



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION
Advisory Opinion # AO-2014-006

Date: September 4, 2014

Subject: Discretion to Grant Part 1628 Waivers for Fund Balances Exceeding 25% of LSC Support

QUESTION PRESENTED

Whether 45 C.F.R. Part 1628 affords the Legal Services Corporation (LSC or the Corporation) discretion to grant a recipient of LSC funding a waiver to retain a fund balance in excess of 25% of its annual support to address circumstances other than the three specific “extraordinary and compelling circumstances” specifically enumerated in 45 C.F.R. § 1628.3(c).

BRIEF ANSWER

No. The plain language of 45 C.F.R. Part 1628, consistent with the preamble to the final revised rule, does not afford the Corporation discretion to grant a recipient of LSC funding a waiver to retain a fund balance in excess of 25% of its LSC support for reasons other than those specifically enumerated in section 1628.3(c). 45 C.F.R. §§ 1628.3(d) and 1628.4(d), governing the Corporation’s discretion to grant waivers, each expressly incorporates section 1628.3(c), thereby requiring the Corporation to determine whether one of the three “extraordinary and compelling circumstances” in that section is present when exercising its discretion to grant a waiver to retain funds that exceed 25% of a recipient’s annual support.

BACKGROUND

A recipient of LSC funding requested a waiver to retain its FY 2013 LSC fund balance, which comprised well over 25% of its annual LSC support. The reasons that the recipient cited for the carryover include the sale of one of its buildings and the unanticipated receipt of use-or-lose non-LSC funds. Pursuant to 45 C.F.R. § 1628.3(c), the recipient is expressly permitted to apply for a waiver to retain the amount received from the sale of real property, as this is one of the three types of “extraordinary and compelling circumstances” specified in that section. If the Corporation’s discretion to grant waivers for the retention of the remaining funds exceeding 25% of annual support is limited to the three circumstances enumerated in section 1628.3(c), then, to the extent those circumstances are not present here, the recipient may retain only an amount up to 25% of its FY 2013 support. Thus, the recipient would have to return to LSC the remaining unused LSC funds.

ANALYSIS

I. Relevant Provisions of 45 C.F.R. Part 1628

45 C.F.R. Part 1628, governing LSC recipient fund balances, was revised in 2000 “to provide the Corporation with more discretion to determine whether to permit a recipient to maintain a fund balance of up to 25% of its LSC support for a particular period and sets forth the requirements and limitations applicable to waiver requests and the uses of fund balances.” 65 Fed. Reg. 66637, 66638 (Nov. 7, 2000). In addition, the final revised rule “authorizes the Corporation to exercise its discretion to waive the 25% cap on excess fund balances in three specific circumstances when extraordinary and compelling reasons exist for such a waiver.” *Id.*

45 C.F.R. § 1628.3(a) permits LSC recipients “to retain from one fiscal year to the next LSC fund balances up to 10% of their LSC support.” 45 C.F.R. § 1628.3(b) provides that “[r]ecipients may request a waiver to retain a fund balance up to a maximum of 25% of their LSC support for special circumstances.” 45 C.F.R. § 1628.3(c) then states:

Recipients may request a waiver to retain a fund balance in excess of 25% of a recipient’s LSC support only for the following extraordinary and compelling circumstances[:] when the recipient receives an insurance reimbursement, the proceeds from the sale of real property, or a payment from a lawsuit in which the recipient was a party.

With regard to section 1628.3(c), the preamble provides insight to the process of adopting the precise language of the final rule:

The Committee considered using a standard of “extraordinary and compelling” for these waivers with the three specific circumstances discussed as examples. However, it was felt that more guidance was required to avoid erosion of the standard. Therefore, the Board ultimately decided to limit the permissible circumstances for these extraordinary waivers to the three conditions which have in the past been known to give rise to the sudden infusion of large sums

65 Fed. Reg. at 66640.

45 C.F.R. § 1628.3(d) states that “[a] waiver pursuant to paragraph (b) or (c) of this section may be granted at the discretion of the Corporation pursuant to the criteria set out in section 1628.4(d).” 45 C.F.R. § 1628.4(d) provides, in relevant part, that in granting a waiver for a recipient to retain a fund balance,

[t]he Corporation shall consider the following factors:

- (1) Emergencies, unusual or unexpected occurrences, or the circumstances giving rise to the existence of a fund balance in excess of 10% of LSC support set out in § 1628.3(b) or (c)

With regard to section 1628.4(d), the preamble explains that “the final standard incorporates by reference the need for . . . ‘extraordinary and compelling circumstances’ as specified in § 1628.3(c) to justify a waiver for a fund balance in excess of 25% of a recipient’s LSC support.” 65 Fed. Reg. at 66641. It also reiterates that

to obtain a waiver in excess of 25% of LSC support, the recipient must demonstrate that one of the three circumstances specified in § 1628.3(c) gave rise to the excess fund balance in order to show extraordinary and compelling circumstances to justify a waiver. Thus, the ability of a recipient to obtain a waiver to retain a fund balance in excess of 25% of its LSC support is narrowly circumscribed.

Id.

II. Application of Part 1628 to the Corporation’s Discretion to Grant a Waiver

With regard to the carryover funds that the recipient has requested to retain, neither the unanticipated receipt of use-or-lose non-LSC funds nor any of the other factors cited by the recipient, except the sale of real property, are reasons sufficient to permit a waiver to retain a balance of funds that exceeds 25% of its annual LSC support. Section 1628.3(c) by its express terms limits the “extraordinary and compelling circumstances” for which a recipient is permitted to request such a waiver to “when the recipient receives an insurance reimbursement, the proceeds from the sale of real property, or a payment from a lawsuit in which the recipient was a party.” Only the second of those circumstances applies here, and even if LSC exercises its discretion to grant a waiver of that amount, the recipient’s fund balance would still exceed 25%. The preamble to the final rule also emphasizes that “the Board ultimately decided to limit the permissible circumstances for these extraordinary waivers to the three conditions which have in the past been known to give rise to the sudden infusion of large sums” 65 Fed. Reg. at 66640. Furthermore, section 1628.4(d) incorporates the specific requirements of section 1628.3(c) as factors that the Corporation must consider as part of the proper procedure for granting a waiver. 45 C.F.R. § 1628.3(d)(1). In relation to that section, the preamble clarifies that a recipient must show “‘extraordinary and compelling circumstances’ as specified in § 1628.3(c) to justify a waiver for a fund balance in excess of 25% of a recipient’s LSC support” and that “the ability of a recipient to obtain a waiver to retain a fund balance in excess of 25% of its LSC support is narrowly circumscribed.” 65 Fed. Reg. at 66641. Therefore, because the circumstances cited by the recipient (other than the sale of its building) do not fall within the three “extraordinary and compelling circumstances” listed in section 1628.3(c), the Corporation does not have discretion to grant the recipient a waiver to retain a fund balance in excess of 25% of its annual support for FY 2013 for reasons other than the sale of its building. 45 C.F.R. § 1628.3(c).

We were also asked whether section 1628.3(d) constitutes an independent grant of discretion to the Corporation to grant waivers, distinct from section 1628.3(c). In contrast with section 1628.3(c), governing a recipient’s *request* for a waiver to retain funds in excess of 25%

of annual support, section 1628.3(d) describes the Corporation's discretion to *grant* such a waiver. *Compare* 45 C.F.R. § 1628.3(c), *with* 45 C.F.R. § 1628.3(d). However, section 1628.3(d) applies only to "waiver[s] pursuant to paragraph (b) and (c) of this section," thereby requiring the Corporation to determine whether one of the "extraordinary and compelling circumstances" in section 1628.3(c) is present before exercising its discretion to grant a waiver to retain funds in excess of 25% of support. 45 C.F.R. § 1628.3(d). As quoted above, the preamble makes clear that the final rule "authorizes the Corporation to exercise its discretion to waive the 25% cap on excess fund balances *in three specific circumstances* when extraordinary and compelling reasons exist for such a waiver." 65 Fed. Reg. at 66638 (emphasis added).

CONCLUSION

45 C.F.R. Part 1628 does not afford the Corporation discretion to grant the recipient a waiver to retain a balance in excess of 25% of its support for FY 2013 for reasons other than those enumerated in section 1628.3(c).

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