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7050-01-P-01-P

## **LEGAL SERVICES CORPORATION**

### **45 CFR Parts 1606 and 1623**

**Termination, limited reductions in funding, and debarment procedures; recompetition; Suspension procedures**

**AGENCY:** Legal Services Corporation

**ACTION:** Notice of Proposed Rulemaking

**SUMMARY:** This Notice of Proposed Rulemaking (NPRM) proposes amendments to the Legal Services Corporation's regulations on termination and suspension procedures.

**DATES:** Comments on the NPRM are due [insert date 60 days from date of publication].

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### **SUPPLEMENTARY INFORMATION:**

#### **Background**

The Legal Services Corporation (LSC) Act (the Act) provides general enforcement authority to the Corporation.<sup>1</sup> LSC's principal regulation discussing general enforcement authority and procedures is the Enforcement Procedures regulation at 45 C.F.R. Part 1618. In accordance with the requirements of Part 1618, LSC uses a variety of enforcement tools, formal and informal, to ensure compliance. Several enforcement

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<sup>1</sup> LSC Act, §2996e(b)(1)(A); 42 U.S.C. §1006(b)(1)(A).

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tools are provided for in LSC-adopted regulations and are generally intended and available to the Corporation to address those instances of significant non-compliance by a recipient.<sup>2</sup> In particular, LSC has adopted suspension procedures (45 C.F.R. Part 1623) and questioned cost procedures (45 C.F.R. Part 1630). LSC has also adopted grant termination procedures (45 C.F.R. Part 1606) which contains procedures for the termination in whole or part of funding in cases of a recipient's substantial noncompliance with LSC statutory or regulatory requirements and other policies, instructions or grant terms and conditions. Under this regulation, any contemplated reduction of 5% or more of a recipient's funding is considered a termination and triggers the termination procedures.<sup>3</sup> Reductions of funding of less than 5% are not considered terminations. In order to reduce a recipient's funding by less than 5% without using the 1606 termination procedures, procedures have to be established by rulemaking.<sup>4</sup>

considering adding additional enforcement tools intended to increase LSC's flexibility in addressing compliance issues.<sup>5</sup>

***Amending Part 1606 to Include Standards and Procedures on Limited Reductions in Funding***

The adoption of standards for the imposition of a reduction of funding of less than 5% would provide LSC with additional flexibility in enforcement tools. On those occasions in which such a penalty would be warranted, having a limited reduction of funding option utilizing a less cumbersome and involved process than the existing termination process would be an appropriate way of sanctioning a recipient. There have been a few cases in which a recipient has violated restrictions where the amount of LSC funds expended in the commission of the violations was so small that a questioned cost proceeding would not have provided a punishment commensurate with the nature of the violation, but in which a 1606 termination would have been excessive. In such cases, an intermediate sanction, such as a limited reduction in funding, could have provided LSC with a meaningful and appropriate sanction to use to address the infraction, had it been a viable option. The option to impose a limited reduction in funding would also minimize the risk that a recipient's client service or ability to implement corrective action would suffer due to a significant lack of resources.

Accordingly, LSC is proposing to add a new section to Part 1606 to implement procedures for the reduction of a recipient's funding in an amount less than 5% of the

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<sup>5</sup> LSC notes also that consideration of the adoption of additional enforcement tools responds to concerns expressed by the Government Accountability Office (GAO) in its report, *LEGAL SERVICES b84 Tw[wi30.2a m)8RPt*

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recipient's current annual level of financial assistance. Much of the proposed procedure is modeled on the suspension procedure in Part 1623 because those procedures provide a straightforward process with significant opportunity for recipient input and due process. However, because the sanction proposed would involve a reduction of the recipient's

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LSC imposed a 2% reduction in funding for that grant year, it would reduce the recipient's funds for that second year of the grant term only and there would be no effect on the recipient's level of funding for the third year of the grant term (presuming the grant was renewed for the third year of the grant term).

### *Grounds for Limited Reductions in Funding*

Proposed paragraphs (b) and (c) address the permissible grounds for the imposition of a limited reduction in funding. Specifically, LSC proposes that paragraphs (b) and (c) read as follows:

*(b) Grounds for reduction in funding. A limited reduction of funding may be imposed when the Corporation determines that termination in whole or in part of the recipient's grant is not warranted but that, nevertheless, there has been a substantial violation by the recipient of an applicable provision of law, or a rule, regulation, guideline or instruction issued by the Corporation, or a term or condition of the recipient's current grant or contract with the Corporation; and the Corporation has reason to believe that prompt action is necessary to:*



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terminations in part and ensure that this tool is targeted for use in situations in which LSC anticipates its greatest utility.

### *Criteria for Determining the Amount of the Limited Reduction in Funding*

Proposed paragraph (d) sets forth the criteria LSC would use in determining the amount of a reduction in funding it was seeking to impose on a recipient. Specifically, LSC proposes that paragraph (d) read as follows:

*(d) The Corporation shall determine the dollar amount of the reduction in funding based on consideration of the following criteria:*

*(1) The number of restrictions or requirements violated;*

*(2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement;*

*(3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions;*

*(4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; and*

*(5) Whether the violation was knowing and willful.*

These are the same criteria LSC proposes to use for determining whether there has been a substantial violation for the purposes of justifying the grounds for imposing a limited reduction in funding. These proposed criteria provide recipients with notice of the basic analytic framework LSC would use in determining the amount of a proposed limited reduction in funding; the worse the violation(s) (i.e., the more repeated, substantive,

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and/or knowing and willful the violations are), the larger the limited reduction in funding would likely be. Similarly, the longer a recipient failed to remedy a situation, the larger the limited reduction in funding would likely be. At the same time, the proposed criteria reserve considerable discretion to the Corporation to fashion a proposed reduction. This is necessary to enable the Corporation to tailor the proposed sanction as appropriate on a case-by-case basis to achieve the most appropriate outcome.

### *The Limited Reduction in Funding Process*

Proposed paragraphs (e) through (k) set forth the process LSC would follow to impose a limited reduction in funding on a recipient. Specifically, LSC proposes that paragraphs (e) through (k) read as follows:

*(e) When the Corporation has made a proposed determination to impose a limited reduction of funding in a*



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*at which it may attempt to show that the proposed limited reduction in funding should not be imposed; and*

*(5) Advise the recipient that, within 10 days of its receipt of the proposed determination and without regard to whether it requests an informal meeting, it may submit written materials in opposition to the proposed limited reduction in funding.*

*(f) If the recipient requests an informal meeting with the Corporation, the Corporation shall designate the time and place for the meeting. The*

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*(3) be promptly transmitted to the Chair of the recipient's governing body, and to the recipient in a manner that verifies receipt of the determination by the recipient.*

*(i) The recipient may seek review by the President of a recommended determination. A request for review must be made in writing within 10 calendar days after the recipient's receipt of the recommended determination and must state in detail the reasons for seeking review. If the recipient does not request review by the President, a recommended determination shall become final 10 calendar days after receipt by the recipient. If the President has had prior involvement in the consideration of the recommended determination, the President shall designate another senior Corporation employee who has not had prior involvement to consider the review of the recommended determination. The President shall also have discretion where the President has not had prior involvement in the recommended determination, to designate another senior Corporation employee to consider the review, provided that the senior Corporation employee has not had prior involvement in the recommended determination.*

*(j) The President or designee's review shall be based solely on the*

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*submissions made to the President or designee. All submissions and responses made to the President or designee shall become part of the administrative record.*

*(k) As soon as practicable after receipt of the request for review of a recommended determination, but not later than 30 days after the request for review, the President or designee shall affirm, modify, or reverse the recommended determination, or direct further consideration of the matter. The final determination of the President or designee shall conform to requirements of paragraph (h) of this section and shall become final upon receipt by the recipient.*

Proposed paragraphs (e), (f) and (g) are based on similar provisions found at paragraphs (a), (b) and (c) of §1623.4 of the suspension rule. The one difference between what LSC is proposing and the correlated suspension procedure requirements is that LSC is proposing to also send notices of the initial proposed, recommended and final determinations to the Chair of the recipient's governing body in addition to the recipient itself. This is similar to how notice is provided regarding terminations. Because of the relative severity of the situation that would be inherent in any case in which LSC was proposing a limited reduction in funding, LSC believes that notice to the governing body Chair is necessary.

Proposed paragraphs (h) through (k) are based on paragraph (b) of §1606.9 and §1606.10 of the termination rule. As noted above, LSC believes that the suspension procedures provide a straightforward, reasonably simple process with significant opportunity for recipient input and due process. These proposed provisions guarantee

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LSC believes that the proposed procedures provide a significant amount of due process to recipients, while being simple and straightforward and without being nearly as resource intensive as the formal hearing process used for terminations.

### *Other Conforming Amendments to Part 1606*

LSC is proposing to amend the title of Part 1606 to specifically reference limited reductions in funding. Since a limited reduction in funding is not a termination, LSC believes that adding the reference to limited reductions in funding to the title of Part 1606 is not only more accurate, but will aid LSC, recipients and others in understanding where to find the limited reduction in funding procedures in LSC's regulations. LSC is also proposing amendments to §§1606.2, Definitions, and 1606.13, Interim and termination funding; reprogramming, to harmonize these sections with the proposed new section. First, LSC is proposing to amend §1606.2(d)(v) which specifies that a reduction of funding of less than 5% of a recipient's funding is not a termination. That paragraph currently provides that "No such reduction shall be imposed except in accordance with regulations promulgated by the Corporation." Since LSC is now proposing to promulgate such regulations, LSC proposes to delete this sentence and include a specific cross-reference to the proposed new §1606.15. Accordingly, LSC proposes to revise §1606.2(d)(v) to read in its entirety: "A reduction of funding of less than 5 percent of a recipient's current annual level of financial assistance imposed by the Corporation in accordance with §1606.15 of this Part."

Second, LSC proposes to amend paragraphs (a), (b) and (d) of §1606.13, Interim and termination funding; reprogramming.<sup>6</sup> Currently §1606.13 addresses issues

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<sup>6</sup> Amendment of paragraph (c) is not necessary because that paragraph addresses close-out funding which applies only to circumstances involving a termination in whole.

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related to funding during and upon the conclusion of termination procedures and Corporation use of funds recovered through a termination proceeding. LSC believes these provisions should be equally applicable in cases involving a limited reduction in funding. Accordingly, LSC proposes to amend paragraphs (a), (b) and (d) of §1606.13 to include references to limited reduction in funding procedures pursuant to §1606.15 as follows:

*(a) Pending the completion of termination or limited reduction in funding proceedings under this part, the Corporation shall provide the recipient with the level of financial assistance provided for under its current grant or contract with the Corporation.*

*(b) After a final decision has been made to terminate a recipient's grant or contract or impose a limited reduction of funding, the recipient loses all rights to the terminated or reduced funds.*

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*(d) Funds recovered by the Corporation pursuant to a termination or limited reduction in funding shall be reallocated by the Corporation for basic field purposes at its sole discretion.*

LSC notes that, with respect to proposed paragraph (d), in addition to including a reference to limited reductions in funding, LSC is proposing a substantive change to this provision. The current provision reflects the Corporation's longstanding policy that recovered funds are generally to be used in the service area which the funds originally supported, unless the Corporation exercises its discretion to reallocate the funds for some other basic field purpose, such as for making emergency or other special grants.

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Although this policy is appropriate in other cases involving recovered funds, in the case of limited reductions in funding and terminations, especially terminations in part, the funds are being recovered as a sanction to the recipient. As most service areas only have one recipient operating within them, a presumption or expectation that funds be returned

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*(3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions;*

*(4) The extent to which the recipient failed to take action to cure the*



*Amending Part 1623 to Increase Maximum Period of Suspension of Funding Pending  
Corrective Action*

LSC is proposing to extend the current maximum suspension period from 30 days to six months, with the suspended funding fully restored at the end of that suspension period. Although §1011(2) of the LSC Act provides that “a suspension of financial assistance shall not be continued for longer than thirty days, unless [the recipient] has been afforded reasonable notice and opportunity for a timely, full, and fair hearing, and, when requested, such hearing shall be conducted by an independent hearing examiner,” §501(b) of LSC’s FY 1998 appropriation legislation (which has been carried forth in each subsequent appropriation) renders that provision inoperative. Specifically, that section states that “[s]ections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 2996j) shall not apply to the provision, denial, suspension, or termination of any financial assistance using funds appropriated in this Act.” LSC is, thus, within its statutory authority to increase the maximum suspension period through regulatory action.

As with limited reductions in funding, LSC believes that a longer maximum suspension period can be a useful option due to its expected deterrent effect (thereby also enhancing the efficacy of non-monetary sanctions) and as a meaningful sanction in itself in the infrequent instances in which it would be needed. Moreover, the reasons as discussed below justifying the regulation’s current 30-day maximum suspension period are no longer as compelling as they were when the rule was adopted. Rather the current operating environment for many recipients suggests that a longer maximum suspension period is now merited.

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The preamble to the current version of

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to provide LSC access to certain records. LSC believes that having a more credible threat of a suspension may have provided additional incentive to those recipients to be more cooperative in producing these records.

LSC anticipates that the maximum six month suspension would be warranted only in rare cases, and would only seek to apply the minimum suspension period it believes would be necessary to result in the required corrective action being taken. As is currently the case, the full funding would be restored upon conclusion of the suspension period, or earlier upon the timely and satisfactory implementation of all required corrective actions. However, the flexibility to apply up to a maximum six-month suspension would be helpful. LSC is of the opinion, however, that if a suspension of longer than six months would be needed or appropriate, other sanctions (such as a reduction in funding or termination) would likely be more appropriate.

Accordingly, LSC proposes to amend §1623.4(e) to substitute “180” for “30” such that the section would read:

*The Corporation may at any time rescind or modify the terms of the final determination to suspend and, on written notice to the recipient, may reinstate the suspension without further proceedings under this part. Except as provided in paragraph (f) of this section, the total time of a suspension shall not exceed 180 days, unless the Corporation and the recipient agree to a continuation of the suspension without further proceedings under this part.*

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**PART 1606 – TERMINATION, LIMITED REDUCTION IN FUNDING, AND  
DEBARMENT PROCEDURES; RECOMPETITION**

**For reasons set forth above, and under th**

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(2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement;

(3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions;

(4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; and

(5) Whether the violation was knowing and willful.

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6. Add a new Sec. 1606.15 to read as follows:

Sec. 1606.15 Limited reductions of funding

(a) The Corporation may, in accordance with the procedures and requirements set forth in this section, impose a limited reduction of funding by reducing a recipient's funding in an amount not to exceed 5% of the recipient's current annual level of financial assistance.

(b) Grounds for limited reduction in funding. A limited reduction of funding may be imposed when the Corporation determines that termination in whole or in part of the recipient's grant is not warranted, but that nevertheless there has been a substantial violation by the recipient of an applicable provision of law, or a rule, regulation, guideline or instruction issued by the Corporation, or a term or condition of the recipient's current grant or contract with the Corporati



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(2) Identify, with reasonable specificity, any facts or documents relied upon as justification for the proposed limited reduction in funding;

(3) Specify what, if any, corrective action the recipient can take to avoid the limited reduction in funding;

(4) Advise the recipient that it may request, within 5 days of receipt of the proposed determination, an informal meeting with the Corporation at which it may attempt to show that the proposed limited reduction in funding should not be imposed; and

(5) Advise the recipient that, within 10 days of its receipt of the proposed determination and without regard to whether it requests an informal meeting, it may submit written materials in opposition to the proposed limited reduction in funding.

(f) If the recipient requests an informal meeting with the Corporation, the Corporation shall designate the time and place for the meeting. The meeting shall occur within 5 days after the recipient's request is received.

(g) The Corporation shall consider any written materials submitted by the recipient in opposition to the proposed limited reduction in funding and any oral presentation or written materials submitted by the recipient at an informal meeting. If, after considering such materials, the Corporation determines that the recipient has failed to show that the reduction in funding should not become effective, the Corporation may proceed to make a recommended determination to impose a limited reduction of funding.

(h) A recommended determination to impose a limited reduction of funding shall:

(1) be set forth in writing;

(2) contain findings of the relevant facts and the reasons for the decision; and



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(3) be promptly transmitted to the Chair of the recipient's governing body, and to the recipient in a manner that verifies receipt of the determination by the recipient.

(i) The recipient may seek review by the President of a recommended determination. A request for review must be made in writing within 10 calendar days after the recipient's receipt of the recommended determination and must state in detail the reasons for seeking review. If the recipient does not request review by the President, a recommended determination shall become final 10 calendar days after receipt by the recipient. If the President has had prior involvement in the consideration of the recommended determination, the President shall designate another senior Corporation employee who has not had prior involvement to consider the review of the recommended determination. The President shall also have discretion where the President has not had prior involvement in the recommended determination, to designate another senior Corporation employee to consider the review, provided that the senior Corporation employee has not had prior involvement in the recommended determination.

(j) The President or designee's review shall be based solely on the information in the administrative record of the limited reduction in funding proceeding and any additional submissions, either oral or in writing, which the President or designee may request. A recipient shall be given a copy of and an opportunity to respond in writing to any additional submissions made to the President or designee. All submissions and responses made to the President or designee shall become part of the administrative record.

(k) As soon as practicable after receipt of the request for review of a recommended determination, but not later than 30 days after the request for review, the President or designee shall affirm, modify, or reverse the recommended determination, or direct

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further consideration of the matter. The final determination of the President or designee shall conform to requirements of paragraph (h) of this section and shall become final upon receipt by the recipient.

### **PART 1623--SUSPENSION PROCEDURES**