

45 CFR Part 1640**Application of Federal Law to LSC Recipients****AGENCY:** Legal Services Corporation.**ACTION:** Interim rule with request for comments.

SUMMARY: This interim rule implements a provision in the Legal Services Corporation's ("Corporation" or "LSC") FY 1996 appropriations act which subjects LSC recipients to Federal law relating to the proper use of Federal funds. This rule identifies applicable Federal law and sets out the mechanism by which recipients must agree to be subject to such law and the consequences of a violation of the law. Although this rule is effective upon publication, the Corporation also solicits public comment on the interim rule in anticipation of adoption of a final rule at a later time.

DATES: This interim rule is effective on August 29, 1996. Comments must be submitted on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First St NE., 11th Floor, Washington, DC 20002-4250.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, (202) 336-8910.

SUPPLEMENTARY INFORMATION: On May 19, 1996, the Operations and Regulations Committee ("Committee") of the LSC Board of Directors ("Board") requested the LSC staff to prepare an interim rule to implement § 504(a)(19) of Public Law 104-134, 110 Stat. 1321(1996), the Corporation's FY 1996 appropriations act, which requires LSC-funded recipients to agree by contract that, with regard to their use of LSC funds, they will be subject to Federal law related to the proper use of Federal funds. The Committee held hearings on staff proposals on July 9 and 19, and the Board adopted this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation which is already effective and which carries strong penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. See 5

U.S.C. 553(b)(3)(B) and 553(d)(3). Accordingly, this rule is effective upon publication.

However, the Corporation also solicits public comment on the rule for review and consideration by the Committee. The Committee intends to hold public hearings to discuss written comments and hear oral comments. It is anticipated that a final rule will be issued which will supersede this interim rule.

Briefly, this rule requires LSC recipients to agree to be subject to "Federal laws relating to the proper use of Federal funds" in their use of LSC funds. This rule puts recipients and their employees on notice that LSC funds are Federal funds for the purposes of the applicable Federal laws cited in this rule and that a violation of such laws would subject the recipient or individual employee to potentially serious sanctions.

A section by section analysis of this interim rule is provided below.

Section 1640.1 Purpose

The purpose of this rule is to ensure that recipients' LSC funds are considered Federal funds for the purposes of Federal law relating to the proper use of Federal funds. This rule also identifies applicable Federal laws and delineates the consequences to the recipient of violations of such law.

Section 1640.2 Definitions

The statutory restriction provides that recipients must contractually agree to be subject to "all provisions of Federal law relating to the proper use of Federal funds" with regard to their use of LSC funds. The regulation interprets this to mean that, with respect to their LSC funds, all programs should be subject to Federal laws which address issues of waste, fraud and abuse of Federal funds. The legislative history limits the applicable laws to those dealing with waste, fraud and abuse and specifically names the laws which apply. The House Report for H.R. 2076, an earlier unsuccessful effort to enact a provision similar to the provision that was ultimately enacted, states:

[S]ection 504(2) requires all programs receiving Federal funds to comply with Federal statutes and regulations governing waste, fraud, and abuse of Federal funds.

H. Rep. No. ____, 104th Cong., 1st Sess. 116 (July 1995). See also the McCollum/Stenholm bill (HR 1806), a recent effort to amend the LSC Act, which expressly cites most of the laws included in this part. Other laws have been added after consultation with the Corporation's Office of the Inspector General, one of

whose statutory mandates is to prevent the misuse of LSC funds.

The relevant laws are listed in the definition of "Federal law relating to the proper use of Federal funds" in paragraph (a)(1) of this section. Generally, such laws deal with the bribery of public officials or witnesses; the embezzlement or theft of federal funds; attempts to defraud the government; the obstruction of federal audits; and making false statements and claims to the Federal government. One exception makes it clear that *qui tam* actions authorized by section 3730(b) of Title 31 may not be brought against the Corporation, any recipient, subrecipient, grantee, or contractor of the Corporation, or any employee thereof.

Paragraph (a)(2) clarifies that for the purposes of the laws cited in paragraph (a)(1), the Corporation shall be considered a Federal agency and its funds shall be considered to be Federal funds provided by grant or contract.

Paragraph (b) of this section defines the meaning of a "violation of the agreement." A violation of a recipient's agreement to be subject to Federal law related to the proper use of Federal funds could occur in either of two ways. First, there would be a violation if the *recipient* were convicted of or judgment were entered against it for a violation of any of the relevant Federal laws by the Federal court having jurisdiction of the matter, and all appeals were final or the time to file for an appeal had expired.

Second, there would be a violation if an *employee* or board member of the recipient were convicted of a violation of the enumerated laws and the Corporation found that responsibility for the offense should be imputed to the recipient because the recipient had knowingly or through gross negligence allowed the illegal activities to occur.

Section 1640.3 Contractual Agreement

This section implements the statutory requirement that, as a condition of receiving a grant or contract with the Corporation, recipients must enter into a contractual agreement that, in regard to LSC funds, they will be subject to Federal law relating to the proper use of Federal funds in regard to LSC funds. The Federal laws in question normally apply to Federal agencies and Federal funds. Because the Corporation is not a Federal agency, it was necessary for Congress to provide in § 504(a)(19) of its FY 1996 appropriations act that, for purposes of the application of these laws to recipients, the Corporation shall be considered to be a Federal agency and all funds provided by the Corporation shall be Federal funds provided by grant or contract. This

language authorizes the application to the Corporation's recipients of Federal law on the proper use of Federal funds.

This provision also requires that the agreement include a statement that the recipient's employees and board members have been informed of the applicable Federal laws and the potential consequences to them both personally and to the recipient if the law is violated. Thus, recipients should familiarize their staff and board with the Federal laws listed in this part and the significance of the agreement made by the recipient. The agreement and § 504(a)(19) mean that, in regard to its LSC funds, the recipient, its board members, and its employees could be subject to Federal criminal prosecution and civil false claims liability for a violation of the Federal statutes listed in this part.

Recipients should also be mindful of the fact that the Corporation's Office of the Inspector General has statutory responsibility to investigate the activities covered by the Federal laws listed in this part. Although the agreement would apply only to LSC funds, recipients are also reminded that the Corporation's Inspector General investigates reports of possible theft or misappropriation of a recipient's non-LSC funds as well as its LSC funds and would report any such thefts or misappropriations that it found to the appropriate Federal or State authorities.

Section 1640.4 Violation of Agreement

Paragraph (a) provides that a violation of the agreement as defined in this part would render a recipient's grant or contract terminated by the Corporation. Section 504(a)(19) clearly evidences Congressional intent that a recipient's funding be terminated if there is a violation of the applicable Federal law. Because a violation pursuant to § 1640.2(b)(1) requires a recipient to have been found by a court of law to have violated the applicable Federal law, the Corporation would not be obligated to provide a termination hearing. For a § 1640.2(b)(2) violation, on the other hand, prior to any termination, the Corporation would be obligated to provide notice and an opportunity to be heard for the sole purpose of determining whether a recipient knowingly or through gross negligence allowed the illegal activities to occur. Once a final decision has been made to impute responsibility for the violation to the recipient, the law requires that the grant or contract be terminated by the Corporation.

In any case, the Corporation has the authority and responsibility to take the steps necessary to safeguard its funds.

Section 1640.5 Reporting Requirement

This section requires a recipient to give telephonic or other actual notice to the Corporation within two (2) working days when the recipient or any of its employees or board members have been charged with a violation of any of the Federal laws listed in § 1640.2(a). It also clarifies that "charged with a violation" means that an individual or governmental entity having authority to initiate such proceedings has initiated action against the recipient or its employees or board members and the proceeding is pending. A recipient must also give the Corporation notice within two (2) days if it has reason to believe that any of its employees or board members have misused LSC funds under this part. Finally, this section requires a recipient to follow up the telephonic or other actual notice with a written notice within ten (10) calendar days.

List of Subjects in 45 CFR Part 1640.

Fraud; Grant programs-law; Legal services.

For reasons set forth in the preamble, 45 CFR Chapter XVI is amended by adding part 1640 as follows:

PART 1640—APPLICATION OF FEDERAL LAW TO LSC RECIPIENTS

Sec.

- 1640.1 Purpose.
- 1640.2 Definitions.
- 1640.3 Contractual agreement.
- 1640.4 Violation of agreement.
- 1640.5 Reporting requirement.

Authority: Pub. L. 104-134, 110 Stat. 1321.

§ 1640.1 Purpose.

The purpose of this rule is to ensure that recipients use their LSC funds in accordance with Federal law related to the proper use of Federal funds. This rule also identifies the Federal laws which apply and provides notice of the consequences to a recipient of a violation of such Federal laws by recipients, its employees or board members.

§ 1640.2 Definitions.

- (a) (1) Federal law relating to the proper use of Federal funds means:
 - (i) 18 U.S.C. 201 (Bribery of Public Officials and Witnesses);
 - (ii) 18 U.S.C. 286 (Conspiracy to Defraud the Government With Respect to Claims);
 - (iii) 18 U.S.C. 287 (False, Fictitious or Fraudulent Claims);
 - (iv) 18 U.S.C. 371 (Conspiracy to Commit Offense or Defraud the United States);
 - (v) 18 U.S.C. 641 (Public Money, Property or Records);

- (vi) 18 U.S.C. 1001 (Statements or Entries Generally);

- (vii) 18 U.S.C. 1002 (Possession of False Papers to Defraud the United States);

- (viii) 18 U.S.C. 1516 (Obstruction of Federal Audit);

- (ix) 31 U.S.C. 3729 (False Claims);

- (x) 31 U.S.C. 3730 (Civil Actions for False Claims), except that actions that are authorized by § 3730(b) of such title to be brought by persons may not be brought against the Corporation, any recipient, subrecipient, grantee, or contractor of the Corporation, or any employee thereof;

- (xi) 31 U.S.C. 3731 (False Claims Procedure);

- (xii) 31 U.S.C. 3732 (False Claims Jurisdiction); and

- (xiii) 31 U.S.C. 3733 (Civil Investigative Demands).

(2) For the purposes of the laws listed in paragraph (a)(1), LSC shall be considered a Federal agency and a recipient's LSC funds shall be considered to be Federal funds provided by grant or contract.

(b) A violation of the agreement means:

(1) That the recipient has been convicted of, or judgment has been entered against the recipient for, a violation of any of the laws listed in § 1640.2(a)(1), with respect to its LSC grant or contract, by the court having jurisdiction of the matter and any appeals of the conviction or judgment have been exhausted or the time for the appeal has expired; or

(2) An employee or board member of the recipient has been convicted of, or judgment has been entered against the employee or board member for, a violation of any of the laws listed in § 1640.2(a)(1) with respect to a recipient's grant or contract with LSC by the court having jurisdiction of the matter, and any appeals of the conviction or judgment have been exhausted or the time for appeal has expired, and the Corporation finds that the recipient has knowingly or through gross negligence allowed the employee or board member to engage in such activities.

§ 1640.3 Contractual agreement.

As a condition of receiving LSC funds, a recipient must enter into a written contractual agreement with the Corporation that, with respect to its LSC funds, it will be subject to the Federal laws listed in § 1640.2(a)(1). The agreement shall include a statement that all of the recipient's employees and board members have been informed of such Federal law and of the consequences of a violation of such law,

both to the recipient and to themselves as individuals.

§ 1640.4 Violation of agreement.

(a) A violation of the agreement under § 1640.2(b)(1) shall result in the recipient's LSC grant or contract being terminated by the Corporation without need for a termination hearing. During the pendency of any appeal of a conviction or judgment, the Corporation may take such steps as it determines necessary to safeguard its funds.

(b) A violation of the agreement under § 1640.2(b)(2) shall result in the recipient's LSC grant or contract being terminated by the Corporation. Prior to such termination, the Corporation shall provide notice and an opportunity to be heard for the sole purpose of determining whether the recipient knowingly or through gross negligence allowed the employee or board member to engage in the activities which led to the conviction or judgment. During the pendency of any appeal of a conviction or judgment or during the pendency of a termination hearing, the Corporation may take such steps as it determines necessary to safeguard its funds.

§ 1640.5 Reporting requirement.

(a) The recipient shall give telephonic or other actual notice to the Corporation within two (2) working days of the date that:

(1) The recipient or any of the recipient's employees has been charged with a violation of any of the Federal laws listed in § 1640.2(a) with respect to its LSC funds; or

(2) It has reason to believe that any of its employees or board members have misused the recipient's LSC funds in violation of any of the Federal laws listed in § 1640.2(a).

(b) The notice required in paragraph (a) of this section shall be followed by written notice within ten (10) calendar days.

(c) A recipient or an employee or board member of the recipient has been "charged with a violation" when a governmental entity having authority to initiate such a proceeding has instituted action against the recipient or the recipient's employee and the proceeding is pending.

Dated: August 20, 1996.

Suzanne B. Glasow,

Senior Counsel for Operations & Regulations.
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45 CFR Part 1642

Attorneys' Fees

AGENCY: Legal Services Corporation.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule is intended to implement a provision in the Legal Services Corporation's ("Corporation" or "LSC") FY 1996 appropriations act that prohibits LSC recipients from seeking attorneys' fees in cases filed after the date of enactment of the appropriation. Although this interim rule is effective upon publication, the Corporation also solicits public comment on the interim rule in anticipation of adoption of a final rule at a later time.

DATES: This interim rule is effective on August 29, 1996. Comments must be submitted on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of General Counsel, Legal Services Corporation, 750 First St. NE., 11th Floor, Washington, DC 20002-4250.

FOR FURTHER INFORMATION CONTACT: Victor Fortunato, General Counsel, (202) 336-8910.

SUPPLEMENTARY INFORMATION: On May 19, 1996, the Operations and Regulations Committee ("Committee") of the Legal Services Corporation ("LSC" or "the Corporation") Board of Directors ("Board") requested the LSC staff to prepare interim rules to implement § 504(a)(13) of the Corporation's FY 1996 appropriations act, Public Law 104-134, 110 Stat. 1321 (1996), prohibiting LSC recipients and their employees from claiming, or collecting and retaining attorneys' fees. The Committee held hearings on July 10 and 19, and the Board adopted this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation that is already in effect and which carries severe penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. 5 U.S.C. 553(b)(3)(B) and 553(d)(3). Accordingly, this rule is effective upon publication.

However, the Corporation also solicits public comments on the rule for review

and consideration by the Committee. After receipt of written public comment, the Committee intends to hold public hearings to consider the written comments and to hear oral comments. The Committee anticipates that a final rule will be issued which will supersede this interim rule.

This rule is based, in part, on provisions in 45 CFR Part 1609, the Corporation's regulation dealing with attorneys' fees in relation to fee-generating cases. The Corporation has determined that, although related, the issues of fee-generating cases and attorneys' fees are sufficiently separate to warrant separate rules. Accordingly, the provisions on attorneys' fees and acceptance of reimbursement for costs and expenses in this part supersedes the comparable provisions in Part 1609. A revised version of part 1609 is also published in this publication of the Federal Register as a proposed rule.

A section-by-section discussion of this interim rule is provided below.

Section 1642.1 Purpose

The purpose of this rule is to ensure that LSC recipients and their employees do not seek or retain attorneys' fees awarded pursuant to Federal or State law, including common law, permitting or requiring such fees.

Section 1642.2 Definitions

This section defines "attorneys' fees" as an award that is intended to compensate an attorney of the prevailing party as permitted or required by Federal or State law. An "award" is defined as an order of a court or administrative agency that an unsuccessful party pay the attorneys' fees of the prevailing party. The definition makes clear that the term includes attorneys' fees that are awarded as part of a court or agency approved settlement agreement. The Corporation has received a number of comments arguing that the restriction was not intended to apply to attorneys' fees in Social Security cases, because such fees are paid pursuant to an agreement by the client to pay the fees out of the client's back benefits. The court or administrative agency merely approves the agreement, but does not "award" the fees. The definition of "award" reflects this interpretation.

Programs which seek fees out of favorable awards to clients should be aware that the Corporation's interpretation of the statute reflected in this interim rule may change following receipt of public comment and any such change could affect a recipient's practices.