

OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION  
Advisory Opinion # AG2014-006

Date: September 4, 2014

## 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 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.”

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) 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 [s] 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 that 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. 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-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(d) 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 J 0.1

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 in 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 p4 Tw 5.86w(w)-2(ai)-6(v)-4 BDC 0.15 Td [(6p4