

(e) The decision of the Corporation regarding the granting of a waiver shall be guided by the statutory mandate requiring the recipient to provide high quality legal services in an effective and economical manner. In addition, the Corporation shall consider the following factors.

(1) Emergencies or unusual or unexpected occurrences, or circumstances giving rise to the existence of a fund balance in excess of 10%;

(2) The special needs of clients;

(3) The need for a recipient that operates a compensated private bar program or component to retain a cash reserve up to 25% of the amount of direct payment to attorneys indicated in the recipient's last audit for direct payment to attorneys in the bar program;

(4) The need for the recipient to retain a cash reserve to replace or update the recipient's information technology systems; and

(5) The recipient's financial management record.

(f) The Corporation's written approval of a request for a waiver shall require that the recipient use the funds it is permitted to retain within the time period set out in the approval and for the purposes set out in the waiver request, as revised by the Corporation's approval.

(g) Excess fund balance amounts approved by the Corporation for expenditure by a recipient must be separately reported in the current fiscal year audit. This may be done by establishing a separate fund or by providing a separate supplemental schedule as part of the audit report.

#### **§ 1628.5 Fund balance deficits.**

(a) Sound financial management practices such as those set out in Chapter 3 of the Corporation's Accounting Guide for LSC Recipients should preclude deficit spending. Use of current year LSC grant funds to liquidate deficit balances in the LSC fund from a preceding period requires the prior written approval of the Corporation.

(b) The recipient may, within 30 days of the issuance of the recipient's annual audit, apply to the Corporation for approval of the costs associated with the liquidation of the deficit balances in the LSC fund.

(c) In the absence of approval by the Corporation, expenditures of current year LSC grant funds to liquidate a deficit from a prior year shall be identified as questioned costs.

(d) The recipient's request must specify the same information relative to

the deficit LSC fund balance as that set forth in § 1628.4(c) (1) and (2).

Additionally, the recipient must develop and submit a plan approved by its governing body describing the measures which will be implemented to prevent a recurrence of a deficit balance in the LSC fund. The Corporation reserves the right to require changes in the submitted plan.

(e) The decision of the Corporation regarding acceptance of these deficit-related costs shall be guided by the statutory mandate requiring the recipient to provide high quality legal services performed in an effective and economical manner. Special consideration will be given for emergencies, unusual occurrences, or other circumstances giving rise to this situation.

Dated: October 16, 1998.

**Victor M. Fortuno,**  
General Counsel.

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## **LEGAL SERVICES CORPORATION**

### **45 CFR Part 1635**

#### **Timekeeping Requirement**

**AGENCY:** Legal Services Corporations.

**ACTION:** Proposed rules.

**SUMMARY:** This proposed rule would revise the Corporation's timekeeping rule to require full-time attorneys and paralegals to provide the date as well as the time spent on each case, matter or supporting activity. In addition, timekeeping records for full-time attorneys and paralegals would be required to be consistent with the recipient's time and attendance records.

Public comment is requested on two alternative proposed requirements that would ensure that a recipient's part-time attorneys and paralegals do not engage in restricted activities during the time periods they are being compensated by an LSC recipient. The first alternative would revise the Corporation's timekeeping rule to require part-time attorneys who work for organizations that do restricted work to include additional information in their timekeeping records. In addition, their timekeeping records would be required to be consistent with the recipient's time and attendance records. The second alternative would require part-time attorneys and paralegals to certify in writing that they have not engaged in any restricted activities during the time for which they are compensated by a recipient. Comments

on these and other possible alternatives are requested.

**DATES:** Comments should be received on or before December 21, 1998.

**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:** Suzanne Glasow, Office of the General Counsel, 202-336-8817.

**SUPPLEMENTARY INFORMATION:** This proposed rule is a response to the Corporation's Office of Inspector General's (OIG) Summary Report on Audits of Selected Grantees for Compliance with Selected Regulations (February 1998). The report found that timekeeping records could not demonstrate that part-time employees of grantees do not work on restricted activities<sup>1</sup> during any time for which they are compensated with LSC funds for their services. In order to address this finding, the OIG recommended revising the Corporation's timekeeping rule to require that part-time attorneys and paralegals who work part-time for the recipient and part-time for an organization that engages in restricted activities (hereinafter referred to as "part-time employees") account for all hours worked for the recipient by date and time of day in their timekeeping records.

The Operations and Regulations Committee (Committee) of the Legal Services Corporation's (LSC) Board of Directors (Board) met on September 11, 1998, in Chicago, Illinois, to consider proposed revisions to § 1635.3(b)(1) of the Corporation's timekeeping rule intended to provide records that more clearly demonstrate that part-time employees have not engaged in any restricted activities during the time for which they are compensated by the recipient. At the meeting, a certification requirement was suggested as an alternative to revising the timekeeping rule. The Committee decided to publish both the proposed timekeeping rule and the alternative certification requirement in this rule for public comment before making any decision on which is the better alternative. In addition, the Committee requests comments on any

<sup>1</sup> For the purposes of this requirement, the term restricted activities is an umbrella term that refers to the restrictions listed in the definitions of purpose prohibited by the LSC Act and activity prohibited by or inconsistent with section 504 in 45 CFR § 1610.2(a) & (b). A particular activity is restricted only to the extent it is limited pursuant to statutory or regulatory law. Nothing in this rule is intended to expand on the scope of any restriction or the type of recipient funds implicated by a particular restriction.

other alternatives that might better address the OIG's concerns. Comments should address the legal and practical implications of each alternative in this rule. They should also address whether a particular alternative would achieve the desired end, that is, would it provide sufficient information to demonstrate whether part-time employees have engaged in restricted activities during time for which they have been compensated by the recipient.

Generally, the revisions to the timekeeping rule would require part-time employees to include information in their timekeeping records that is not required for full-time employees. The certification requirement would require part-time employees to certify in writing that they have not engaged in any restricted activities during the time for which they have been compensated by a recipient. A more detailed analysis is provided below.

### I. Timekeeping Rule

Three changes are proposed for § 1635.3(b)(1) of the timekeeping rule. One applies only to part-time employees, another applies only to full-time employees and the third applies to both.

*Part-time employees:* The proposed revision applicable only to part-time employees would require that their time records provide the date and exact time of day for time spent on each case, matter or supporting activity. This would provide sufficient information to check against other available documents to determine whether a part-time employee was compensated by the recipient during the time for which the employee engaged in restricted activities for another organization.

*Full-time employees:* The proposed revision applicable only to full-time employees would require that such employees provide the date for time spent on each case, matter or supporting activity. A total number of hours spent on a particular case, for example, has little significance unless put into the context of a particular time frame, such as a grant year, a month, a pay period or a work day. For the purposes of this rule, a work day is proposed as most useful in determining how time is spent by recipient employees.

*Part-time and full-time employees:* The proposed rule would also require that the time records for both full-time and part-time employees be consistent with the recipient's time and attendance records used for payroll purposes. This means that time spent by an employee must at least add up to the amount of time reflected in the attendance records.

Records are not inconsistent if the timekeeping records reflect more time than the attendance records. For example, exempt employees' actual hours of work are often more than the amount of hours necessary to count as a workday for payroll purposes. Records would be inconsistent, however, if the timekeeping records reflect fewer hours on a particular day than the attendance records because the employee is being paid with program funds for hours not reflected in the timekeeping records and there would be no records for that day demonstrating how the time was spent.

This requirement does not mean that the timekeeping and attendance records must be mechanically integrated into the same recordkeeping system. It means that when compared, the timekeeping and attendance records will not be found to be inconsistent.

### II. Certification

The certification alternative would require part-time employees to certify in writing that they have not engaged in any restricted activities during a time for which they have been compensated by a recipient. To certify means to "authenticate or vouch for a thing in writing," to "attest as being true or as represented," to "testify in writing." See *Black's Law Dictionary* 207 (Fifth Edition 1979); *Random House Webster's College Dictionary* 215, Second Edition (1997).<sup>2</sup>

A false certification, depending on the applicable law or circumstances, may constitute a violation of civil or criminal law. For LSC purposes, a false certification by a recipient employee could possibly implicate certain Federal laws related to the use of Federal funds that are currently applicable to LSC recipients pursuant to 45 CFR Part 1640. Violations of certain laws listed in Part 1640 carry severe sanctions for false statements or claims to the Federal government regarding the use of Federal funds. See for example, 18 U.S.C. 287, 371, 1001 and 31 U.S.C. 3729; *United States v. Columbia/HCA Healthcare Corporation*, 125 F.3d 899 (5th Cir. 1997) ("false certifications of compliance create liability under the [False Claims Act] when certification is a prerequisite to obtaining a government benefit."); *United States v. Burns*, 104 F.3d 529 (2nd Cir. 1997) (falsified timesheets submitted for pay under government funded program found to be violation of 18 U.S.C. 1001).

Under Part 1640, whether or not a recipient or an employee of a recipient

<sup>2</sup>To certify means to attest authoritatively, and any form which affirms the fact in writing is sufficient." *Doherty v. McDowell*, 276 F. 728, 730 (D.Me 1921).

has violated any of the applicable Federal laws is determined by the Federal court having jurisdiction of the matter. The Corporation does not prosecute or make judgments under the applicable Federal laws but it has authority to terminate funding under the conditions set out in § 1640.4. Several of the laws included in Part 1640 prohibit making false claims to the government regarding the use of Federal funds. LSC funds are Federal funds for the purposes of the laws included in Part 1640. Thus, a false certification regarding activities for which the applicable employee is compensated with LSC funds, in certain circumstances, may put the employee at risk of prosecution for violation of such laws. Employees who sign such certifications should be fully informed of the implications and sign forms that, to the best of their knowledge, are true and accurate.

The only provision revised in the proposed timekeeping rule is § 1635.3(b)(1). However, the entire rule is published so that the proposed revisions may be considered in context.

### List of Subjects in 45 CFR Part 1635

Legal services, Reporting and recordkeeping requirements.

For reasons set out in the preamble, LSC proposes to revise 45 CFR Part 1635 to read as follows:

### PART 1635—TIMEKEEPING REQUIREMENT

Sec.

1635.1 Purpose.

1635.2 Definitions.

1635.3 Timekeeping requirement.

1635.4 Administrative provisions.

**Authority:** 42 U.S.C. 2996e(b)(1)(A), 2996g(a), 2996g(b), 2996g(e).

#### § 1635.1 Purpose.

This part is intended to improve accountability for the use of all funds of a recipient by:

(a) Assuring that allocations of expenditures of Corporation funds pursuant to 45 CFR part 1630 are supported by accurate and contemporaneous records of the cases, matters, and supporting activities for which the funds have been expended;

(b) Enhancing the ability of the recipient to determine the cost of specific functions; and

(c) Increasing the information available to the Corporation for assuring recipient compliance with Federal law and corporation rules and regulations.

#### § 1635.2 Definitions.

As used in this part—

(a) A case is a form of program service in which an attorney or paralegal of a

recipient provides legal services to one or more specific clients, including, without limitation, providing representation in litigation, administrative proceedings, and negotiations, and such actions as advice, providing brief services and transactional assistance, and assistance with individual PAI cases.

(b) A matter is an action which contributes to the overall delivery of program services but does not involve direct legal advice to or legal representation of one or more specific clients. Examples of matters include both direct services, such as community education presentations, operating pro se clinics, providing information about the availability of legal assistance, and developing written materials explaining legal rights and responsibilities; and indirect services, such as training, continuing legal education, general supervision of program services, preparing and disseminating desk manuals, PAI recruitment, intake when no case is undertaken, and tracking substantive law developments.

(c) A supporting activity is any action that is not a case or matter, including management and general, and fundraising.

#### **§ 1635.3 Timekeeping requirement.**

(a) All expenditures of funds for recipient actions are, by definition, for cases, matters, or supporting activities. The allocation of all expenditures must be carried out in accordance with 45 CFR part 1630.

(b) Time spent by attorneys and paralegals must be documented by time records which record the amount of time spent on each case, matter, or supporting activity.

(1) Time records must be created contemporaneously and account for time in increments not greater than one-quarter of an hour which comprise all of the efforts of the attorneys and paralegals for which compensation is paid by the recipient. Such time records for full-time attorneys and paralegals must also provide the date for time spent on each case, matter or supporting activity. Such time records for part-time attorneys and paralegals who also work for an organization that engages in restricted activities must also provide the date and exact time of day for time spent on each case, matter or supporting activity for the recipient. Finally, such time records must be consistent with the time and attendance records used for payroll purposes.

(2) Each record of time spent must contain: for a case, a unique client name or case number; for matters or supporting activities, an identification

of the category of action on which the time was spent.

(c) The timekeeping system must be implemented within 30 days of the effective date of this regulation or within 30 days of the effective date of a grant or contract, whichever is later.

(d) The timekeeping system must be able to aggregate time record information from the time of implementation on both closed and pending cases by legal problem type.

#### **§ 1635.4 Administrative provisions.**

Time records required by this section shall be available for examination by auditors and representatives of the Corporation, and by any other person or entity statutorily entitled to access to such records. The Corporation shall not disclose any time record except to a Federal, State or local law enforcement official or to an official of an appropriate bar association for the purpose of enabling such bar association official to conduct an investigation of an alleged violation of the rules of professional conduct.

Dated: October 16, 1998.

**Victor M. Fortuno,**  
General Counsel.

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## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 227**

[Docket No. 921232-2332; I.D. 092192B]

#### **Endangered and Threatened Species; Proposed Threatened Status for the Gulf of Maine Population of Harbor Porpoise**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** National Marine Fisheries Service (NMFS) is reopening the comment period on the proposed rule to list the Gulf of Maine/Bay of Fundy (GOM/BOF) harbor porpoise, (*Phocoena phocoena*), as a threatened species under the Endangered Species Act (ESA). Due to the passage of time since the close of the previous comment period, the availability of new/additional information and the desire to review the best scientific information available during the decision-making process, the comment period is being reopened.

**DATES:** Comments must be received by November 23, 1998.

**ADDRESSES:** Comments, requests for copies of this notice or a complete list of references should be addressed to the Chief, Marine Mammal Division (PR2), Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Margot Bohan, F/PR2, NMFS, (301) 713-2322, Laurie Allen, Northeast Region, NMFS, (978) 281-9291, or Kathy Wang, Southeast Region, NMFS, at (727) 570-5312.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

On January 7, 1993, NMFS published a proposed rule (with a 90-day comment period) to list the GOM population of harbor porpoise as threatened under the ESA (58 FR 3108). The listing was proposed in response to an ESA petition submitted by the Sierra Club Legal Defense Fund, on behalf of the International Wildlife Coalition and 12 other organizations (notice of receipt of petition to list published on December 13, 1991 (56 FR 65044)). It was also based on NMFS' research findings at the time, which demonstrated that (a) the rate of bycatch of harbor porpoise in commercial gillnet fisheries (extending from the Bay of Fundy, Canada, south throughout the Gulf of Maine) might reduce this population to the point where it would become threatened throughout all or a portion of its range and that (b) there were no regulatory measures in place to reduce this bycatch.

Following publication of the proposed rule, NMFS received several comments requesting that public hearings be held throughout New England. In response to these requests, NMFS extended the comment period on the proposed rule until August 7, 1993 (58 FR 17569, April 5, 1993).

During the extended comment period, NMFS completed analyses of sighting data from the 1992 porpoise abundance surveys and analyses of the 1992 observer data used to determine total estimated bycatch in the GOM gillnet fishery. These data were presented and discussed at a meeting of the New England Fishery Management Council (NEFMC) Groundfish Committee, Harbor Porpoise Subgroup, on June 16, 1993. After the Harbor Porpoise Subgroup meeting, NEFMC forwarded comments to NMFS requesting a 6-month extension of the final decision-making period on the proposed rule to