

OFFICE OF LEGAL AFFAIRS  
EXTERNAL OPINION

External Opinion # EX-2003-1009

**To:** Legal Services of New York City, South Brooklyn Legal Services,  
Farmworker Legal Services of New York, c/o The Brennan Center.

**Date:** June 24, 2003

**Subject:** Part 1610 Program Integrity Configuration Proposal

---

ISSUES PRESENTED

Would the arrangement set forth in the April 25, 2003, "Configuration Proposal" from the Brennan Center, as clarified by the May 23, 2003, supplemental proposal, establish sufficient

The original four-page proposal and the five-page clarification are attached and incorporated into this opinion.<sup>1</sup> In brief, the proposal is from LSNY, its subgrantee South Brooklyn Legal Services, and Farmworker Legal Services of New York, a former LSC grantee that apparently would re-apply for LSC funding if it could set up an affiliate as described therein. The proposal states that each of those three organizations “proposes to establish a legally separate Corporation ... in accordance with the laws of the State of New York.” The proposal then describes how the relationships between the LSC grantees and the non-LSC entities would be structured including many areas of overlapping staff, equipment, offices, governing bodies, etc.

## ANALYSIS

### Part 1610 Program Integrity Regulation

Section 1610.8(a) of the LSC regulations requires recipients to have “objective integrity and independence from any organization that engages in restricted activities.” The regulation specifies three separate factors, each of which must be met, for a recipient to be determined to have objective integrity and indepe

Finally, the organizations must be physically and financially separate. 45 CFR §1610.8(a)(3). Physical and financial separation is characterized by a variety of indicia, including but not limited to:

- (1) the existence of separate personnel;
- (2) the existence of separate accounting records;
- (3) the degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
- (4) the extent to which signs and other forms of identification which distinguish the recipient from the other organization are present.

Physical and financial separation is the most nuanced and complex of the three factors required by the regulation. Whether physical and financial separation exists is determined on a case-by-case basis, considering the totality of the circumstances. Individual factors present in one situation might be acceptable in the context of the overall relationship between the entities, although they might be unacceptable in another situation in which other factors weigh more heavily against a finding of sufficient separation. Each factor weighs for or against separation. Some factors are heavy, some are light. It is the total weight of all the factors together that LSC looks at in determining the strength of the grantee's physical and financial separation from the other entity. However, in all situations the separation between the organizations must be clear to clients, courts, agencies and others with whom the recipient comes into contact, and to the general public.

It is also important to note that the f

with the laws of the State of New York. In addition, the proposal states that the “membership of the boards of directors of the LSC and non-LSC affiliates will be coextensive at the outset, but

*Physical and Financial Separation*

Paragraphs 2 (Names), 5 (Timekeeping), 6 (Signage), 7 (Equipment), 8 (Physical Premises), 9 (Time) and 10 (Intake) of the proposal implicate physical and financial separation issues.<sup>6</sup> As noted above, the physical and financial separation analysis is a fact-specific, totality of the circumstances analysis that requires consideration of all of the different indicia of separation (the most important of which are identified in the regulation, as discussed above), taken together. On the basis of the information provided, the proposal does not meet the physical and financial separation standard, for many of the same reasons the 1997 Queens Legal Services situation was rejected.<sup>7</sup>

For the purpose of understanding which aspects of the proposal indicate a lack of physical and financial separation, the specific aspects of the proposal touching on physical and financial separation are discussed in greater detail below. The overall conclusion regarding the physical and financial separation analysis does not hinge on any single factor; rather the entire situation is considered as a whole.

Paragraph 2 (Names) provides proposed names for each of the non-LSC grantee affiliates which are intended to convey the respective affiliate's "separate legal, financial and programmatic status."

<u>LSC Grantee</u>	<u>Non-LSC Affiliate</u>
Legal Services for New York City	New York City Justice Center
South Brooklyn Legal Services	South Brooklyn Justice Center
Farmworker Legal Services of New York	Farmworker Justice Center

The names proposed are indicative of separate legal, financial and programmatic status and are sufficiently likely to convey that status to clients, courts, agencies, the public and others with whom the grantees and the affiliates would be dealing. In particular, each grantee has a "legal services" name while the non-LSC affiliates would all be "Justice Centers." This is exemplified in the disclaimer example on page four of the May 22, 2003, clarification letter: the LSC grantee is referred to as "SBLS" while the non-LSC affiliate is referred to as the "Justice Center."

---

<sup>6</sup> In EX-2003-1008 we placed the discussion of boards in the section of the Opinion on physical and financial separation. The issue of board overlap and control properly belongs in the legally separate entity section. Consequently, the discussion of Paragraph 3 of the proposal has been moved to the legally separate entity section of this Opinion.

<sup>7</sup> On August 12, 1997, LSNY asked for LSC's Part 1610 evaluation of a proposed affiliation between its subgrantee Queens Legal Services Corporation and a non-LSC program. John Tull, Director of the LSC Office of Program Operations, informed LSNY by letter on September 10, 1997, that the proposal did not meet the requirements of Part 1610.

Paragraph 5 (Timekeeping). The proposal implies, but does not explicitly state, that each organization will require its own legal employees to keep detailed time records of work

as a copier and a library, a complete sharing of *all* office property, including telephones, furniture, case management systems, etc., would be a heavy indicia of a lack of physical separation. Although the proposal notes that the costs of the equipment is intended to be apportioned, that aspect speaks only to subsidization, but not to physical and financial separation. As the regulation states, “[m]ere bookkeeping separation of LSC funds from other funds is not sufficient.”

“Program Integrity Guidance” at 3, attachment to October 30, 1997, LSC Program Letter “Certification of Program Integrity” attached to EX-2003-1008 and available at [www.lsc.gov](http://www.lsc.gov). In order to best demonstrate separation, the two organizations could clearly track and allocate the time and activities of all staff and volunteers.

The pledge that “no personnel will engage in LSC-funded activities while working in the capacity as an employee of a non-LSC grantee affiliate” does not ameliorate the problem that by having completely overlapping staffs, each grantee and its affiliate appear to be essentially one organization. In the same way that apportioning costs for overhead and equipment speaks only to the issue of subsidization and not to physical and financial separation, the fact that employees “on the clock” for the grantee would not be doing any work for the affiliate, and vice versa, serves only to prevent potential subsidization and is not sufficient to demonstrate physical and financial separation of the organizations.

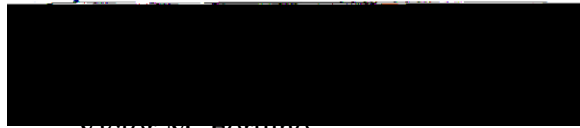
Paragraph 10 (Intake) states that “the respective affiliates propose to share a common intake and allocation mechanism to refer clients and cases between the affiliates.” As the point of entry for clients, a shared intake mechanism must clearly differentiate between the two entities. The only description of how the intake system will work is a statement that the disclaimers described in the proposal will be provided to applicants for service and clients. By itself this does very little to give the clients a clear experience of being directed to one of two separate organizations rather than merely being routed within one entity. Considering the extensive degree of integration otherwise being proposed between the organizations, the shared intake system, absent more detailed procedures to distinguish the two affiliates, would only serve to reinforce the experience of the affiliates as essentially one entity with administrative separation on paper.

## CONCLUSION



restricted activities.” While the amended proposal could meet the requirements of legally separate entities, no transfer of LSC funds, and no subsidization of restricted activities with LSC funds, it fails to provide for sufficient physical and financial separation between the two organizations.

Very truly yours,



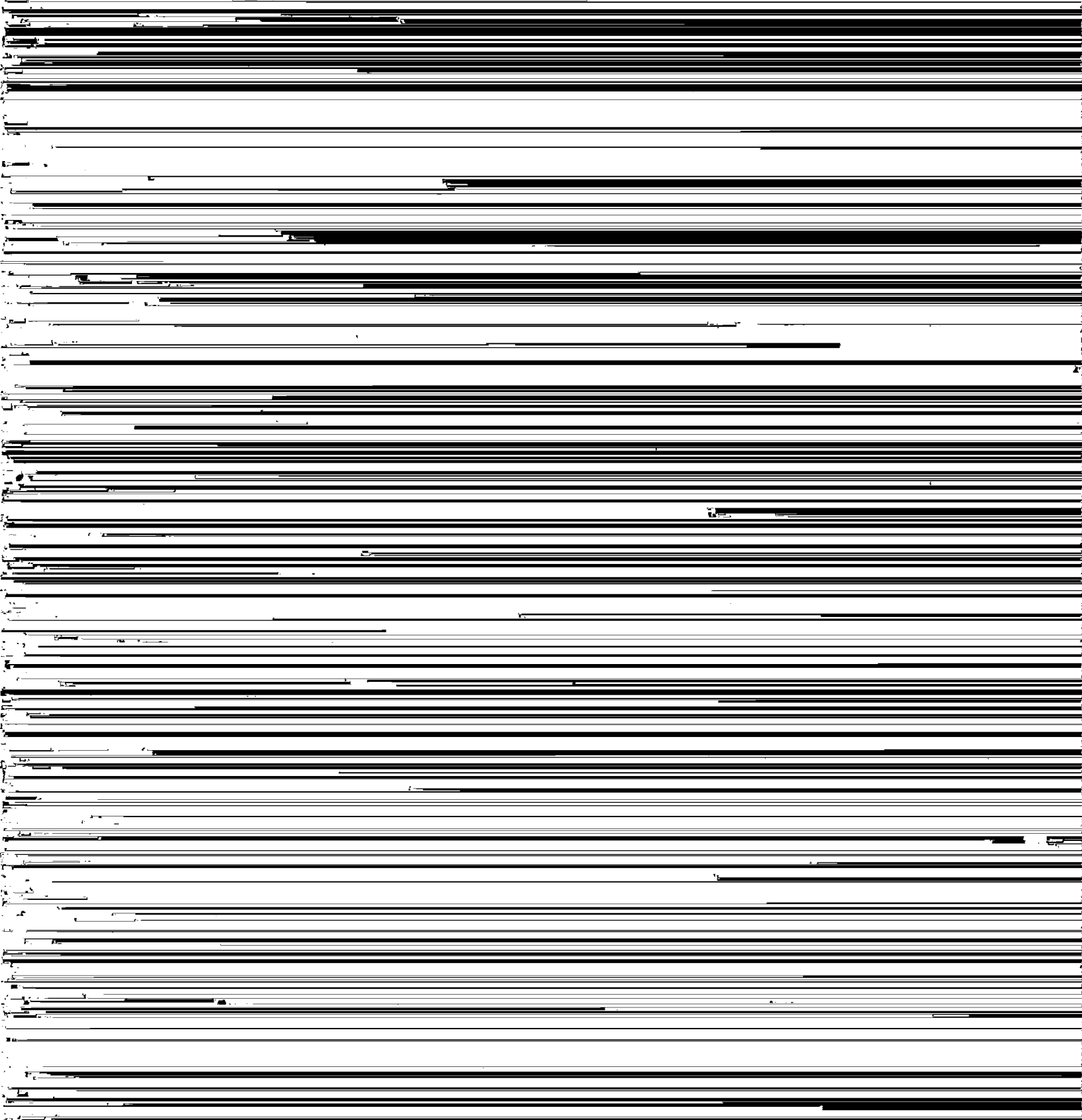
Victor M. Fortunato  
General Counsel

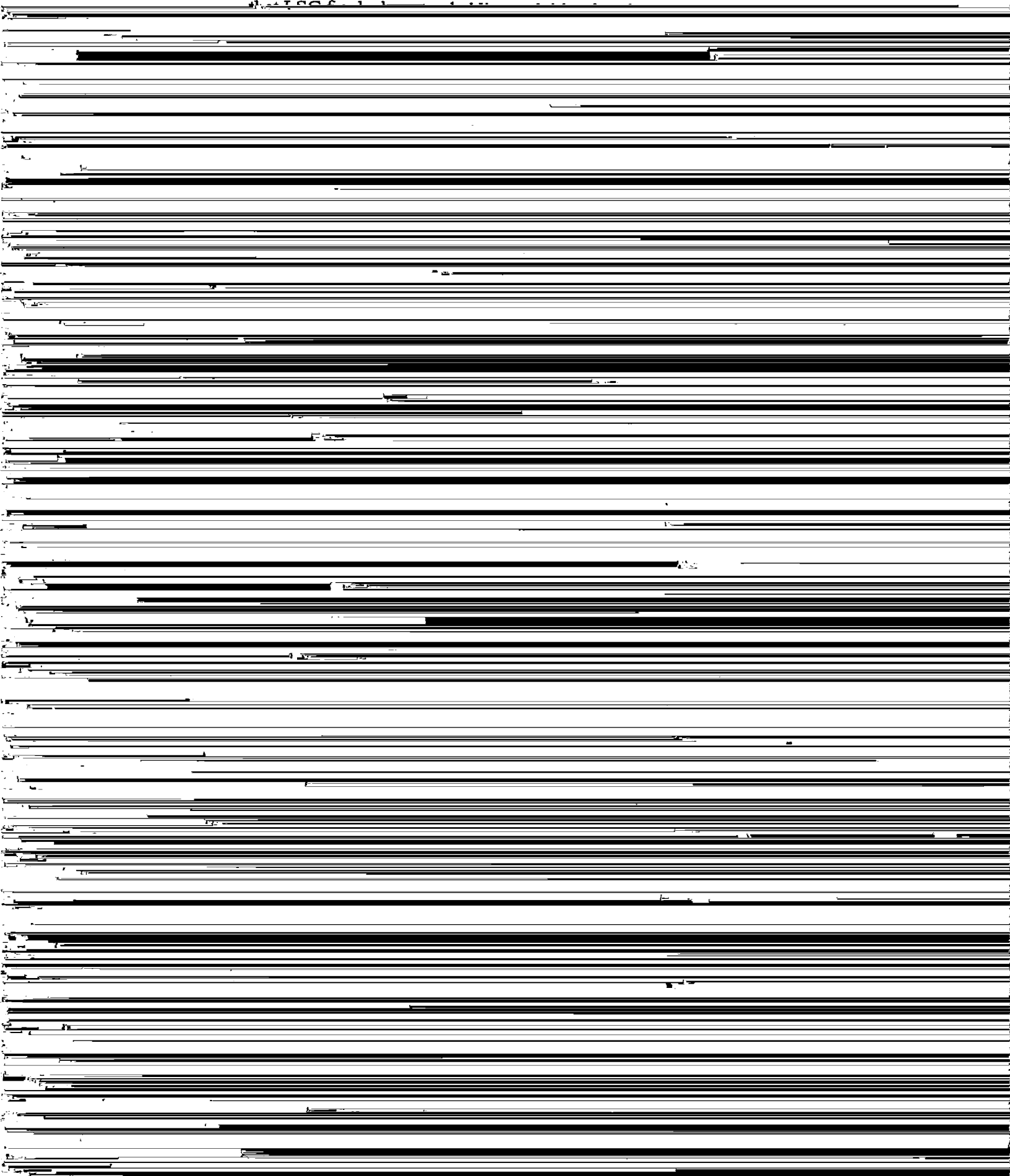
Attachments: April 25, 2003 Configuration Proposal  
May 22, 2003 Clarification

**EX-2003-1009 Attachment #1**  
**April 25, 2003, Configuration Proposal**

**Configuration Proposal**

Each grantee-plaintiff submits for review by the Legal Services Corporation ("LSC") the following proposal designed to satisfy LSC's program integrity regulations, while respecting the First Amendment protection afforded to grantees and donors to utilize their own LSC funds.



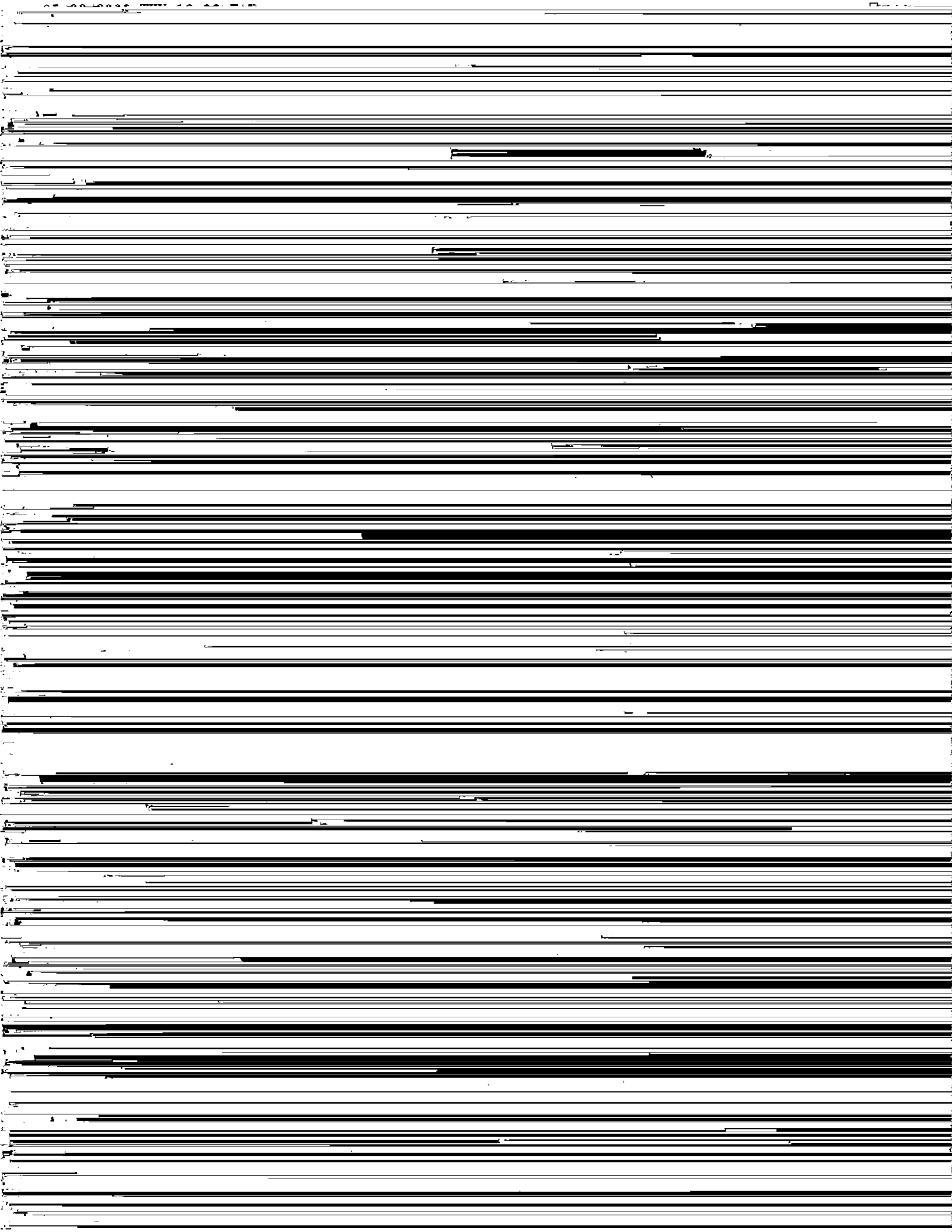


6. **Signage and Disclaimers:** The two affiliates will ensure that clients under

will be allocated to the LSC grantee. No employee may engage in activities barred by the LSC restrictions during time paid for with LSC funding.

10 **Intake:** The two affiliates may share a common intake and allocation system.

**EX-2003-1009 Attachment #2**  
**May 22, 2003, Clarification of Configuration Proposal**









In addition, the LSC grantee will include the following disclaimer (or similar text to the same effect) in all client retainer agreements: