion from LSC, may plan a budget as if the funding has been approved. Most importantly, it ensures that recipients and subrecipients have some level of certainty that a funding decision will be made within a specific time frame. If funding was not automatically granted, after LSC failure to respond within a reasonable time frame, the recipients and subrecipients would bear the

¹³ LSC Grant Approval Process, 48 Fed. Reg. 231 (Nov. 30, 1983) (codified as 45 C.F.R. 1627.3).

consequences of LSC's inaction. Without a specified time period in LSC's approval process, there is no recourse for receiving approval unless approval is automatically granted.

Finally, it is important in keeping with LSC's focus on uniformity and consistent application of rules and regulations that all parties bear equitable burdens with regard to meeting LSC statutory and regulatory requirements. It is thus appropriate for the existing subgrant approval process to have reasonable timelines, which benefit all parties involved. The current time frames in the approval process should remain in the regulation to prevent subrecipients or recipients, and ultimately their clients from being disadvantaged as recipients make their best efforts to comply with all aspects of 45 C.F.R. 1627.

6. 1627.5(c) Timekeeping

In its comments regarding proposed revisions to timekeeping requirements for LSC funded subrecipients, LSC indicates that it considered "multiple options for creating coherent timekeeping requirements for recipients and subrecipients alike".¹⁴ One option LSC considered was to leave the current language in the LSC regulations regarding time keeping in place and add language describing the minimum requirements for subrecipient timekeeping. LSC indicates that "Doing so would allow recipients and subrecipients flexibility to develop timekeeping systems that would ensure accountability for expenditures of LSC funds, while minimizing the administrative burden to the subrecipient."¹⁵

LSC ultimately rejected this option and chose a one size fits all approach, replacing requiring all subrecipients to comply with the same timekeeping *requirements applicable to recipients mandated by 45 C.F.R. 1635*. Even though LSC acknowledged in its comments that this requirement may be difficult for some subrecipients that are "...small organizations that currently do not have, or may find it difficult to develop, the capacity to maintain timekeeping records that comply with part 1635."¹⁶

¹⁴ 80 Fed. Reg. 21697, 21,697; Proposed Regulation: § 1627.5(c) *Timekeeping* (2015); available at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

¹⁵ *Id.* at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

¹⁶ *Id.* at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

NLADA understands that subrecipients who receive LSC funds need to be accountable for their use of these funds which including the maintenance a time keeping system. However, LSC's current proposal is not necessary to achieve LSC's goals of accountability, is overly burdensome for both recipients and subrecipients and contrary to the principles espoused by LSC to "... work with LSC funded programs to maximize their efficiency, effectiveness, and quality, to promote innovation in the delivery of legal services, and to serve as many people as possible."¹⁷

The relationship of LSC recipient programs and their subrecipients vary in many ways such as their size, structure, staffing, priorities and funding levels. Imposing one standard time keeping requirement for all subrecipients, who maintain accountability with their own timekeeping system, is counter-productive and will harm recipient's ability to maintain relationships with subrecipients who are unable or unwilling to conform their own timekeeping system to specific LSC requirements. LSC, particularly given its expressed emphasis on leveraging community resources, should be encouraging - not discouraging - partnerships in the community, especially with private attorneys and providers of pro bono services such as local bar associations.

The current LSC timekeeping requirement for subgrantees, contained in 1610.7 (b) (2) requires staff to keep general records of their time spent on each case or matter handled with LSC funds. The timekeeping requirements for recipients in the LSC regulation 45 C.F.R. 1635 requires that all time spent by attorneys and paralegals must be documented with time records:

1. That are made contemporaneously - at the same time the legal assistance activity occurs
2. That records the date and time spent on all activities in increments of one quarter hour or less
3. That includes the case number or identifies the category of the activity
 - a. A case – when legal assistance is provided to a specific client or clients.
 - b. A matter – contributes to the overall delivery of services but does not involve direct legal advice or representation to a specific client(s).

¹⁷ *Message from the President* (2015), available at: <http://www.lsc.gov/about/message-president>.

- Examples of matters are community legal education presentations, training, and continuing legal education programs.
- c. A supporting activity is any action that is not a case or matter including management and fund-raising.
 4. The time keeping system must be able to group (aggregate) information for closed and pending cases by legal problem type
 5. Programs must certify on a specific LSC form that no time or resources paid for by LSC was used for LSC restricted activities

LSC indicated that there are three reasons LSC chose to propose that all subrecipients keep time in the same manner as recipients are required to do, pursuant to regulation 1635, in lieu of a more flexible option LSC also considered. Below NLADA discusses why each of these reasons does not support LSC's choice of a rigid method that would be burdensome to subrecipients over the more flexible option:

1. "LSC has learned that some recipients have misinterpreted the current regulation that clearly requires subrecipients to keep time records. These recipients have incorrectly determined that the regulation does not require subrecipients to keep time records."¹⁸

A regulation does not necessarily have to be revised because there have been some incorrect interpretations of the regulation. It is unclear from LSC's comments whether recipients' erroneous readings of the subrecipient timekeeping regulation is a significant, recurring problem or has been found among a small number of recipients and already corrected. Absent a widespread problem, LSC's concerns could be more easily and adequately addressed by the methods LSC routinely uses to provide guidance and clarification to recipients regarding regulatory requirements by issuing an advisory opinion, program letter or other form of communication.

Regardless, LSC's indication that some recipients have incorrectly interpreted the existing regulation does not support LSC's imposition of a regulatory one size fits all rule for all subrecipients. LSC's own comments indicate that there is alternative

¹⁸ 80 Fed. Reg. 21695, 21695. Proposed Regulation: § 1627.3 *Characteristics of subgrants* (2015) available at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

option that would ensure accountability and minimize administrative burdens on subrecipients.

2. "...LSC's experience in overseeing subgrants over the past eighteen years has given LSC reason to believe that clear timekeeping requirements for subgrants will lead to increased accountability for the use of LSC funds by subrecipients."¹⁹

This statement also does not indicate why a regulatory revision is necessary. As indicated above, LSC has on many occasions provided clarity for recipients as to regulatory requirements by communicating the requirements with existing recipients and subrecipients through program letters, advisory opinions or other communication methods. Even if there is a need for further clarity in the actual regulation, this rationale does not explain why LSC chose to impose a rigid timekeeping system on subrecipients with varied practices for maintaining accountability with their timekeeping systems as opposed to timekeeping systems that ensure accountability while "... minimizing administrative burdens to the subrecipient."²⁰

There is no indication that LSC factored in the number of other requirements that recipients and subrecipients must follow to ensure their compliance with restrictions applicable when using LSC funds. These include:

- i. An approval process for all subgrants by LSC.
- ii. Grants are limited to one year, any unspent funds, with the exception of specialty grant, must be returned at the end of the year.
- iii. Subrecipients are subject to LSC's audit and financial requirements in the *LSC Audit and Accounting Guide*.
- iv. LSC restrictions apply to subrecipient activities, unless the activity is a PAI activity, then the restrictions only apply to the subrecipient for their PAI activities.

¹⁹ 80 Fed. Reg. 21697, 21,697; Proposed Regulation: § 1627.5(c) *Timekeeping* (2015); available at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

²⁰ 80 Fed. Reg. 21697, 21,697; Proposed Regulation: § 1627.5(c) *Timekeeping* (2015); available at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

- v. The recipient remains responsible for oversight of the subgrantee and is subject to a questioned cost finding for any inappropriate use of LSC funds by a subgrantee.

These requirements are in addition to the prescribed subgrant agreement form required by LSC, and the form which requires a detailed description of the recipient and subrecipient's relationship and activities that must be submitted to LSC during the approval process.

Given the significant controls already in place to insure accountability by recipients and subrecipients, combined with the requirement to maintain a timekeeping system subject to annual audit by the recipient and oversight by LSC; an across the board timekeeping requirement is not necessary to ensure subrecipients' accountability.

3. LSC's third reason for the timekeeping revision is its belief "...that having three distinct timekeeping requirements creates unnecessary confusion about which requirements apply to which uses of LSC funds. LSC's proposal will make the timekeeping provisions of parts 1627 and 1635 consistent and will reflect the methods that recipients use to document time charged to their LSC grants."²¹

The requirements contained in these three regulatory provisions are not contradictory and only one of these three regulations applies to subrecipients. Two of these regulations, 1635 and 1614.1 (a) (1) apply only to staff attorneys and paralegals employed by the recipients and not subrecipients. The two regulations can be read together consistently requiring recipient employees who are staff attorneys or paralegals to keep time records for supporting activities: 1614.1(a) (1) indicates that indirect time of attorneys and paralegals employed by recipients must also be documented by timesheets accounting for their employees' time.

For subrecipients, LSC indicates in the preamble to 1610, that subrecipients are not required to keep time in accordance with the Corporation's timekeeping requirements.²² Thus, 1610.7(b) (2) is the one regulation that requires

²¹ 80 Fed. Reg. 21697, 21,697; Proposed Regulation: § 1627.5(c) *Timekeeping* (2015); available at: <https://www.federalregister.gov/articles/2015/04/20/2015-08951/use-of-non-lsc-funds-transfer-of-lsc-funds-program-integrity-subgrants-and-membership-fees-or-dues>.

²² 62 Fed. Reg. 27698, 27,698; 45 C.F.R. 1610 (1997), available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&n=45y4.1.3.11.11&r=PART&ty=HTML>.

subrecipients to maintain time records and per LSC subrecipients do not have to comply with the requirements in the other two regulations cited above in 1635 and 1614. The three provisions do not create unnecessary confusion. Two current provisions, 1635 and 1614, are consistent and apply to recipients; the other current timekeeping regulation only applies to subrecipients. So long as the regulation regarding timekeeping requirements for subrecipients is clear, imposing a blanket timekeeping requirement would be solely for the sake of consistency rather than eliminating confusion. This is unnecessary when there are less administratively burdensome solutions that provide subrecipients with needed flexibility.

NLADA consulted with the National Association of Pro Bono Professionals (NAPBPro) to discuss what impact this regulatory change would have on subrecipients. NAPBPro is an independent organization of *pro bono* professionals. NAPBPro is devoted to promoting *pro bono* services to the poor and the professional development of *pro bono* managers and professionals and others interested in this field. <http://www.napbpro.net/>

NLADA has received input from a small number of NAPBPro members, not all of whom are LSC funded. The feedback from pro bono programs reinforced NLADA's concerns regarding the impact of the new regulations: smaller LSC funded subrecipient programs would be burdened by having to conform their timekeeping system to the LSC requirements in 1635. At least one pro bono program indicated that given the significant requirements currently attached to LSC funding and the percentage of LSC funding the program receives, their organization's program would need to consider whether the cost of meeting this new requirement would be worth continuing to receive LSC funds.

Uniform timekeeping requirements are not necessary to ensure compliance, and as indicated above, imposing 1635 requirements may have the unforeseen effect

Paragraph (b) modifies this requirement in the areas of timekeeping and priorities. The statutory provisions on timekeeping and priorities are administrative requirements more appropriately applicable to a recipient's own use of its funds. The intent is to assure greater accountability for the recipient's use of its funds without imposing unnecessary administrative burdens. Thus, this section applies the administrative requirements on priorities and timekeeping only to the funds transferred and only to the extent to ensure accountability for those funds. The rule requires that entities receiving a transfer of LSC funds must either use the funds consistent with the recipient's priorities or establish their own priorities for the use of the funds. In regard to timekeeping, the language tracks the statutory requirement so that entities that receive a transfer of LSC funds are required to maintain records of time spent on each case or matter undertaken with the funds transferred. However, they are not required to keep time in accordance with the Corporation's timekeeping regulation, 45 CFR part 1635. 62 FR 27695.

of subrecipients abandoning LSC funding altogether. Without these funds, recipients will be more constrained in their ability to maintain and develop valuable relationships within their community, particularly with the private bar – including bar associations and ATJ commissions - to leverage their resources in maximizing the availability of legal services for people who are poor and in need of legal assistance.

Since LSC's goal is to insure accountability there is simply no need to adopt a more rigid approach that will create roadblocks to engaging the community when there is a more flexible option that LSC indicates achieve accountability goal.

Thank you for the opportunity to provide comments on Use of Non-LSC Funds, Transfer of LSC Funds, Program Integrity; Subgrants and Membership Fees or Dues; Cost Standards and Procedures, 45 C.F.R. § 1610, 1627, 1630.

Sincerely,

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Silvia Argueta, Chair, CPG Regulations and Policies Committee

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National Legal Aid and Defender Association