




RULEMAKING OPTIONS PAPER

TO: Operations & Regulations Committee
Board of Directors

FROM: Victor M. Fortuno 
Vice President & General Counsel

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SUBJECT: Rulemaking Regarding the Provision of Legal Assistance
Under the Compact of Free Association Act

Introduction

This Rulemaking Options Paper (“ROP”) has been prepared by the Office of Legal Affairs (“OLA”), after consultation with LSC’s senior management. The ROP is structured as follows: a summary of Management’s recommendation; a “Background” section to provide some legal and programmatic context for the issue(s) presented; a “Scope of Potential Rulemaking” section, which sets forth policy options; a “Rulemaking Process” section, which sets forth a discussion of the available rulemaking process options; and, finally, there is a “Management Recommendation” section which sets forth Management’s recommendations with respect to the rulemaking scope and process options. This ROP is intended to aid the Committee and the Board in the deliberation and decisionmaking process.

Summary

Management recommends that LSC initiate a narrow rulemaking to amend 45 C.F.R. §1626.10(a) to permit FAS¹ citizens lawfully residing in the United States to receive legal assistance from LSC-funded programs anywhere in the United States without having to be otherwise eligible under 45 C.F.R. Part 1626. It

¹ The designation “FAS” stands for “Freely Associated States” and will be used throughout this memorandum to refer to the Republic of the Marshall Islands, the Federated States of Micronesia and the Republic of Palau, collectively.

is Management’s recommendation that such rulemaking be undertaken through Notice and Comment Rulemaking only and conducted on an expedited schedule.

Background

History of Eligibility for Legal Assistance from LSC-funded Programs

At the time of the creation of LSC in 1974, the countries that are now the sovereign nations of the Republic of the Marshall Islands (“RMI”), the Federated States of Micronesia (“FSM”) and the Republic of Palau were territories of the United States and known as the Trust Territories of the Pacific Islands (“the Trust Territories”). The LSC Act defined the Trust Territories as a “State” for the purposes of the Act. The Act thus conferred eligibility for LSC-funded legal services to Trust Territory residents to the same extent as provided to residents of any state of the United States. Section 1002(8) of the LSC Act, 42 U.S.C. §2996a(8).

In 1983, Congress placed the first statutory restrictions on representation of aliens on LSC recipients in LSC’s appropriations act for that fiscal year, P.L. 97-377. That law provided that none of the funds appropriated could be expended to provide legal assistance for or on behalf of any alien unless the alien was a resident of the U.S. and otherwise met certain statutorily specified criteria. On its face, this language would have appeared to imply that all non-U.S. citizens, including residents of RMI, FSM and Palau would be subject to these restrictions, notwithstanding their eligibility under the LSC Act. To deal with this problem, in the implementing regulations on representation of aliens, 45 CFR Part 1626, LSC included a “special eligibility section” (§1626.10(a)) to exempt residents of the Trust Territory from the alien restrictions imposed by Congress.

In 1986 the trust governing the relationship between the U.S. and the Trust Territories was terminated. At that time, the former Trust Territories were recognized as independent nations and a new relationship with RMI, FSM and Palau was created by the signing of two Compacts of Free Association, one with RMI and FSM and the other with Palau. The Compact with RMI and FSM contemplates the provision of certain services and programs of the U.S. to those nations. Section 224 of the Compact of Free Association with RMI and FSM provides that:

The Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia may agree from time to time to the extension of additional United States grant assistance, services and programs as provided by the laws of the United States, to the Marshall Islands or the Federated States of Micronesia, respectively.

The Compact of Free Association Act of 1985 ("CFA Act") (P.L. 99-239, codified at 48 U.S.C. 1901, et seq.), which implemented the Compact, provides express authority for the provision of LSC-funded legal services. Specifically, section 105(h)(1)(A) of the CFA Act provides that:

. . . pursuant to section 224 of the Compact the programs and services of the [Legal Services Corporation] shall be made available to the Federated States of Micronesia and to the Marshall Islands

The implementing statute for the Compact with Palau makes section 105 of the CFA Act applicable to the Republic of Palau. 48 U.S.C. 1932(b).

After the signing of the respective Compacts and the corresponding implementing statutes, the FAS remained covered by the special eligibility section of Part 1626, notwithstanding their change in legal status vis-à-vis their relationship with the United States. In 1989, LSC amended that section of the regulation to make the section more precise in light of the termination of the trust. Under this version of Part 1626, the special eligibility section provided:

(a) *Micronesia*. The alien restriction stated in the appropriations acts is not applicable to the legal services program in the following Pacific island entities:

- (1) Commonwealth of the Northern Marianas;^[2]
- (2) Republic of Palau;
- (3) Federated States of Micronesia;
- (4) Republic of the Marshall Islands

All citizens of these entities are eligible to receive legal assistance, provided they are otherwise eligible under the [LSC] Act.

² Citizens of the Northern Mariana Islands are U.S. citizens. Thus there is no issue related to the eligibility under Part 1626 of these persons for service outside of the Northern Marianas.

54 Fed. Reg. 18812 (April 29, 1989). The preamble to the Final Rule adopting this language explained that this change was intended to “restate[] congressional intent that residents of these political entities be eligible to be clients of a legal services program.” *Id.* at 18110. The special eligibility section addressing the FAS remained as set forth above until 1996.

As a result of new statutory restrictions contained in the LSC FY 1996 appropriations legislation (P.L. 104-134), additional changes to Part 1626 were made in 1996. Although the statutory amendments did not address this issue, §1626.10(a) was again revised in response to comments from the LSC Office of the Inspector General (“OIG”). The preamble to the 1996 Final Rule states that:

The OIG suggested that both the prior rule and the interim rule dealt with the question of special eligibility incorrectly and urged that the final rule refer only to the legal services programs serving people who were citizens of those jurisdictions. The effect of this change would be to make financially eligible citizens of the Federated States of Micronesia, the Republic of the Marshall Islands and the Republic of Palau only eligible for legal services from the recipients serving those areas. . . . *They would not be eligible for services from any other recipients unless they also came within one of the categories of eligible aliens listed in section 1626.5*

62 FR 19413 (April 21, 1997) (emphasis added). The OIG’s comments were based upon their interpretation of the language of the CFA Act. The Board considered the matter, agreed with the OIG’s interpretation and revised §1626.10(a) accordingly. 62 FR 19413 (April 21, 1997).

Implementing this interpretation, the revised (and still current) version reads:

This part [1626] is not applicable to recipients providing services in the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, or the Republic of the Marshall Islands.

45 CFR §1626.10. The change was intended to make financially eligible citizens of the FAS only eligible for legal services from the recipients serving those areas and not from any other recipients unless they also came within one of the categories of eligible aliens listed in §1626.5. Thus, since 1996 otherwise

financially eligible residents of the FAS seeking assistance from legal services providers in the United States could be provided such assistance only if they met/meet the alien eligibility requirements of §1626.5.

Developments Since 1996

When LSC initiated a Negotiated Rulemaking in 2001 to consider changes to Part 1626, one of the issues raised in the course of the Negotiated Rulemaking Working Group discussions was whether LSC would consider amending §1626.10 to permit FAS citizens lawfully residing in the United States to receive legal assistance from LSC-funded programs (without such citizens having to independently meet the 1626 eligibility criteria). As part of those discussions, LSC attempted, both informally and formally, to obtain further guidance from both the Department of State and the Office of Insular Affairs of the Department of the Interior (which has administrative authority over a variety of issues relating to the FAS) regarding the interpretation of the Compact and implementing acts reflected in LSC's current regulation. Until recently, neither agency had provided LSC with any response.³

In 2003, the United States negotiated amendments to the Compact of Free Association with FSM and RMI and extended several portions of the Compact otherwise set to expire. The amendments were enacted into law with the passage and signing of House Joint Resolution 63, which became Public Law number P.L. 108-188. LSC-funded legal assistance is authorized in the Compact Amendments Act in section 105, which provides, in pertinent part, that:

In addition to the programs and services set forth in section 221 of the Compact, and pursuant to section 222 of the Compact, the program and services of [LSC and other enumerated] agencies shall be made available to the Federated States of Micronesia and to the Republic of the Marshall Islands:

Pub. L. 108-188, Section 105(f)(1)(C). The House Report accompanying the new law explains that this provision “[s]tates in paragraph (1) that certain programs and services (from the Legal Services Corporation, Public Health Service, and Rural Housing Service) be made available to the FSM and the RMI, pursuant to section 222 of the amended Compacts.” H. Rpt. 108-262 at 84.

³ Recent developments with the Department of the Interior and the Department of State are discussed on pages 7-8, *infra*.

The Compact of Free Association Amendments Act of 2003 did not make any amendment to the existing provisions of the Compact with respect to the availability of LSC-funded legal services. Rather, the new law restated the authority for service found in the prior law. In the new law, as in the old, LSC-funded services are “made available to the Federated States of Micronesia and to the Republic of the Marshall Islands[.]”

During the last session of Congress, legislation was passed in the Senate by unanimous consent on September 29, 2006, which would have definitively clarified the issue by clearly stating that LSC services were to be available to the citizens of the FAS. Specifically, section 5 of S.1830, provided as follows:

SEC. 5. AVAILABILITY OF LEGAL SERVICES.

Section 105(f)(1)(C) of the Compact of Free Association Amendments Act of 2003 (48 U.S.C. 1921d(f)(1)(C)) is amended by inserting before the period at the end the following: “which shall also continue to be available to the citizens of the Federated States of Micronesia, the Republic of Palau, and the Republic of the Marshall Islands who legally reside in the United States (including territories and possessions)”

The report accompanying S.1830 explains that:

Section 5 clarifies that section 105(f)(1)(C) of the CFAAA is intended to continue eligibility for the programs and services of the Legal Services Corporation for FSM and RMI migrants who legally reside in the United States. Legal Services Corporation eligibility was extended by the first Compact Act in 1986 (P.L. 99-239), but in 1996, without any further action by Congress, the Legal Services Corporation, by rule, terminated the eligibility of FSM and RMI migrants. Section 104(e) of the original Compact Act, and of the CFAAA, state that it is ‘not the intent of Congress to cause any adverse consequences for an affected area,’ which are defined as Hawaii, Guam, the CNMI, and American Samoa. The Legal Services Corporation is one of those programs which had assisted local communities, in both the ‘affected areas’ and in the mainland U.S., in responding to the impacts and needs of FSM and RMI citizens who

were residing in U.S. communities. This section would restore eligibility as it existed from 1986 to 1996.

Similar legislation was introduced in the House, but was not acted on during the 109th Congress. Accordingly, there was no legislation enacted into law on this subject.

More recently, on January 12, 2007, S.283, the Compact of Free Association Amendments Act was introduced in the Senate. On February 15, 2007, the bill was reported out of the Senate Committee on Energy and Natural Resources, accompanied by a written report. The operative language of the bill and report dealing with the availability of legal assistance from LSC recipients to citizens of the FAS, regardless of where they are obtaining those services, is the same as in last year's Senate bill (quoted above). The next procedural step for this legislation is for the full Senate to act on the bill. At this point, the bill is not scheduled so it is difficult to predict when or even if this will happen.

In June of 2007, LSC received a letter from David Cohen, Deputy Assistant Secretary for Insular Affairs at the Department of Interior. This is the first time LSC has received any formal communication from the Department on this subject. In his letter, Deputy Assistant Secretary Cohen stated:

I can assure you that it is consistent with Federal policy under the Compacts and the [implementing] public laws ... to allow FAS citizens lawfully resident in the United States to receive LSC services. . . . We are not aware of any intention to permit the extension of LSC benefits to FAS citizens in the FAS but to prevent the extension of those benefits to FAS citizens during their lawful residence in the United States.

Subsequently, representatives from LSC met with the Deputy Assistant Secretary, several members of his staff and an attorney from the Department of State. They reiterated their understanding of the Compact and the CFAA. In particular, they explained that the United States and the FAS countries negotiated the Compacts as essentially an aid package and that the Departments of Interior and State, as well as the FAS nations themselves, consider the extension of benefits to the FAS to include the extension of benefits to FAS citizens, regardless of where those citizens are lawfully residing (in the FAS or the United States). As an example, they noted that the CFAA extends the Pell Grant (educational grants) program to the FAS and

that the grants are provided to FAS citizens regardless of whether they are attending institutions of higher education in the FAS or in the United States. Similarly, FAS citizens are eligible for Job Corps services being provided in the United States. We anticipate receipt of additional correspondence from the Department of the Interior further supporting the discussion summarized herein, as well as correspondence from the respective FAS embassies setting forth their official understanding and interpretation of the Compacts and implementing acts. We also expect confirmation of the understanding and interpretation from Congressional staff involved in drafting the implementing legislation.

FAS Citizens in the United States

When LSC was created in 1974, there were probably no more than a few thousand Micronesians living in Guam and Hawai'i, and a scattering in the continental United States. Even when the first Compact was negotiated in 1986, there were probably still less than ten thousand Micronesians living within US territory, still mostly in Guam and Honolulu. However, when the Compact was renegotiated and extended in 2002 it was then known that the migration pattern was showing greatly increased numbers in the continental United States. According to the Embassy of the Federated States of Micronesia, in addition to the traditionally high populations of Micronesians in Guam and Hawai'i, at least 30,000 to 40,000 FSM citizens living or going to school in almost every state in the continental United States. The Board heard a discussion of this issue at its April 2007 meeting in Little Rock, Arkansas. According to Legal Aid of Arkansas, there are 6,000 to 10,000 Marshallese living in Northeast Arkansas alone.

Thus, while there was relatively little demand for legal services among FAS citizens in the United States in 1996, the increased migration of FAS citizens to the United States has increased the potential demand. The inability of financially eligible FAS citizens in the United States to access legal services from LSC-funded programs is a growing problem for the FAS community here. The Legal Aid Society of Hawai'i ("LASH"), for example, has noted that that FAS citizens working in Hawai'i are more likely to be victims of unscrupulous employers because they know that such persons have no recourse to legal services to protect their employment rights.

Scope of Potential Rulemaking

Initiate Rulemaking to Amend §1626.10(a) to Permit Citizens of the FAS to Receive Legal Assistance Anywhere LSC Services are Provided Without Requiring Independent Eligibility Under Part 1626

In connection with the Committee's development of a 2007 Rulemaking Agenda, LASH and Legal Aid of Arkansas ("LAA") have both requested that LSC engage in rulemaking to change the provision of Part 1626, which limits eligibility of citizens of the FAS to services provided in those respective nations (unless the applicant is otherwise eligible under Parts 1611 and 1626). LASH and LAA argue that LSC's reading of the Compact and the CFAA has, since 1996, been unduly narrow. They point to the use of the word "continue" in the bill and report language of the respective Senate bills as an indication that Congress never intended to limit the eligibility of citizens of the FAS to services provided in the FAS.

The position articulated by LASH and LAA appears to be consistent with the view communicated to us by the Departments of Interior and State. Given this, Management recommends amending §1626.10(a) to permit FAS citizens to receive legal assistance anywhere LSC services are provided without requiring independent eligibility under Part 1626. Management anticipates that such an amendment would be straightforward.

Management firmly believes that the appropriate course of action for LSC is to amend the regulation to permit the FAS citizens to access legal services wherever they may be in the United States. To help expedite the rulemaking, Management is preparing a Draft Notice of Proposed Rulemaking for the Committee's review which, although not yet finalized (and therefore not attached to this ROP), will be provided in advance of the Operations & Regulations Committee meeting scheduled for later this month. This is being done because of Management's recommendation that limited rulemaking be undertaken on an expedited basis (as discussed further in the Rulemaking Process section below).

Rulemaking Process

Management recommends that LSC initiate a new rulemaking to address this narrow issue.⁴ Under its rulemaking protocol, LSC may pursue rulemaking by Notice and Comment Rulemaking only, or through the use of Negotiated Rulemaking (followed by a brief Notice and Comment process). If LSC pursues a Notice and Comment rulemaking only, LSC has the option of conducting a public Regulatory Workshop to engage in a discussion with interested parties about the subject of the rulemaking prior to the development of a Notice of Proposed Rulemaking.

An amendment to the regulation to permit the eligibility of FAS citizens lawfully residing in the United States for legal assistance from LSC-funded programs anywhere in the country would be a straightforward matter. It does not appear that a prolonged face-to-face dialog with grantees would be necessary in this instance and Management believes that the time and expense of a Negotiated Rulemaking would not be warranted. Instead, a Notice and Comment rulemaking would appear to suffice.

Although the regulation is likely to be of significant interest to the grantee community, the issues do not appear to be of such a nature as to require the convening of a Regulatory Workshop. The LSC Rulemaking Protocol calls for the use of Regulatory Workshops to elicit information through open discussion about problems or concerns with a particular issue and to provide an opportunity for sharing ideas regarding how to address that issue. Since the contemplated rulemaking would likely not be controversial, a public discussion (beyond that which may occur at the Board meeting in which this issue is raised) would not be expected to raise issues or to lead to novel approaches to problem-solving which will be of significant assistance to LSC in the drafting of a Notice of Proposed Rulemaking. In this instance, the normal exchange of ideas through the statutorily prescribed notice and comment process will likely be adequate. *See* 42 U.S.C. 2996g(e).

In light of the above, Management recommends that the limited scope rulemaking to address only the FAS issue be pursued on an expedited schedule. As noted above, the increased presence of FAS citizens in the United States has, in

⁴ Management recommends that the Part 1626 rulemaking that was opened in 2001 but has been dormant in recent years be terminated contemporaneously with initiation of this new narrower rulemaking.

turn, been accompanied by a potentially increased need for legal services. By committing LSC to completing a rulemaking on an expedited schedule, LSC can open an avenue to justice for FAS citizens living in the United States sooner rather than later. To that end, in conjunction with its recommendation that LSC initiate a Rulemaking, Management will be presenting a Draft Notice of Proposed Rulemaking (“NPRM”) for the Committee’s review and recommendation to the Board for publication. Management estimates that, if the Committee recommends and the Board approves at the upcoming meeting the publication of an NPRM with the legally required minimum 30-day public comment period, a Draft Final Rule could be prepared for the Committee’s review by mid-September.

Management’s Recommendation for Action

In light of the foregoing, Management recommends that LSC initiate a very narrow rulemaking for the purpose of amending §1626.10(a) to permit FAS citizens lawfully residing in the United States to receive legal assistance from LSC-funded programs anywhere in the United States without having to be otherwise eligible under Part 1626. Management further recommends that such rulemaking be undertaken through Notice and Comment Rulemaking only and conducted on an expedited schedule.

Approved:



Helaine M. Barnett
President