



LEGAL SERVICES CORPORATION

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MEMORANDUM

TO: All LSC Program Directors, Board Chairs

FROM: John A. Tull, Director
Office of Program Operations

DATE: October 30, 1997

RE: Certification of Program Integrity

Each LSC recipient's governing body is required under 45 CFR Part 1610 to certify by December 19, 1997, and annually thereafter, that the program is in compliance with the program integrity requirements of Section 1610.8. This section requires a recipient to have "objective integrity and independence" from any organization which engages in restricted activities as defined in 45 CFR Part 1610. This memorandum and the attached documents are intended to provide guidance on the certification process and the requirements of 45 CFR Part 1610.

Part 1610 was adopted to implement Congressional restrictions on the use of non-LSC funds and to assure that no LSC-funded entity shall engage in restricted activity. A list of restricted activities can be found at 45 CFR Sections 1610.2(a)¹ and (b). They include, among other things, lobbying, participation in class actions, representation of prisoners, and claiming, or collecting and retaining attorneys' fees. Under this regulation, an LSC recipient cannot itself engage in such activities, transfer LSC funds to another organization which engages in restricted activity,² or use recipient resources to subsidize the restricted activity of another organization.

¹ The restrictions in §1610.2(a) are not "entity" restrictions and only apply to LSC and private funds. Thus, recipients may use public funds to engage in §1610.2(a) activities without compromising the program integrity standards discussed in this memo and attached documents.

² An LSC recipient may transfer LSC funds to bar associations, *pro bono* programs, private attorneys or law firms, or other entities *for the sole purpose* of funding the recipient's private attorney involvement activities (PAI) pursuant to 45 CFR Part 1614, regardless of

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Recipients may transfer *non*-LSC funds to another organization which engages in restricted activity if, and only if, the other organization is a legally separate entity³ and the LSC recipient maintains objective integrity and independence from it. Even where there is no transfer of funds, the LSC recipient must maintain objective integrity and independence from any organization which engages in restricted activity.

To meet the objective integrity and independence test, a recipient must be organized so it is *physically and financially separate* from the other organization. Mere bookkeeping separation is insufficient.

To determine whether there is sufficient physical and financial separation, a range of factors, including the following, must be considered:

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

The presence or absence of any one or more factors will not be determinative. Each situation will be viewed on a case-by-case, totality of the circumstances basis.

Recipient governing bodies must consider the same factors when preparing the enclosed Certification of Program Integrity. To assist recipients and their governing bodies, additional guidance is contained in the instructions to the Certification form and the attached Guidance in Applying the Program Integrity Standards.

If you have any questions, please contact Anh Tu at (202) 336-8946 or Bob Gross at (202) 336-8856.

whether such associations, programs, attorneys, law firms or other entities otherwise engage in restricted activity using their other funds. Of course, the PAI activities supported by the recipient's funds and counted towards the recipient's PAI activity must not include any restricted activity.

³ An LSC recipient may have an overlapping board with a legally separate organization which engages in restricted activity as long as the recipient maintains objective independence and integrity from the other organization.

CERTIFICATION OF PROGRAM INTEGRITY

Recipient Name: _____

Recipient Number: _____

I certify that the governing body has received and reviewed a written report from the executive director pertaining to the recipient's compliance with the program integrity requirements of 45 CFR 1610 and authorized me, based on the governing body's review and discussion of the director's report, to certify that:

1. The recipient is a legally separate entity from any organization which engages in restricted activity; *and*
2. Except for funds provided to a bar association, *pro bono* program, private attorney or law firm, or other entity for the sole purpose of funding private attorney involvement activities (PAI) pursuant to 45 CFR part 1614, since January 1, 1997, the recipient has not transferred LSC funds to any organization which engages in restricted activity; *and*
3. Since January 1, 1997, the recipient has not utilized recipient funds or resources to subsidize the restricted activity of any organization; *and*
4. The recipient meets the requirements of 45 C.F.R. 1610.8(a) in that the recipient is physically and financially separate from any organization which engages in restricted activity. Factors relevant to the Board's determination of program independence and integrity include:
 - a. The existence of separate personnel;
 - b. The existence of separate accounting and timekeeping records;
 - c. The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities;
 - d. The extent to which signs and other forms of identification which distinguish the recipient from the other organization are present.

On behalf of the governing body, I acknowledge that compliance with the integrity and independence requirements of 45 C.F.R. 1610.8(a) is a prerequisite to the recipient receiving continued funding from the Legal Services Corporation.

_____ (Chair or President of the Board)

_____ (Date)

INSTRUCTIONS FOR CERTIFICATION OF PROGRAM INTEGRITY

Introduction. Section 1610.8(b) of 45 CFR Part 1610 requires each recipient's governing body to certify by December 19, 1997 that the recipient is in compliance with the program integrity requirements of Section 1610.8. This regulation requires a recipient to have objective integrity and independence from any organization which engages in restricted activities as defined in 45 CFR Part 1610.¹

To comply with Part 1610, the president or chair of the recipient's governing body must sign and date the attached certification and mail it by *December 19, 1997* to:

Office of Program Operations
Legal Services Corporation
750 First Street, NE, 10th Floor
Washington, D.C. 20002-4250

Written Report to Governing Body. To enable each recipient's governing body to undertake the review required by the regulation, the program director must provide its governing body with a written report which either:

(a) states that the recipient has not transferred recipient funds to nor subsidizes, employs, shares or utilizes any of the same personnel, office space, facilities or equipment with an organization which engages in restricted activity; or

(b) addresses the following:

- A. **Legally separate entity.** A recipient may not engage in restricted activity and must be a legally separate entity from any organization which engages in restricted activity. If the recipient has any relationship with an organization which engages in restricted activity which involves a transfer of recipient funds, overlapping board membership between the two organizations, joint employment or utilization of any of the same personnel, office space, facilities or equipment, the director must provide the governing body with information demonstrating that the other organization is a legally separate entity, such as a separately incorporated non-profit organization or a legally separate partnership.

¹ "Restricted Activity" means those activities defined in 45 CFR Section 1610.2 (a) "Purpose prohibited by the LSC Act" and (b) "Activity prohibited by or inconsistent with Section 504." Note that restrictions in §1610.2(a) are not "entity" restrictions and only apply to LSC and private funds. Thus, recipients may use public funds to engage in §1610.2(a) activities without compromising the program integrity standards.

- B. Transfers of program funds.** Except to support its private attorney involvement activity under 45 CFR Part 1614,² an LSC recipient may not transfer LSC funds to an organization which engages in restricted activity. Recipients may transfer non-LSC funds to organizations which engage in restricted activity only if the recipient maintains objective integrity and independence from the transferee organization.³

If, since January 1, 1997, the recipient has transferred funds to another organization, the director's report must demonstrate that the transfers were permissible because they involved either:

- (1) LSC funds to support the recipient's private attorney involvement activity under 45 CFR Part 1614; or
- (2) LSC funds pursuant to a previously approved subgrant under 45 CFR Part 1627; or
- (3) non-LSC funds.

If LSC funds have been transferred for any other purpose, the recipient may not be able to complete the certification form and should contact LSC for guidance.

- C. Subsidies.** LSC recipients may not use recipient resources to subsidize restricted activity.⁴

² An LSC recipient may transfer LSC funds to bar associations, *pro bono* programs, private attorneys, law firms, or other entities *for the sole purpose* of funding the recipient's private attorney involvement activities (PAI) pursuant to 45 CFR Part 1614, regardless of whether such associations, programs, attorneys, law firms or other entities otherwise engage in restricted activity using their other funds. Of course, the PAI activities supported by the recipient's funds and counted towards the recipient's PAI activity must not include any restricted activity.

³ For the purpose of this Certification, "transfer" means a payment of funds by a recipient to a person or entity for the purpose of conducting programmatic activities that are normally conducted by the recipient, such as the representation of eligible clients, or that provide direct support to the recipient's legal assistance activities. The term "transfer" does not include payment of recipient funds to vendors, accountants or other providers of goods and services made by the recipient in the normal course of business.

⁴ "Subsidize" means to use recipient resources to support, in whole or in part, restricted activity conducted by another entity, or payment by the recipient to cover another entity's

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If the recipient employs any of the same personnel, donates to, or shares or utilizes office space or equipment, with an organization which engages in restricted activity, the director must provide the governing body with information establishing that the recipient is not subsidizing restricted activity.

Such information might include, for example, evidence that the recipient receives fair value for a sublease of space or use of recipient equipment; or that the donated space is not used for restricted activity. In the case of shared personnel, the director must establish that compensation by the recipient of staff who are jointly employed by the other organization is consistent with compensation policies established in recipient personnel policies or union contracts. Such information may be a part of the description provided in paragraphs D (1) or (2) below.

D. Physical and Financial Separation. Whether a recipient maintains sufficient physical and financial separation from an organization which engages in restricted activity is determined by the totality of the circumstances. If the recipient employs, shares or utilizes any of the same personnel, office space or equipment with an organization which engages in restricted activity, the director must describe the joint utilization in the report to the governing body.

(1) Physical Separation. If the recipient shares or utilizes any of the same office space or equipment with an organization which engages in restricted activity, and the office space or equipment is under the control of the recipient or the other organization, the director's report must include the following information:

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overhead for restricted activity. A "subsidy" does not include a transfer of a recipient's non-LSC funds to another organization regardless of the use the other entity makes of those funds. However, a recipient will be considered to be subsidizing the activities of another organization if it provides the use of its resources (e.g., donates space or telephone services) for restricted activity without receiving fair value for such use. A recipient will also be considered to be subsidizing the activities of another organization if it pays a third party to cover the overhead expenses for the restricted activities of the other entity (e.g., pays the rent for space that the other organization uses to conduct restricted activity without reimbursement from the other entity). Note, however, that the fact that the recipient receives a fair payment does not necessarily mean the arrangement is permissible. A recipient must also maintain physical and financial separation from an entity which engages in restricted activity.

- a. **the name of the organization with whom the recipient jointly utilizes facilities or equipment,**
 - b. **what facilities and equipment are jointly utilized,**
 - c. **the frequency of use of such facilities or equipment by the recipient and the other organization,**
 - d. **the financial arrangement for such joint utilization,**
 - e. **whether there are separate entrances, signs and other forms of identification distinguishing the recipient from the other organization.**
- (2) **Separate Personnel.** If the recipient employs any staff who are also employed by an organization which engages in restricted activity, where
- a. there is an arrangement between the recipient and the other organization regarding the terms and conditions of employment of such staff; or
 - b. the recipient and the other organization are using any of the same facilities or equipment; or
 - c. although there is no arrangement or sharing of facilities or equipment, a substantial proportion⁵ of the recipient's attorney and/or paralegal staff work part-time for an organization which engages in restricted activity;
- the director's report must include the following information:
- a. **the name of the organization employing such recipient staff,**
 - b. **the positions occupied and duties performed by such recipient staff for the recipient,**
 - c. **the terms and conditions of employment between the recipient and such staff.**
- (3) **Separate Accounting and Timekeeping Records.** If there is any joint utilization of facilities, equipment, or staff required to be reported above, the director's report must include information describing how the recipient maintains separate accounting and timekeeping records.

⁵ For larger organizations, 10% of the recipients's attorney/paralegal staff should serve as a guide. However, for recipients with smaller staffs, the program director should use his or her best judgement to determine whether part-time staff constitute a substantial proportion of the recipient's legal workforce.

- E. Recordkeeping.** Recipients must maintain copies of the report and any accompanying documentation provided the governing body under these instructions.

GUIDANCE IN APPLYING THE PROGRAM INTEGRITY STANDARDS

The following information is provided to help recipient governing bodies assure their programs comply with 45 CFR Part 1610 which requires LSC recipients to have “objective integrity and independence” from any organization which engages in “restricted activity.” Programs are encouraged to contact LSC if they have any questions about compliance with the program integrity standards.

Objective integrity and independence: To meet the program integrity standard of 45 CFR Part 1610, if the recipient has any relationship with another organization which engages in restricted activities:

- the other organization must be a legally separate entity;
- the other organization must not receive any transfer of LSC funds;
- the recipient must not subsidize any restricted activities engaged in by the other organization; and
- the recipient must be physically and financially separate from the other organization.

A. Legally separate entity. A recipient may not engage in restricted activity and must be a legally separate entity from any organization which engages in restricted activity.

Overlapping boards: A recipient may have the same or overlapping Board of Directors as another organization which engages in restricted activity. However, the other organization must be a legally separate entity and the recipient’s Board must ensure that the relationship between the recipient and the other organization meets the program integrity standards.

The fact that the recipient and another organization which engages in restricted activities have no common board members does not automatically mean there is no relevant relationship that should be reviewed to see if it meets the program integrity standards. For example, even though they share no board members, if the recipient subleases space to an organization which engages in restricted activity, or employs some of the same staff, the relationship should be reviewed for program integrity.

B. Transfers of recipient funds. Recipients may transfer LSC funds pursuant to the subgrant provisions of 45 CFR Part 1627 to an organization which does *not* engage in restricted activity.¹ Recipients may transfer LSC funds to an organization which engages in restricted

¹ For the purpose of the Program Integrity Certification required by 45 CFR Section 1610.8(b), “transfer” means a payment of funds by a recipient to a person or entity for the purpose of conducting programmatic activities that are normally conducted by the recipient, such as the representation of eligible clients, or that provide direct support to the recipient’s legal assistance activities. The term “transfer” does not include payment of recipient funds to vendors,

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activity *only if* the transfer is to support the recipient's private attorney involvement activity under 45 CFR Part 1614. Recipients may transfer *non-LSC* funds to an organization which engages in restricted activity only if the recipient maintains objective integrity and independence from the transferee organization.

Private attorney involvement. A recipient may transfer LSC funds to bar associations, *pro bono* programs, private attorneys or law firms, or other entities *for the sole purpose of* funding private attorney involvement activities (PAI) pursuant to 45 CFR Part 1614, regardless of whether such associations, programs, attorneys, law firms or other entities otherwise engage in restricted activity using their other funds. Of course, the PAI activities supported by the recipient's funds and counted towards the recipient's PAI activity must not include any restricted activity.

C. Subsidizing restricted activity. A recipient may not use recipient resources to subsidize restricted activity.

“Subsidize” means to use recipient resources to support, in whole or in part, restricted activity conducted by another entity, or payment by the recipient to cover another entity's overhead for restricted activity. A “subsidy” does not include a transfer of a recipient's non-LSC funds to another organization regardless of the use the other entity makes of those funds. However, a recipient will be considered to be subsidizing the activities of another organization if it provides the use of its resources (e.g., donates space or telephone services) for restricted activity without receiving fair value for such use. A recipient will also be considered to be subsidizing the activities of another organization if it pays a third party to cover the overhead expenses for the restricted activities of the other entity (e.g., pays the rent for space that the other organization uses to conduct restricted activity without reimbursement from the other entity). Note, however, that the fact that the recipient receives a fair payment does not necessarily mean the arrangement is permissible. A recipient must also maintain physical and financial separation from an entity which engages in restricted activity.

D. Physical and financial separation: The determination of whether a recipient is physically and financially separate from another organization which engages in restricted activities will be determined on the totality of the factors in each particular case. Thus, this guidance on particular factors should not be considered as providing a bright-line response that would be true in all circumstances. Nor should it suggest that some involvement of each factor is necessarily permissible. With this caveat, the following is provided to assist recipients in reviewing their relationships with other organizations that engage in restricted activities.

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accountants or other providers of goods and services made by the recipient in the normal course of business.

1. **Separate facilities:** Recipients should be cautious about sharing space, equipment and facilities with another organization which engages in restricted activity since doing so may give the impression that the recipient is engaged in such activity. This is particularly so if the two organizations employ any of the same personnel or use any of the same facilities that are accessible to clients or the public. On the other hand, standing alone, being housed in the same building, sharing a library or other common space that is not accessible to clients or the public may be permissible so long as there is appropriate signage, separate entrances and other forms of identification distinguishing the two organizations, and no recipient funds subsidize restricted activity.

The governing body should review whether the recipient utilizes any of the same office space or equipment as an organization which engages in restricted activity. If so, the governing body should review what facilities and equipment are jointly utilized, the degree and frequency of use of such facilities or equipment for restricted activities, and whether the recipient receives fair value for the use of any of its space or equipment.

2. **Separate personnel.** There is no *per se* bar against a recipient employing part-time staff who are also employed part-time by an organization which engages in restricted activity. Generally speaking, however, the more staff “shared,” or the greater the responsibilities of the staff who are employed by both organizations, the more danger that program integrity will be compromised. Sharing an executive director, for example, inappropriately tends to blur the organizational lines between the entities. Likewise, sharing a substantial number or proportion of recipient staff calls the recipient’s separateness into question.

- a. **Arrangements to share personnel.** The governing body should review whether the recipient has any arrangements to employ any of the same personnel with other organizations which engage in restricted activity. If such arrangements exist, the governing body should review the number and positions of recipient staff who are “shared,” and the duties they perform as recipient employees.
- b. **Joint utilization of personnel and facilities.** Even where there is no agreement to jointly employ the same staff, if the recipient and an organization which engages in restricted activity are using any of the same facilities or equipment, the governing body should review the number, positions and duties of part-time staff who are also working part-time with the other organization.
- c. **Substantial proportion of attorney or paralegal staff.** The governing body should be similarly informed if a substantial proportion² of the recipient’s attorney

² For larger organizations, 10% of the recipients’ attorney/paralegal staff should serve as
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and/or paralegal staff work part-time for an organization which engages in restricted activity regardless of whether or not there is an agreement to share staff or the two organizations share facilities or equipment.

- d. **No restricted work while on duty.** The governing body should also ensure that the recipient has systems in place to assure that no staff perform any restricted work while on duty for the recipient nor identify the recipient with restricted activity. Attorneys or paralegals must maintain time records pursuant to the timekeeping requirements of 45 CFR Part 1635. Accurate timekeeping of activity undertaken for the recipient will be especially important for any recipient attorneys or paralegals who work part-time for an organization which engages in restricted activity.

3. **Separate accounting and timekeeping records.** If the recipient employs any of the same personnel, or shares or utilizes office space or equipment, with an organization which engages in restricted activity, the governing body should review and ensure that the recipient maintains its own accounting and timekeeping records separate from those of any other organization. A recipient may send its financial records to an outside accountant or service bureau. A recipient may also perform accounting services for, or purchase them from, any other organization, provided the recipient maintains its records separately and fair value is exchanged for the services.

4. **Signs and other forms of identification.** Organizational names, building signs, business cards, telephone and fax numbers, e-mail addresses and other forms of identification should clearly distinguish the recipient from any organization which engages in restricted activity. Recipient governing bodies should review whether any such forms of identification could mislead the public about the recipient's separation and independence from organizations which engage in restricted activity.

E. **Involvement of more than one factor.** The program integrity test is a case-by-case determination based upon the totality of the circumstances. The more factors involved in a particular relationship between the recipient and another organization which engages in restricted activities, the more likely the recipient will fail the program integrity test. Once the governing body has sufficient information about each of the above factors, it must determine whether, taken as a whole, the recipient is physically and financially separate and independent from any organization which engages in restricted activity. If the answer is no, the governing body should

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a guide. However, for recipients with smaller staffs, the program director should use his or her best judgement to determine whether part-time staff constitute a substantial proportion of the recipient's legal workforce.

take such action as is necessary to alter or disengage the recipient from the relationship before signing the certification.

F. Questions? Recipients are encouraged to contact LSC if they have any questions about the program integrity standards. Call either Anh Tu at (202) 336-8946 or Bob Gross at (202) 336-8856.