

LEGAL SERVICES CORPORATION

45 CFR Parts 1606, 1607, 1612, 1617, and 1625

Proposed Implementation of Limitations on Uses of Funds

AGENCY: Legal Services Corporation.

ACTION: Proposed rules.

SUMMARY: The Continuing Resolution which appropriated funds for the Legal Services Corporation (the "Corporation") for the 1983 fiscal year imposed a number of limitations and restrictions on the use of Corporation funds. Certain of these limitations and restrictions will necessitate changes in current Corporation regulations. The Corporation staff prepared proposed regulations revising four current sections of the Corporation's regulations, Parts 1606, 1607, 1612 and 1617, and adding a new Part 1625 ("staff proposals") pursuant to instructions from the Chairman of the Operations and Regulations Committee. Two members of the Corporation's Board of Directors prepared alternatives to three of the staff proposals, Parts 1606, 1617 and 1625 ("Harvey/Olson proposals"). At its October 29-30, 1982, meeting, the Corporation's Board approved the publication in the *Federal Register* of both the staff proposals and the Harvey/Olson proposals.

Both of the proposed revisions of Part 1606 would delete references to denials of refunding which would be covered by the procedures described in either version of the new Part 1625. The staff proposal would also make some additional changes that are consistent with the continuing resolution. The proposed revisions of Part 1607 would implement changes in the requirements for recipients' governing board structure mandated by the continuing resolution. The proposed revisions of Part 1612 would implement the restrictions on administrative and legislative representation required by the continuing resolution. Both of the Proposed alternative revisions of Part 1617 would establish the policies governing class action suits by legal services programs against Federal, state or local governments required by the continuing resolution.

DATES: Comments must be submitted on or before December 8, 1982.

ADDRESS: Comments may be mailed to: Office of General Counsel, Legal Services Corporation, 733 Fifteenth Street, N.W., Suite 700, Washington, D.C. 20005.

FOR FURTHER INFORMATION CONTACT: Mary Wieseman, (202) 272-4010.

SUPPLEMENTARY INFORMATION—PART 1606: Under the continuing resolution providing funds for the Corporation during the 1983 fiscal year there are several changes in the hearing rights that recipients of Corporation funds are entitled to before funding may be terminated or an application for refunding denied. There is no longer a right to an independent hearing examiner in either proceeding and the level of interim funding that the Corporation must provide pending a final determination granting or denying a refunding application has been changed. The hearing rights in a denial of refunding are substantially circumscribed. Both the staff and the Harvey/Olson proposals basically leave intact the hearing rights for terminations, but remove from the current Part 1606 all references to "denials of refunding" which would, instead, be governed by the procedures described in either of the proposed versions of Part 1625. In addition, the staff proposal would revise the definition of "presiding officer" to make it consistent with the definition contained in the Corporation staff proposal for Part 1625, and would change the obligation for the providing interim funding pending the completion of the termination procedures to make it consistent with the language of the continuing resolution. For the most part, the remaining revisions consist of technical changes, e.g., renumbering of sections. For those sections where the staff proposal and the Harvey/Olson proposal differ, the staff proposal is designated as Alternative A and the Harvey/Olson proposal is designated as Alternative B.

List of Subjects in 45 CFR Part 1606

Legal services.

For the reasons set out above, 45 CFR Part 1606 is proposed to be amended as follows:

PART 1606—[AMENDED]

1. Part 1606—"Procedures Governing Termination of Financial Assistance and Denial of Refunding" is renamed "Procedures Governing Termination of Financial Assistance."

2. The authority citation for Part 1606 is revised to read as follows:

Authority: Sec. 1006(b)(1) and (3), 1007(a)(1), 1007(a)(3), 1007(a)(9), 1007(d), 1008(e), 1011 (42 U.S.C. Sections 2996e(b)(1) and (3), 2996f(a)(1), 2996f(a)(3), 2996f(a)(9), 2996f(d), 2996g(e), 2996j), Sec. 122, Pub. L. 97-276, 96 Stat. 1186.

§ 1606.1 [Amended]

3. (Alternative A).

Section 1606.1 is amended by removing the word "full" and the commas enclosing it, and by removing the phrase "or refunding denied."

(Alternative B).

Section 1606.1 is amended by removing the phrase "or refunding denied."

§ 1606.2 [Amended]

4. Section 1606.2 is amended by removing § 1606.2(b) and redesignating §§ 1606.2(c) and 1606.2(d) as §§ 1606.2(b) and 1606.2(c).

5. (Alternative A).

Newly redesignated § 1606.2(c) is revised to read as follows:

(c) "Presiding Officer" means an impartial person appointed by the President to recommend a decision that a grant or contract should be continued or terminated, who is familiar with legal services and supportive of the purposes of the Act, who is fair and impartial, who has not participated in the matter at issue, and who has no supervisory responsibility for the Corporation employee who made the initial determination.

(Alternative B).

Newly redesignated § 1606.2(c) is further amended by removing the phrase "or that refunding should be granted or denied."

§ 1606.3 [Removed]

§§ 1606.4-1606.20 [Redesignated as §§ 1606.3-1606.19]

6. Section 1606.3 is removed in its entirety and §§ 1606.4 through 1606.20 are redesignated §§ 1606.3 through 1606.19.

7. The references to the following Sections are redesignated as indicated wherever they appear in Part 1606.

Old section	New section
1606.5	1606.4
1606.5(b)	1606.4(b)
1606.6	1606.5
1606.7	1606.6
1606.8(a)	1606.7(a)
1606.9	1606.8
1606.9(c)	1606.8(c)
1606.10	1606.9
1606.13(b)	1606.12(b)
1606.15	1606.14
1606.18	1606.17
1606.19	1606.18

8. Newly redesignated § 1606.3 is revised to read as follows:

§ 1606.3 Grounds for termination.

A grant or contract may be terminated when:

(a) Termination is required by, or will implement, a provision of law, a Corporation rule, regulation, guideline, or instruction that is generally applicable to all recipients of the same class or a funding policy, standard, or criterion approved by the Board, except that termination shall not be based on a Corporation rule, regulation, guideline, or instruction that was not in effect when the current grant was made or when the current contract was entered into; or

(B) There has been substantial failure by a recipient to comply with a provision of law, or a rule, regulation, or guideline issued by the Corporation, or a term or condition of a current or prior grant from or contract with the Corporation. In the absence of unusual circumstances, a grant or contract shall not be terminated for this cause unless the Corporation has given the recipient notice of such failure and an opportunity to take effective corrective action; or

(c) There has been substantial failure by a recipient to use its resources to provide economical and effective legal assistance of high quality as measured by generally accepted professional standards, the provisions of the Act, or a rule, regulation or guideline issued by the Corporation. In the absence of unusual circumstances, a grant or contract shall not be terminated for this cause unless the Corporation has given the recipient notice of such failure and an opportunity to take effective corrective action.

§ 1606.4 [Amended]

9. Newly redesignated § 1606.4(a) is amended by removing the phrase "or that refunding should be denied."

§ 1606.7 [Amended]

10. (Alternative A).
Newly redesignated § 1606.7(a) is revised to read as follows:

(a) The presiding officer shall be appointed by the President and shall be a person who is impartial and who is familiar with legal services and supportive of the purposes of the Act.

(Alternative B).

No change except for redesignation of section.

§ 1606.9 [Amended]

11. (Alternative A).
Newly redesignated § 1606.9(b) is amended by removing the words "full and" from the first sentence.

(Alternative B).

No change except for redesignation of section.

§ 1606.10 [Amended]

12. Newly redesignated § 1606.10(a) is amended by removing the words "or denial of refunding."

13. Newly redesignated § 1606.10(b) is amended by removing the words "or denying refunding."

§ 1606.12 [Amended]

14. Newly redesignated § 1606.12(a)(1) is amended by removing the words "or granting refunding."

15. Newly redesignated § 1606.12(a)(2) is amended by removing the words "or denying refunding."

§ 1606.16 [Amended]

16. Newly redesignated § 1606.16 is amended by removing the words "or refunding is granted."

§ 1606.17 [Amended]

17. (Alternative A).
Newly redesignated § 1606.17 is revised to read as follows:

§ 1606.17 Interim funding.

(a) Failure by the Corporation to meet a time requirement of this part shall not entitle a recipient to continuation of its grant or contract.

(b) Pending a final determination under this part, or until the end of the recipient's current grant or contract term, whichever comes first, the Corporation shall continue to provide the recipient with funding necessary to maintain its current level of legal assistance activities under the act.

(c) If a final determination is not issued prior to the end of the recipient's current grant or contract term, the Corporation shall provide the recipient with interim funding sufficient to allow for the continuation of representation of clients on whose behalf litigation, negotiation or other forms of representation have been initiated, for the period after the end of the recipient's current grant or contract term, pending such final determination.

(Alternative B.)

Newly redesignated § 1606.17 is amended by removing the phrase "or to refunding" in the first sentence.

§ 1606.18 [Amended]

18. Newly redesignated § 1606.18 is amended by removing the phrase "or to deny refunding."

SUPPLEMENTARY INFORMATION—PART 1607:

No funds made available under Pub. L. 97-276 shall be used in making grants or entering into contracts for legal assistance unless the Corporation ensures that any recipient organized primarily for the purpose of providing legal services to eligible clients is

governed by a board of directors or other governing body, the majority of whose membership is comprised of attorneys appointed by the governing bodies of State, county or municipal bar associations which represent a majority of attorneys practicing in the recipient's service area. Congress recognized that in many cases there will not be a single local bar association which represents a majority of attorneys in the recipient's service area. In light of this, a combination of bar associations, including the state bar association, may collectively appoint the attorney members of the governing body. These amendments to Part 1607 implement this statutory requirement.

The legislative history recognizes the practical difficulties involved in immediate compliance with this provision. The Senate Report states that recipients "shall expeditiously submit a plan to the Corporation which outlines its proposed efforts to comply with this provision. Submission of the compliance plan should be viewed as a good faith effort by the grantee to comply; failure to submit a plan should not." Section 1607.7 sets forth the requirements regarding such compliance plans. This approach should help to avoid disruption of programs' operation by allowing recipients to develop a plan for restructuring their governing bodies in order to provide for an orderly transition.

This new provision regarding appointment of the majority of members to recipient governing bodies will not affect the appointment of clients or nonlawyers to these boards, nor should it affect the selection of remaining 9% of the board members required to be attorneys. The Amendment provides for selection of the remaining 9% of attorney members and does not change the current regulation with respect to the selection of nonattorney members of recipient governing bodies.

List of Subjects in 45 CFR Part 1607

Legal services.

It is proposed to amend 45 CFR Part 1607 as follows:

PART 1607—[AMENDED]

1. The authority citation for Part 1607 is revised to read as follows:

Authority: Sec. 1007(c) U.S.C. 2996f(c); Pub. L. 97-276; 96 Stat. 1186.

2. Section 1607.2 is revised to read as follows:

§ 1607.2 Definitions

(a) "Eligible client," as used in this part means a person eligible to receive

legal assistance under the Act, without regard to whether the person is receiving assistance at the time of selection for membership on a governing body.

(b) "Governing body" refers to the board of directors or other governing board of recipient receiving funds under Section 1006(a)(1)(A) of the Act.

(c) "Board member" refers to a member of a recipient's governing body.

3. Section 1607.3 (c) and (g) are revised to read as follows:

§ 1607.3 Composition.

(c) Appointment of the attorney members of the governing body shall be conducted so that a majority of the governing body are appointed by the governing bodies of State, county or municipal bar associations, the membership of which represents a majority of attorneys practicing law in the localities in which the recipient is to provide legal assistance. Appointments shall be made so as to insure that the attorney board members include women and minorities and reasonably reflect the population of the areas served. Appointments may be made either by the bar association which represents a majority of attorneys in the recipient's service area or by the bar associations which collectively represent a majority of the attorneys practicing law in the recipient's service area. Any additional attorney members of the board may be appointed by or selected from other bar associations or legal organizations with an interest in the delivery of legal services to the poor.

(g) The nonattorney board membership shall not be dominated by persons serving as the representatives of a single association group or organization.

4. Section 1607.7 is revised to read as follows:

§ 1607.7 Compliance

(a) A recipient whose current governing body does not satisfy the requirements of this part shall submit a plan for achieving compliance to the relevant Regional Office By March 1, 1983. The plan shall include:

(1) The current composition of the recipient's governing body, and the date upon which the composition was achieved;

(2) The date upon which the terms of each current member of the recipient's governing body will expire;

(3) The recipient's plan for complying with the requirements of § 1607.3 and

timetables for implementation. This plan shall:

(i) Identify the bar associations in the localities in which the recipient provides legal services identifying the individual bar association or combinations of bar associations to which a majority of practicing attorneys belong;

(ii) Detail the method of selecting attorney members to provide for representation on the recipient's governing body in accordance with this regulation and

(iii) Insure that the attorney board members include women and minorities and reasonably reflect the population of the areas served.

(b) Compliance with § 1607.3 shall occur no later than June 15, 1982.

(c) The President may, upon application, extend the time in which a recipient must comply with the requirements of § 1607.3(c). The application must state the reasons why complying by June 15, 1982 would be unduly burdensome or impossible to achieve for the recipients.

(d) An application for an extension of time under paragraph (c) of this section must be received by the Corporation no later than 30 days after the effective date of the regulation. An extension may be granted for no more than three months, and no more than two extensions may be granted to any recipient. In no event may the time for compliance be extended beyond January 15, 1983.

SUPPLEMENTARY INFORMATION—PART 1612:

Background

The proposed amendments to § 1612.4 are intended to clarify the scope of permissible recipient activities concerning legislative and administrative representation. Thus, the proposed amendments include changes in the language of the regulation to more closely conform it to the language of the Legal Services Corporation Act and provisions which implement Legal Services Corporation's appropriations prohibiting grassroots lobbying activities. These riders are the Moorehead Amendment, which has been a rider on each Corporation appropriation from FY 1979 through FY 1982, and Section 607(a) of the Treasury, Postal Service, and General Government Appropriations Act which contains provisions substantially identical to the Moorehead Amendment, and by its terms, applies to all federal appropriations. The proposed amendments also provide for additional recipient documentation and reporting retirements, including a provision application to recipient publications

which address legislative measures, which are intended to improve the Corporation's ability, from a management perspective, to insure that Corporation funds are not used for purposes prohibited by the Legal Services Corporation Act or other applicable law.

Finally, the proposed amendments impose additional restrictions on legislative and administrative activities made applicable to the Corporation's FY 1983 appropriation by Section 122 of Pub. L. 97-276. Public Law 97-276, a joint continuing resolution appropriating FY 1983 funds for the Legal Services Corporation, incorporates the provisions of Section 5 of H.R. 3480 as passed by the House of Representatives on June 18, 1981. The Corporation proposes to implement these provisions of Pub. L. 97-276 through the proposed new paragraph (f) of § 1612.4. In doing so, the Corporation recognizes that, under Section 102 of Pub. L. 97-276, Section 122 of Pub. L. 97-276, expires on December 17, 1983. The Corporation anticipates that it may be necessary to issue additional or amended instructions or regulations on legislative and administrative representation when Congress enacts either a succeeding continuing resolution, an FY 1983 appropriation for the Corporation, or enacts new authorization legislation for the Corporation.

The Corporation considers all provisions of amended § 1612.4 which are consistent with the additional restrictions mandated by Pub. L. 97-276, namely, § 1612.4(b)(5), § 1612.4(c), § 1612.4(e), and § 1612.4(h)(1), (2), (3), and (5), to be also applicable to funds made available under Pub. L. 97-276. Similarly, since the restrictions on legislative activity contained in Pub. L. 97-276 preclude grass roots lobbying activities, the provisions of proposed new paragraph (d) are also applicable to funds made available pursuant to Pub. L. 97-276.

Section-by-Section Summary

Section 1612.4(a)—The additional language added by the proposed amendment tracks the language of Section 1007(a)(5) of the Legal Services Corporation Act.

Section 1612.4(a)(1)—The proposed amendment adds language intended to specify the kind of activities that may be undertaken in response to a request.

Section 1612.4(a)(2)—The additional language added by the proposed amendment tracks the language of Section 1007(a)(5)(A) of the Legal Services Corporation Act.

Section 1612.4(a)(3)—The proposed amendment is intended to make explicit in the regulation the statement now contained in the comment to the regulation that legislative activity on measures directly affecting the recipient refers to appropriations or other measures directed to the Corporation or a recipient and not to poor people's issues generally.

Section 1612.4(b)—The proposed amendment strikes the reference to "appropriate" documentation contained in the existing regulation and adds provisions which specify the kinds of documentation required to establish that recipient legislative and administrative activities fall within the activities permitted under the regulations. The proposed amendment requires that recipient must obtain the necessary documentation prior to undertaking any legislative or administrative advocacy. This provision is now contained only in the comment to the existing regulation. The proposed regulation also would require recipients to submit monthly activity reports describing their legislative and administrative advocacy activities.

Section 1612.4(c)—The proposed amendment would require that recipients provide the Corporation with a copy of the board of directors' resolution, required under the existing regulation, which authorizes the establishment of a full time legislative office, along with an annual budget for the office which includes personnel costs.

Section 1612.4(d)—The proposed amendment adds a new paragraph (d) to the existing regulation. Existing paragraph (d) is redesignated paragraph (g).

Proposed paragraph (d) essentially incorporates the provisions of Moorhead Amendment and Section 607(a) of the Treasury, Postal Service, and General Government Appropriations Act prohibiting the use of Corporation funds for publicity or propaganda purposes designed to support or defeat proposed or pending legislation. "Publicity or propaganda" is defined in the proposed amendment in a manner intended to put recipients on notice that the Corporation will look to the content of a communication in its totality and not simply for an explicit statement urging persons to contact their legislators to determine whether or not a particular communication is proscribed.

Section 1612.4(e)—The proposed amendment adds a new paragraph (e) which establishes a Corporation policy for recipient publications which contain references to proposed or pending legislation. The proposed regulation

makes the provisions of the Moorhead Amendment applicable to such publications, and establishes a system of review or publications to insure accountability for violations of the regulations. Neither the Moorhead Amendment nor any other provision of law applicable to the Corporation bans purely informational and educational discussions of legislative issues. The Corporation believes that the approach to a publication policy contained in the proposed regulation represents a reasonable balance between clients' legitimate interest in obtaining information about proposed or pending legislation and the Corporation's obligation to insure that Corporation funds are not expended contrary to applicable restrictions. The proposed regulation would retain the substance of existing § 1612.4(b)(2), which permits informing a client about a new of proposed statute, executive order, or administrative regulation. The proposed regulation would insure compliance and promote accountability by requiring that the recipient executive director, or his or her designee, review all publications for compliance with the regulations prior to dissemination, and further require recipient to provide the Corporation with a copy of each publication for review within 30 days. Further, the proposed regulation would limit the use of Corporation funds to newsletters or other publications disseminated to recipients, recipient staff, board members, private attorneys representing eligible clients, eligible clients, and the Corporation. Production and dissemination of publications dealing with legislative issues intended for the general public would have to be financed from non-Corporation funding sources, such as subscription income.

Section 1612.4(f)—The proposed amendment adds a new paragraph (f) incorporating the restrictions on recipient legislative and administrative activities imposed by Section 122 of PL 97-276 which appropriates FY 1983 funds to the Corporation. The proposed regulation tracks the language of Section 5 of H.R. 3480 as enacted by the House of Representatives on June 18, 1981.

Section 1612.4(g) The proposed regulation provides for documentation of recipient activities permitted under § 1612.4(f). Thus, proposed § 1612.4(g)(2) requires the recipient's executive director, or his or her designee, to authorize any communications to elected officials made at the request of the official. This is consistent with the legislative history of H.R. 3480 which indicates that the statutory requirement that a request be made through "official channels" was intended to impose some

recipient management control on communications made in response to requests from elected officials. Further, consistent with the legislative history of H.R. 3480, the proposed regulation would authorize a recipient to respond to an official request from an elected official on any authorization, appropriation, or oversight measure concerning a substantive issue in which the recipient was involved on which the recipient or an employee of the recipient has expertise.

List of Subjects in 45 CFR Part 1612

Civil disorder, Legal services, Lobbying.

45 CFR Part 1612 is proposed to be amended as follows:

PART 1612—[AMENDED]

1. The authority citation for Part 1612 is revised to read as follows:

Authority: Secs. 1006(b)(5), 1007(a)(5), 1011, 1008(e), Pub. L. 93-355, 88 Stat. 378 (42 U.S.C. 2996e(b)(5), 2996f(a)(5), 2996j, 2996g(e), Pub. L. 95-431, 92 Stat 1021, Pub. L. 96-68, 93 Stat 416, Pub. L. 96-536, 94 Stat 3166, Pub. L. 97-161, 96 Stat 22, Pub. L. 97-276, 96 Stat 1186.

2. Section 1612.4 is revised as follows:

§ 1612.4 Legislative and administrative representation.

(a) No funds made available to a recipient by the Corporation shall be used, at any time, directly or indirectly, to support activities intended to influence the issuance, amendment, or revocation of any executive or administrative order or regulation of a Federal, State or local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative body or State proposals by initiative petition, except that:

(1) An employee may engage in such activities in response to a request from a governmental agency or a legislative body, committee, or member made to the employee or to a recipient to testify, draft or review measures or to make representations to such agency, body, committee or member; or,

(2) An employee may engage in such activities on behalf of an eligible client of a recipient, if such activities are necessary to the provision of legal advice and representation to a client who may be affected by a particular legislative or administrative measure but no employee shall solicit a client in violation of professional responsibilities for the purpose of making such representation possible; or,

(3) An employee may engage in such activities if a governmental agency, legislative body, committee, or member

thereof is considering a measure directly affecting the activities under the Act of the recipient or the Corporation. This exception extends only to appropriations or other measures directed to the Corporation, or the recipient or its employees.

(b) Recipients shall adopt procedures and forms to document that the legislative and administrative activities in which they engage fall within the activities permitted in § 1612.4(a). Such documentation shall include:

(1) With respect to activities permitted under § 1612.4(a)(1), a written request signed by an official of the governmental agency or a member of the legislative body or committee making the request which states the type of representation or assistance requested and identifies the executive or administrative order or regulation, or legislation, to be addressed;

(2) With respect to activities permitted under § 1612.4(a)(2), a retainer agreement, signed by the client or clients represented, or by an official of the client group in the case of a group client, which agreement shall specify the legislative or administrative measure on which representation is sought, the type of representation sought, (appearance at a hearing, legislative drafting, etc.), and which shall include a statement of the client's direct interest in the particular legislative or administrative measure to be addressed;

(3) With respect to activities permitted under § 1612.4(a)(3), a written statement signed by the recipient's executive director authorizing the initiation of such activities.

(4) Recipients shall obtain the documentation required by this section prior to undertaking any of the activities permitted by § 1612.4(a).

(5) Recipients shall submit monthly reports, in a form prescribed by the Corporation, describing their legislative and administrative advocacy activities conducted pursuant to these regulations.

(c) Recipients may not establish full time legislative offices unless the decision to establish such an office is formally made by the Board of Directors of the recipient consistent with the provisions of Section 1620, provided that the legislative activities of these offices are solely activities permitted under § 1612.4(a). Recipients shall provide the Corporation with a copy of the board resolution formally approving the establishment of a full time legislative office together with an annual budget for such office which describes, in a form prescribed by the Corporation, the actual costs of the office, including personnel costs.

(d) Notwithstanding the provisions of § 1612.4(a), recipients shall not use funds made available by the Corporation for publicity or propaganda purposes designed to support or defeat proposed legislation or legislation pending before Congress or any state legislature. For purposes of this regulation, "publicity or propaganda" means any oral communication or any advertisement, telegram, letter, article, newsletter, or other printed or written matter or device which contains a direct suggestion, or, when taken as a whole, an indirect suggestion to the public at large or to selected individuals to contact elected representatives in support of or in opposition to pending or proposed legislation.

(e) No funds made available to a recipient by the Corporation shall be used to support the preparation, production, and dissemination of any article, newsletter, or other publication or written matter for general distribution which contains any reference to proposed or pending legislation unless:

(1) The publication does not contain any publicity or propaganda prohibited by § 1612.4(d); and

(2) The recipient has adopted a policy requiring the recipient's executive director, or his or her designee, to review each publication produced by the recipient prior to its dissemination for conformity to these regulations; and

(3) The recipient provides a copy of any such material produced by the recipient to the Corporation within 30 days after publication; and

(4) Such funds are used only for costs incident to the preparation, production, and dissemination of such publications to recipients, recipient staff and board members, private attorneys representing eligible clients, eligible clients, and the Corporation, as opposed to the public at large.

(f) Notwithstanding the provisions of § 1612.4(a), no funds made available to a recipient by the Corporation under the authority of Pub. L. 97-276 shall be used, directly or indirectly, to pay for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, or other device, intended or designed to influence any decision by a Federal, State, or local agency, except where legal assistance is provided by an employee of a recipient to an eligible client on a particular application, claim, or case, which directly involves the client's legal rights and responsibilities, or to influence any Member of Congress or any other Federal, State, or local elected official to favor or oppose any Acts, bills, resolutions, or similar legislation, or any referendum,

initiative, constitutional amendment, or any similar procedure of the Congress, any State legislature, any local council, or any similar governing body, except that this subsection shall not preclude such funds from being used in connection with communications to Federal, State, or local elected officials, upon the formal request of such officials through proper official channels, pertaining to the authorization or appropriations of funds or oversight measures directly affecting the operation of the program involved.

(g) Recipients shall adopt procedures and forms to document that the legislative and administrative activities in which they engage fall within the activities permitted under § 1612.4(f). Such documentation shall include:

(1) With respect to activities on behalf of eligible clients, a retainer agreement, signed by the client or clients represented, or by an official of the client group in the case of a group client, which agreement shall specify the administrative measure on which representation is sought, the type of representation sought, (appearance at a hearing, etc.) and which shall include a statement of the client's direct interest in the particular administrative measure to be addressed;

(2) With respect to activities in response to a request from a Federal, State, or local elected official, a written request signed by the official making the request which states the type of communication requested (testimony, legal analysis, legislative drafting, etc.) and identifies the legislative measure to be addressed. Such documentation shall also include the signature of the recipient's executive director (or his or her designee) authorizing the communications requested.

(h) Nothing in this section is intended to prohibit an employee from

(1) Communicating with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies; or

(2) Informing a client about a new or proposed statute, executive order, or administrative regulation consistent with the requirements of § 1612.4(e); or

(3) Advising a client with respect to the client's own communications to elected officials concerning proposed or pending legislation; or

(4) Making direct contact with elected officials concerning proposed or pending legislation as long as such activities are authorized by § 1612.4(a); or

(5) Communicating with the Corporation for any purpose.

**SUPPLEMENTARY INFORMATION—PART
1617****Alternative A (Staff Proposal):
Background**

Under the continuing resolution, Pub. L. 92-276, Corporation funds may not be used to bring a class action suit against the federal government or any state or local government unless the action is brought in accordance with policies or regulations adopted by the Board of Directors of the Corporation. This provision is derived from the Senate version of the continuing resolution (S. Rep. No. 97-581, 97th Cong., 2nd Sess.) which was adopted by the Conference Committee. The House version, which was rejected in Committee, would have banned class action suits against governmental bodies entirely. Therefore, consistent with the legislative history, the proposed regulation would permit class actions against the federal government and state or local governments, but only under the conditions provided for in the regulations. Similarly, the proposed regulations follow the legislative history of the continuing resolution which indicates that the Corporation's regulations on class action against governmental entities should guard against the misuse of such actions while permitting their use in appropriate cases with the objective of enhancing the "efficient and productive use" of Corporation funds. (S. Rep. No. 97-581, 97th Cong., 2nd Sess., p. 11).

Discussion

The proposed regulation imposes restrictions on class actions against the federal government and state or local governments in addition to those contained in existing Part 1617 of the regulations. The existing regulations were promulgated pursuant to Section 1006(d)(5) of the Legal Services Corporation Act which requires the governing body of a recipient to establish policies for class action suits. The continuing resolution, however, requires the Corporation to directly regulate class action suits against governmental bodies through the issuance of policies or regulations (S. Rep. No. 97-581, 97th Cong., 2nd Sess., p. 10). Therefore, the proposed regulations mandate the criteria which the recipient must apply in determining whether a class action may be brought against a governmental entity as opposed to merely requiring recipient governing boards to adopt policies to implement the provisions of the continuing resolution. In addition, reporting requirements are imposed to improve the Corporation's oversight of recipient

activities in this area. This approach avoids Corporation review of class action litigation on a case-by-case basis which is precluded both by the Legal Services Corporation Act and relevant American Bar Association Ethics Opinions. See Sections 1006(a)(3); 1007(a)(1); ABA Committee on Ethics and Professional Responsibility, Formal Opinion 334.

The proposed regulation requires recipients to attempt to resolve matters in dispute with governmental entities prior to bringing a class action, except in circumstances which require immediate action to protect the client's interests. Recipients would also be required to document their efforts to resolve the matter without resort to filing a class action.

The proposed regulation provides that class relief must be sought for the primary purpose of benefiting eligible clients. This provision recognizes that some members of a class ultimately certified by a court could be persons who are not eligible for legal assistance when the case is brought or who become ineligible during the pendency of the suit. This would not preclude maintaining a class action, as long as the primary purpose of the suit is to benefit eligible clients. The suit could not be maintained if the purpose is to benefit a broader group than eligible clients.

List of Subjects in 45 CFR Part 1617

Legal services.

It is proposed to amend 45 CFR Part 1617 as follows:

PART 1617—[AMENDED]

1. The authority citation for Part 1617 is revised to read as follows:

Authority: Sections 1008(b)(5), 1007(a)(5), 1011, 1008(e), Pub. L. 93-355, 88 Stat 378 (42 U.S.C. 2996e(b)(5)), 2996f(a)(5), 2996j, 2996g(e), Pub. L. 97-276, 96 Stat 1186.

2. Part 1617 is amended by adding a new § 1617.5 to read as follows:

§ 1617.5 Class actions against the federal government or state or local governments.

(a) No funds made available to a recipient by the Corporation pursuant to PL 97-276 shall be used to bring a class action suit against the federal government or any state or local government unless:

(1) All the requirements of §§ 1617.3 and 1617.4 are met;

(2) The recipient executive director has determined that the proposed class action is the most effective and efficient means of resolving the legal problems common to a number of similar situated eligible clients. In making such a

determination, the director shall take into account:

(i) The likelihood of and potential cost to the recipient of litigating multiple claims on behalf of eligible clients on the issue involved as opposed to the cost of maintaining a class action;

(ii) The likelihood that potential class members can obtain representation from other sources;

(iii) The likelihood that the class will be certified.

(3) Class relief is sought for the primary benefit of individuals who are eligible for legal assistance;

(4) Prior to filing such an action, the recipient executive director has determined that the government entity is not likely to change the policy or practice in question, that the policy or practice will continue to adversely affect eligible clients, that the recipient has given notice of its intention to seek class relief and that reasonable efforts to resolve without litigation the adverse effects of the policy or practice have not been successful, except that nothing in this paragraph shall preclude immediately filing a class action suit where the circumstances of the case, as determined by the recipient executive director, require immediate action to protect the interests of a client.

(b) With respect to class actions authorized under this section, recipients shall maintain the following records:

(1) A written statement signed by the recipient executive director authorizing the maintenance of the suit as a class action which contains documentation that the executive director has considered all of the factors required by § 1617.5(a) and a specific statement of the efforts undertaken to resolve the matter without litigation required by § 1617.5(a)(4). Such statement shall be available for inspection by the Corporation.

(2) Quarterly reports, prepared in a form prescribed by the Corporation, listing the class action suits brought under § 1617.5.

Alternative B (Harvey-Olson Proposal)

The Continuing Resolution of 1983 contains a directive to the Board of Directors, which requires that this Board regulate class action suits against governmental bodies, through the issuance of policies or regulations.

The language on this is as follows:

Finally, the Committee amendment provides that no funds appropriated under this joint resolution may be used to bring a class action against the Federal Government or any State or local government unless such action is brought in accordance with policies or regulations adopted by the Board of the

Corporation. Currently, local agency boards can authorize class action suits; this amendment will require that the Board of Directors of the Corporation itself regulate class action suits against other governmental bodies, through issuance of policies or regulations. This prohibition assures that recipients must conform to Corporation regulations in bringing class actions against the Government with these Federal funds. The Committee believes this will guard against the misuse of such actions while permitting their use in appropriate cases and thereby enhance the efficient and productive use of these funds.

Two members of the Corporation's Board of Directors believe that the staff's proposed amendment to Part 1617 (alternative A) is not responsive to the Congressional mandate and would not bring the Board into compliance with either (a) and the clear intention of the Congress to effect a major change and (b) the language of the statute and its interpretive committee comment. They, therefore, proposed this alternative amendment.

This amendment is intended to insure that class actions against governmental entities do not divert funds from governmental programs, result in increased taxation or benefit a group of persons smaller than the entire eligible client population of the jurisdiction. For example, if two (2) million persons are eligible clients who are found within the taxing authority which raises funds which are being administered by the individual with whom the executive director consults, and if the court judgment in the proposed class action might result in the allocation of public funds for the construction of a penal institution which might benefit 100 eligible clients, assuming of course that the action can be brought when other criteria have been met, then the class action cannot be commenced because it might result in the allocation of public funds away from the larger class of eligible clients, and the expenditure of those funds on the smaller group of eligible clients.

It is proposed to amend 45 CFR Part 1617 as follows:

PART 1617—[AMENDED]

1. The authority citation for part 1617 is revised to read as follows:

Authority: Sections 1006(d)(5), 1007(a)(1), 1007(a)(3), 1008(e); 42 U.S.C. 2996f(d)(5), 2996f(a)(1), 2996f(a)(3), 2996g(e); Pub. L. 97-276; 96 Stat. 118.

2. Part 1617 is amended by revising § 1617.4 to read as follows:

§ 1617.4 Standards for approval.

The governing body of a recipient shall adopt policies to guide the director of the recipient in determining whether

to approve class action litigation. The policies adopted;

(a) Shall assure that no funds made available to a recipient by the Corporation shall be used to bring a class action suit against the federal government, or any state or local government, or governmental-type organization such as but not limited to a school system, or a Department of Prisons or Mental Health, or county trustees or similar persons who are charged with maintaining county jails, unless:

(1) Class relief is sought exclusively for the benefit of individuals who are eligible for legal assistance and their consent to file the class action has been obtained in advance of suit;

(2) Prior to filing such an action, the recipient executive director has determined that the governmental entity is not likely to change the policy or practice in question, and that the policy or practice will continue to adversely affect eligible clients when the class action is concluded as it affects them when the action is commenced, that the recipient has given notice of its intention to seek class relief and that reasonable efforts to resolve without litigation the adverse effects of the policy or practice have not been successful;

(3) Prior to filing such an action, the recipient's executive director has determined, after consultation with the appropriate governmental officer or person, that the court judgment in the class action will not result in the expenditure of funds received by a public tax authority, which funds; (i) are taken from or diverted from another governmental program; or (ii) are raised by an increase in public taxation; or (iii) are raised by the sale of public securities of any kind which are supported by an increase in public indebtedness which is to be paid by public taxation;

(4) Prior to filing such an action, the recipient's executive director has determined, after consultation with the appropriate person who is charged with the administration of money produced by public taxation, that the court judgment in the class action will not result in the expenditure of public funds on a group of eligible clients which is smaller than the group of all eligible clients which is found within the jurisdiction of the taxing authority which has raised the public funds being administered.

(b) With respect to class actions authorized under this section, recipients shall maintain the following records:

(1) A written statement signed by the recipient executive director authorizing the maintenance of the suit as a class

action which contains documentation that the executive director has considered all of the factors required by § 1617.4(a)(3) and (4), and a specific statement of the efforts undertaken to resolve the matter without litigation required by § 1617.4(a)(2). Such statement shall be available for inspection by the Corporation in the Office of the Inspector General.

(2) Quarterly reports, prepared in a form prescribed by the Corporation, listing the class action suits brought under § 1617.4.

SUPPLEMENTARY INFORMATION—PART 1625

Background

Under the continuing resolution the Corporation is required to provide procedures for denials of refunding that comport with the language of the Conference Report that states:

The conferees are agreed that none of the funds available under this joint resolution for the Legal Services Corporation shall be available for a full adversarial hearing in advance of the denial of any application for refunding. The conferees are also agreed that prior to the denial of any application for refunding, the Corporation shall insure that the applicant has been given reasonable notice and an opportunity for a timely and fair hearing pursuant to regulations promulgated by the Corporation.

At its October 29-30, 1982, meeting the Corporation's Board of Directors authorized the publication of two alternative proposed regulations setting out procedures for denials of refunding. The first of these proposals (Part 1625—Alternative A) was written by the Corporation staff; the second (Part 1625—Alternative B) was written by Board Chairman William F. Harvey and Board member William J. Olson.

Discussion—Alternative A (Staff Proposal)

The purpose of Alternative A of Part 1625 is to provide for a timely, impartial, flexible and fair process for reaching a final determination on refunding while avoiding unnecessary and precipitous disruption in the delivery of legal assistance, Part 1625. As a general framework, the proposed regulation provides for a review of a written record and a summary hearing for all recipients preliminarily denied refunding unless the presiding officer "finds that there are complex issues or material facts in dispute . . . which cannot be adequately resolved by review of the written record," § 1625.9(c). Only if such a finding is made will there be an evidentiary hearing, and such a hearing is likely to be substantially more

abbreviated than the hearing now provided by Part 1606 (45 CFR Part 1606).

At the outset, § 1625.2(a) contains a revised definition of denial of refunding that increases from \$20,000 to \$40,000 the threshold amount by which the Corporation may reduce the annualized level of a grant or contract before it is considered a denial of refunding. This increase is simply a recognition of the fact that, even with the 1981 funding cut suffered by Corporation recipients, funding levels for legal services programs have increased substantially since 1976 when Part 1606 was adopted and that the \$20,000 level unnecessarily inhibits Board flexibility.

In addition, the definition has been expanded to be consistent with the spirit of the continuing resolution's provision on minimum access. Thus, it provides that any reduction in a recipient's annualized funding level which reduces that level to below the current minimum access level (approximately \$6.20 per poor person for 1982 grants) must be considered a denial of refunding subject to the hearing provisions of Part 1625.

The definition of the presiding officer has been revised to reflect the removal of the requirement for an independent hearing officer. In addition, the sections of Part 1606 specifically dealing with challenges to the qualifications of the presiding officer have been left out of Part 1625.

The grounds for denial of refunding remain basically the same as those under Part 1606. Section 1625.3(a) provides the Corporation and the Board with great flexibility in designing rules, regulations, guidelines, instructions, funding policies, standards and criteria that can be used to justify denials of refunding. The only significant change in the grounds is the statement that, with some qualifications, the validity of these Corporation actions are not subject to review in proceedings under Part 1265 unless there are questions of whether any such action was taken in accordance with appropriate procedural safeguards (e.g. notice and comment periods), whether it is appropriately applied to a particular recipient or whether it was adopted in violation of the Act or regulations, thus ensuring that Corporation action is legal and not arbitrary. Sections 1625.3(b) and (c) which state the grounds for denial of refunding "for cause" are identical to the parallel sections of Part 1606.

Sections 1625.4 and 1625.5 retain the provisions for a preliminary determination and an informal conference now contained in Part 1606. The minor changes are intended to make

these provisions consistent with the remaining provisions of Part 1625.

Consistent with the notion that most final determinations in denial cases will be made primarily on review of a written record supplemented by a summary hearing, §§ 1625.7 and 1625.8 are intended to provide simple and orderly procedures to guide the preparation of a complete written record, while guarding against repetitious, unnecessarily voluminous or irrelevant materials.

Section 1625.9 describes the circumstances under which either summary or evidentiary hearings are to be held. In most instances, it is anticipated that hearings will be summary in nature.

Section 1625.10 describes the procedures to be followed in a summary hearing. Such a hearing permits the parties to make oral presentations based primarily on materials already in the written record and limits post-hearing submissions to those the presiding officer determines would be helpful to resolve the case.

Section 1625.11 describes the procedures to be followed in an evidentiary hearing. The presiding officer is empowered to informally attempt in advance to limit the scope of the evidentiary hearing as much as possible to the materials already in the written record and to permit additional materials to be added only in unusual circumstances. The presiding officer also may request that written testimony be submitted in advance so that the oral hearing is limited to cross-examination of witnesses. Unlike the hearings under Part 1606, these procedures do not provide specifically for participation by non-parties. In general, the procedures under § 1625.11 are intended to be as flexible and informal as appropriate under the circumstances.

Under § 1625.12, the burden of proving factual and other issues is on the recipient, not on the Corporation as under Part 1606.

With the exception of technical revisions to conform with the changes in numbering, §§ 1625.13 and 1625.14 dealing with the presiding officer's recommended decision and issuance of a final decision by the Corporation's President are identical to the parallel provisions of current Part 1606.

Sections 1625.16 (Right to Counsel), 1625.17 (Reimbursement), 1625.19 (Termination Funding), and 1625.20 (Notice) are basically identical to the parallel provisions of current Part 1606.

Section 1625.18 dealing with interim funding revises the current § 1606.8 to make it clear that should the proceedings under this part extend

beyond the end of the recipient's current grant or contract term, the Corporation's obligation to continue funding pending a final determination is only at that level of funding "sufficient to allow for the representation of clients on whose behalf litigation, negotiation or other forms of representation have been initiated" as provided in the continuing resolution. However, the Corporation may provide funding at a higher level, and is obligated to continue funding at the recipient's current grant or contract level until the end of the current grant term.

Discussion—Alternative B (Harvey/Olson Proposal)

The purpose of Alternative B of Part 1625 is to increase the ability of the Corporation to use its resources effectively to promote the objectives of the Legal Services Corporation Act by providing recipients with reasonable notice of any proposed application for refunding and opportunity for a timely, expeditious and fair informal hearing prior to the cessation or substantial reduction of financial assistance § 1625.1.

Under § 1625.2(a)(2), the definition of denial of refunding is changed to include a provision that would permit reprogramming of carryover funds. Thus if a recipient received \$100,000 funding and obligated only \$80,000 in one year and then received \$75,000 plus a reprogramming of the \$20,000 carryover funds, its funding level would be \$95,000 and the reduction in funding only 5%, not requiring a hearing. In addition, it is the level of support per time period, not the total amount that is protected. Hence if a recipient had received \$100,000 for one year and then received \$48,000 for six months, there would be no denial of refunding, although there might be at the end of six months unless another grant was made. However, if such a recipient received only \$35,000 for six months, a denial of refunding would have occurred and a hearing would be required.

Also, Part 1625 eliminates the section of Part 1606 that provides for a hearing when a special condition is imposed on a recipient without the required reduction in funding; also note that in § 1625.2(a)(2) a reduction of over \$20,000 which is not 10% is no longer a denial of refunding.

The proposed § 1625.3 (Grounds for Denials of Refunding) deletes the requirement for prior notice and the opportunity to correct either specific violations or general ineffectiveness. In addition, it provides that an alternative ground for denial of refunding is that the

President of the Corporation or the Board of Directors has found that other organization, whether a recipient or not, could better serve eligible clients in the recipient's service area.

The proposed version of Part 1625 contains no informal conference prior to the initiation of proceedings and provides for an informal hearing in all instances.

Under § 1625.10 the burden of going forward with the evidence remains with the Corporation, but the burden of proof is shifted to the recipient. However, the Corporation must show a reasonable basis for concluding that another recipient can better serve eligible clients.

List of Subjects in 45 CFR Part 1625

Administrative practice and procedure, Legal services.

Accordingly, 45 CFR Part 1625 (Alternatives A and B) is proposed to be added as follows:

Alternative A (Staff Proposal)

PART 1625—PROCEDURES GOVERNING DENIAL OF REFUNDING

Sec.	Purpose.
1625.1	Purpose.
1625.2	Definitions.
5.3	Grounds for denial of refunding.
4.4	Preliminary determination.
1625.5	Informal conference.
1625.6	Initiation of proceedings.
1625.7	Preparation of written hearing materials.
1625.8	Development of the record by the presiding officer.
1625.9	Nature of hearing.
1625.10	Summary hearing.
1625.11	Evidentiary hearing.
1625.12	Burden of proof.
1625.13	Recommended decision.
1625.14	Final decision.
1625.15	Time extension and waiver.
1625.16	Right to counsel.
1625.17	Reimbursement.
1625.18	Interim funding.
1625.19	Termination funding.
1625.20	Notice.

Authority: Sec. 1006(b)(1) and (3), 1007(a)(1), 1007(a)(3), 1007(a)(9), 1007(d), 1008(e), 1011 (42 U.S.C. Sections 2996e(b)(1) and (3), 2996f(a)(1), 2996f(a)(3), 2996f(a)(9), 2996f(d), 2996g(e), 2996j), Pub. L. 97-276, 96 Stat. 1188.

§ 1625.1 Purpose.

This part is intended to provide a fair, impartial, timely and flexible process for reaching a final determination when there is reason to believe that refunding of a grant or contract should be denied. At the same time, this part seeks to avoid unnecessary and precipitous interruption in the delivery of legal assistance to eligible clients.

§ 1625.2 Definitions.

(a) "Denial of refunding" means a decision that, after expiration of its current grant or contract, a recipient:

(1) Will not be provided with financial assistance; or

(2) Will have its annual level of financial support reduced to an extent that is not required either by a change of law or by a reduction in the Corporation's appropriation that is apportioned among all recipients of the class in proportion to their current level of funding, and is either more than 10 percent or more than \$40,000 below the recipient's annual level of financial assistance under its current grant or contract; provided, however, that any such reduction in a recipient's annual level of financial support which reduces that level below the minimum access level for the term of the new grant shall be considered a denial of refunding; or

(3) Will be provided with financial assistance subject to a new condition or restriction that is not generally applicable to all recipients of the same class, and that would significantly reduce the ability of a recipient to maintain the quality and quantity of its current legal assistance to eligible clients.

(b) "Director of a recipient" means the person who has overall day-to-day responsibility for management of operations by the recipient.

(c) "Presiding Officer" means a person appointed by the President to recommend a decision that refunding should be granted or denied, who is familiar with legal services and supportive of the purposes of the Act, who is fair and impartial, who has not participated in the matter at issue, and who has no supervisory responsibility for the Corporation employee who made the initial determination.

§ 1625.3 Grounds for denial of refunding.

Refunding may be denied when:

(a) Denial is required by, or will implement, a provision of law, a Corporation rule, regulation, guideline, or instruction that is generally applicable to all recipients of the same class, or a funding policy, standard, or criterion approved by the Board, the validity of which shall not be subject to review in these proceedings except to the extent that they are challenged as violating the Act or other substantive legislation affecting the Corporation or its regulations, or as having been adopted in violation of the Corporation's rule-making procedures; or

(b) There has been substantial failure by a recipient to comply with a provision of law, or a rule, regulation, or guideline issued by the Corporation, or a

term or condition of a current or prior grant from or contract with the Corporation. In the absence of unusual circumstances, refunding shall not be denied for this cause unless the Corporation has given the recipient notice of such failure and an opportunity to take effective corrective action; or

(c) There has been substantial failure by a recipient to use its resources to provide economical and effective legal assistance of high quality as measured by generally accepted professional standards, the provisions of the Act, or a rule, regulation or guideline issued by the Corporation, in the absence of unusual circumstances, refunding shall not be denied for this cause unless the Corporation has given the recipient notice of such failure and an opportunity to take effective corrective action.

§ 1625.4 Preliminary determination.

(a) When there is reason to believe that refunding should be denied, the Corporation shall serve a written preliminary determination upon the recipient, which shall state the grounds for the proposed action, and shall identify, with reasonable specificity, any facts or documents relied upon as justification for that action.

(b) The preliminary determination shall advise the recipient that it may, within 10 days of receipt of the preliminary determination, make written request for a review of the preliminary determination in accordance with the procedures under this part.

(c) The preliminary determination shall also advise the recipient of its right to receive interim, and to request termination, funding, under §§ 1625.18 and 1625.19 of this part.

(d) If the recipient advises the Corporation that it will not request review, or if it fails to request review within the time prescribed in § 1625.4(b) or § 1625.5, the preliminary determination shall become final.

§ 1625.5 Informal conference.

(a) On timely request for review by the recipient under § 1625.4(b), the Corporation employee who made the preliminary determination shall promptly conduct an informal conference with the recipient at a time and place designated by the employee. Such conference should, if possible, be held within 7 working days of the request. The parties thereto shall exchange views, seek to narrow the issues, and explore the possibilities of settlement or compromise. At the conclusion of the conference, which may be adjourned for deliberation or consultation, the Corporation employee

shall, in writing, modify, withdraw, or affirm the preliminary determination.

(b) The recipient may, within 5 working days after the conclusion of the informal conference, make written request for a hearing in accordance with §§ 1625.7 through 1625.13 of this part. This request must include a brief statement of why the recipient believes the preliminary determination is wrong and why refunding should be approved.

§ 1625.6 Initiation of proceedings.

Within 7 days after receipt of a request for continued review made under § 1625.5(b), the Corporation will send the recipient an acknowledgment, enclose a copy of these procedures, advise the recipient of the name of the presiding officer appointed by the President and of the next steps in the review process.

§ 1625.7 Preparation of written hearing materials.

(a) Within 15 days after making the written request for a hearing under § 1625.5, the recipient shall submit the following to the Corporation (and to the presiding officer if not an employee of the Corporation):

(1) A written statement of the recipient's argument concerning why the Corporation's preliminary determination is wrong and why refunding should be approved ("recipient's brief");

(2) A written request for an evidentiary hearing under § 1625.11 of this Part, if desired, and a written statement of why such a hearing is necessary and appropriate to permit adequate review of the written record.

(3) Copies of all documents that the recipient believes are important to the Corporation's decision on the issues in the case.

(b) Within 10 days after receiving the recipient's submission under paragraph (a) of this section, the Corporation shall submit the following to the recipient (and to the presiding officer if not an employee of the Corporation):

(1) A written statement responding to the recipient's brief ("Corporation's brief");

(2) A written statement either requesting an evidentiary hearing, acceding to or opposing such a request by the recipient if one was made under paragraph (a)(2) of this section. If the Corporation opposes such a request, it shall state in writing why it considers such a hearing unnecessary and inappropriate. If the Corporation requests such a hearing in the absence of a request by the recipient, the Corporation shall state in writing why it considers such a hearing necessary and appropriate.

(3) Any additional documents, not submitted previously by the recipient, supporting the Corporation's position.

(c) Within 7 days after receiving the Corporation's submission under paragraph (b) of this section, the recipient may submit a short reply, including a statement that it accedes to or opposes any Corporation request for an evidentiary hearing. The recipient should avoid repeating arguments already made.

(d) Whenever possible, the Corporation and the recipient should try to develop the record jointly, agree to preparation of documents by one of them, agree to facts to eliminate the need for some documents, or agree that one party will submit documents identified by the other. Where submission of all relevant documents would lead to a voluminous record, the presiding officer will consult with the parties about how to reduce the size of the record.

§ 1625.8 Development of the record by the presiding officer.

The presiding officer may request additional documents or information; request briefing on issues in the case; hold preliminary conferences (generally by telephone) to establish schedules and refine issues; and take such other steps as he or she determines appropriate to develop a prompt, sound recommendation.

§ 1625.9 Nature of Hearing.

A hearing under this part may be either a summary hearing under § 1612.10 or an evidentiary hearing under § 1625.11, depending on the following circumstances:

(a) If neither party requests an evidentiary hearing, the hearing will be a summary hearing.

(b) If either party requests an evidentiary hearing and the other party accedes to that request, the hearing will be an evidentiary hearing.

(c) If one party requests an evidentiary hearing and the other party opposes that request, the presiding officer will preliminarily review the written record and grant or deny the request within 5 days of receipt of the final submission under § 1625.7. If the presiding officer finds that there are complex issues or material facts in dispute, the resolution of which would be significantly aided by such an evidentiary hearing and which cannot be adequately resolved by review of the written record, the presiding officer shall grant the request for an evidentiary hearing. Otherwise, such request shall be denied.

(d) If at the conclusion of a summary hearing the presiding officer finds that there are outstanding issues of material fact that require an evidentiary hearing he or she may order that an evidentiary hearing be held.

§ 1625.10 Summary Hearing.

(a) The purposes of the summary hearing are to give the parties an opportunity to make oral presentations to the presiding officer and to give the presiding officer the opportunity to clarify issues and question both parties about matters which the presiding officer may not yet fully understand from the record.

(b) Unless the parties and the presiding officer otherwise agree, the following procedures for a summary hearing apply:

(1) The hearing will be held within 15 days of a determination under § 1625.9(a) or (c).

(2) The hearing generally will be held in Washington, D.C. In exceptional circumstances, the presiding officer may hold the hearing at a Corporation Regional Office or other place convenient to the recipient.

(3) The hearing will be recorded at Corporation expense. The Corporation will send one copy of the transcript to the recipient as soon as it is received by the presiding officer (and forwarded to the Corporation if the presiding officer is not a Corporation employee).

(4) Only in exceptional circumstances will documents be received at a summary hearing. Inquiry will focus on material already in the record. If a party finds that further documents should be in the record for the summary hearing, the party should supplement the record, submitting copies of the documents to the Corporation (and the presiding officer if not a Corporation employee) not less than 5 days prior to the summary hearing.

(5) Each party's representative may make an oral presentation. The presiding officer will allow reply comments, and may allow short closing statements. On request, the presiding officer may allow the Corporation and the recipient to question each other.

(6) There will be no post-hearing submissions, unless the presiding officer determines they would be helpful to resolve the case. The presiding officer may require or allow the parties to submit proposed findings and conclusions.

§ 1625.11 Evidentiary hearing.

(a) Evidentiary hearings generally will be held within 20 days of a

determination under § 1625.9 (b), (c) or (d).

(b) The presiding officer may hold a prehearing conference to consider any of the following: the possibility of settlement; simplifying and clarifying issues; stipulations and admissions; limitations on evidence and witnesses that will be presented at the hearing; scheduling the hearing; and any other matter that may aid in resolving the issues. The presiding officer, after consulting with the parties, may reduce the results of the conference to writing in a document which will be made part of the record, or may transcribe the proceedings and make the transcript part of the record.

(c) Evidentiary hearings generally are held at a place convenient to the recipient and the community it serves. A hearing affecting more than one community shall be held in a single centrally located place unless the presiding officer determines that additional hearing places are required.

(d) *Conduct of the evidentiary hearing.* (1) The presiding officer will conduct the evidentiary hearing in a manner that is as flexible as reasonably possible, keeping in mind the need to establish an orderly record. The presiding officer generally will admit evidence unless it is determined to be clearly irrelevant, immaterial or unduly repetitions, so the parties should avoid frequent objections to questions and documents. Both sides may make opening and closing statements, may present witnesses as agreed upon in the prehearing conference, and may cross-examine witnesses. Since the parties have ample opportunity to develop a complete record prior to the evidentiary hearing, a party may introduce an exhibit at such a hearing only after explaining to the satisfaction of the presiding officer why the exhibit was not submitted earlier (for example, because the information was not available).

(2) The presiding officer may request the parties to submit written statements of witnesses prior to the evidentiary hearing so that such hearing will primarily be concerned with cross-examination and rebuttal.

(3) Official notice may be taken of published policies, rules, regulations, guidelines, and instructions of the Corporation, of any matter of which judicial notice may be taken in a Federal court, or of any other matter whose existence, authenticity, or accuracy is not open to serious question.

(4) The hearing will be recorded at Corporation expense. The Corporation will send one copy of the transcript to the recipient as soon as it is received by

the presiding officer (and forwarded to the Corporation if the presiding officer is not a Corporation employee).

(e) At the discretion of the presiding officer, the parties may be required or allowed to submit post-hearing briefs or proposed findings and conclusions (the parties will be informed at the hearing). A party should note any major prejudicial transcript errors in an addendum to its post-hearing brief (or if no brief will be submitted, in a letter submitted within a time limit set by the presiding officer).

(f) The transcript and any post-hearing briefs or letters will become part of the record.

§ 1625.12 Burden of proof.

The recipient shall have the obligation of proving, by a preponderance of the evidence contained in the record that any disputed fact relied upon by the Corporation as justification for denial of refunding was incorrect; with respect to all other issues, the recipient shall have the obligation to establish that the Corporation lacked a substantial basis for denying refunding.

§ 1625.13 Recommended decision.

(a) As soon as practicable after the record is completed and normally within 10 days after the conclusion of the summary or evidentiary hearing, the presiding officer shall issue a written recommended decision:

(1) Granting refunding subject to any modification or condition that may be deemed necessary and appropriate on the basis of information adduced from the record; or

(2) Denying refunding.

(b) The recommended decision shall contain findings of the significant and relevant facts and shall state reasons for the recommended decision. Findings of fact shall be based solely on evidence adduced from the record or on matters of which official notice was taken.

§ 1625.14 Final decision.

(a) If neither the Corporation nor the recipient requests review by the President, a recommended decision shall become final 10 days after receipt by the recipient.

(b) The recipient or the Corporation may seek review by the President of a recommended decision. A request shall be made in writing within 5 days after receipt by the party of the recommended decision, and shall state in detail the reasons for seeking review.

(c) As soon as practicable after receipt of a request for review of a recommended decision, and normally within 10 days, the President shall adopt, modify, or reverse the

recommended decision, or direct further consideration of the matter. In the event of modification or reversal, the President's decision shall conform to the requirements of § 1625.13(b).

(d) A decision by the President shall become final upon receipt by the recipient.

§ 1625.15 Time extension and waiver.

(a) Any period of time provided in these rules may, upon good cause shown and determined, be extended:

(1) By the person making the preliminary determination, prior to the time the presiding officer is designated;

(2) By the presiding officer, prior to the issuance of a recommended decision; or

(3) By the President at any time.

(b) Requests for extensions of time shall be considered in light of the overall objective that the recommended decision under § 1625.13 shall be issued within 90 days of the request for a hearing under § 1625.5(b).

(c) Any other provision of these rules may be waived or modified:

(1) By the presiding officer with the assent of the recipient and of counsel for the Corporation; or

(2) By the President upon good cause shown and determined.

§ 1625.16 Right to counsel.

At a hearing under § 1625.10 or § 1625.11, the Corporation and the recipient each shall be entitled to be represented by counsel, or by another person. The person designated to represent a party may be an employee, or may be outside counsel retained for the purpose. Unless prior written approval is received from the Corporation, the fee paid to outside counsel shall not exceed the hourly equivalent of the rate of level V of the executive schedule specified in Section 5316 of Title 5, United States Code.

§ 1625.17 Reimbursement.

If refunding is granted after a final determination has been issued under § 1625.14, a recipient shall receive reimbursement by the Corporation, to the extent it has prevailed, for reasonable and actual expenses that were required in connection with proceedings under this part.

§ 1625.18 Interim funding.

(a) Failure by the Corporation to meet a time requirement of this part shall not entitle a recipient to refunding of its grant or contract.

(b) If a final determination is not issued prior to the end of the recipient's current grant or contract term, the Corporation shall provide the recipient

with interim funding sufficient to allow for the representation of clients on whose behalf litigation, negotiation or other forms of representation have been initiated, for the period after the end of the recipient's current grant or contract term, pending receipt of such final determination.

§ 1625.19 Termination funding.

After a final determination to deny refunding, and without regard to whether a hearing has occurred, the Corporation may authorize temporary funding if necessary to enable a recipient to close or transfer current matters in a manner consistent with the recipient's professional responsibility to its present clients.

§ 1625.20 Notice.

A notice required to be sent to a recipient under this part shall be sent to the director of the recipient, and may be sent to the chairperson of its governing body.

Alternative B (Harvey/Olson Proposal)

PART 1625—DENIAL OF APPLICATION FOR REFUNDING

Sec.

- 1625.1 Purpose.
- 1625.2 Definitions.
- 1625.3 Grounds for denial of refunding.
- 1625.4 Preliminary determination.
- 1625.5 Initiation of proceedings.
- 1625.6 Presiding officer.
- 1625.7 Pre-hearing conference.
- 1625.8 Pre-hearing requirements.
- 1625.9 Conduct of the informal hearing.
- 1625.10 Burden of proof.
- 1625.11 Post-hearing arguments.
- 1625.12 Recommended decision.
- 1625.13 Final decision.
- 1625.14 Extension of time and waiver.
- 1625.15 Right to counsel.
- 1625.16 Reimbursement.
- 1625.17 Interim funding.
- 1625.18 Termination funding.
- 1625.19 Notice.

Authority: Sec. 1006(b)(1) and (3), 1007(a)(1), 1007(a)(3), 1007(a)(9), 1007(d), 1008(e), 1011 (42 U.S.C. 2996e(b)(1) and (3), 2996f(a)(1), 2996f(a)(3), 2996f(a)(g), 2996f(d), 2996g(e), 2996j, Pub. L. 97-276, 96 Stat. 1188.

§ 1625.1 Purpose.

This part seeks to increase the ability of the Corporation to use its resources effectively to promote the objectives of the Act by providing recipients with reasonable notice of any proposed application for refunding and opportunity for a timely, expeditious and fair informal hearing prior to the cessation or substantial reduction of financial assistance.

§ 1625.2 Definitions.

(a) "Denial of refunding" means a decision that after the expiration of a grant or contract a recipient:

- (1) Will not be provided financial assistance; or
- (2) Will have its annualized level of financial support reduced to an extent that is not required by a change of law or a reduction in the Corporation's appropriation apportioned among all recipients of the same class and that is more than 10 percent below the recipient's annualized level of financial assistance under its current grant or contract. Carryover funds reprogrammed from a recipient's previous funding period(s) shall be included in a recipient's current level of funding.

(c) "Director of a recipient" means the person who has overall day to day responsibility for management of operations by the recipient.

(d) "Presiding officer" means the person appointed by the President to recommend a decision that a grant or contract should be refunded or not refunded.

§ 1625.3 Grounds for denial of refunding.

Refunding may be denied when:

- (a) Denial is required by, or will implement, a provision of law, a Corporation rule, regulation, guideline, or instruction that is generally applicable to all recipients of the same class, or a funding policy, standard, or criterion approved by the Board; or
- (b) The recipient has not complied with a provision of law, or a rule, regulation, or guideline issued by the Corporation, or a term or condition of a current or prior grant from or contract with the Corporation; or
- (c) The recipient has not used its resources to provide economical and effective legal assistance of high quality as measured by generally accepted professional standards, or the provisions of the act, or a rule, or regulation or guideline issued by the Corporation.
- (d) The President of the Corporation or the Board of Directors finds that another organization, whether a recipient or not, could better serve eligible clients in the recipient's service area.

§ 1625.4 Preliminary determination.

(a) When, based on one or more of the reasons set forth in § 1625.3, a tentative decision not to refund a recipient has been reached, the Corporation shall serve a written preliminary determination upon the recipient. It shall state the bases for denial of refunding, and may identify with reasonable specificity any fact or documents relied

upon which supports the denial of refunding.

(b) The preliminary determination shall advise the recipient that it may make a written request for an informal hearing within 10 days after it receives the preliminary determination.

(c) The preliminary determination shall also advise the recipient of its right to receive interim funding and to request termination funding under §§ 1625.17 and 1625.18.

(d) If the recipient advises the Corporation it will not seek review, or if it fails to request review within the time prescribed in § 1625.4(b), the preliminary determination shall become final.

§ 1625.5 Initiation of proceedings.

Within 10 days after receipt of a request for an informal hearing the Corporation shall notify the recipient of:

- (a) The name of the presiding officer and of the attorney representing the Corporation; and
- (b) The date, time and place of the hearing.

§ 1625.6 Presiding officer.

(a) The presiding officer shall be appointed by the President. The presiding officer shall be a person who is independent and has had no previous participation in the issues between the Corporation and the recipient. Furthermore, this person shall not have been involved with any other dealings between the Corporation and the recipient in the previous year.

(b) Within 5 days of receipt of notice of the name of the presiding officer, the recipient may file a written notice that it objects to the presiding officer on the basis that this person does not fit the criteria of § 1625.6(a) or as made statements or taken actions indicating personal bias against the recipient.

(c) Within 10 days thereafter, the President shall consider the recipient's objection(s) with any supporting documentation and (1) retain the presiding officer; or (2) replace the presiding officer; and (3) shall promptly notify the recipient of the President's decision.

(d) No objection to the appointment of a presiding officer may be made unless presented in the manner specified in this section.

§ 1625.7 Pre-hearing conference.

(a) In particularly complex cases, a pre-hearing conference may be desirable. The convening of such a conference shall be at the discretion of the presiding officer, except that a pre-

hearing conference shall be convened at the request of both parties.

(b) Matters to be discussed at the pre-hearing conference may include:

- (1) The possibility of a settlement;
- (2) Proposals to define and narrow the issues;
- (3) Proposed stipulations of fact;
- (4) Other matters concerning the conduct of the hearing.

§ 1625.8 Pre-hearing requirements.

(a) With or without a pre-hearing conference, the presiding officer may establish specific procedures, consistent with this part for conduct of the informal hearing. The presiding officer may request or permit written submission of arguments and supporting material prior to the hearing.

(b) The presiding officer may, at any time prior to the completion of the hearing, require either party, upon sufficient notice, to produce a relevant document in its possession; the presiding officer may require either party to produce a person in its employ to testify at the hearing.

§ 1625.9 Conduct of the informal hearing.

(a) The hearing shall be scheduled to commence at the earliest appropriate date no less than 20 days after the date of the notice to the recipient required under § 1625.5.

(b) The hearing shall be scheduled at a place convenient to the parties. When accessible to the recipient, the Corporation Headquarters or the nearest Corporation Regional Office may be used as the hearing site. The presiding officer may for good cause shown change the hearing site upon request of the recipient filed not more than 10 days after the date of the notice required under § 1625.5.

(c) The presiding officer shall preside over the hearing, avoid delay, maintain order, conduct a fair hearing, and insure that an adequate record of the facts and issues is made.

(d) The hearing shall be open to the public, unless, in the interests of justice or maintaining order, the presiding officer shall determine otherwise.

(e) The presiding officer may, upon request, allow any interested party or individual to intervene in the hearing, if, in the judgment of the presiding officer, such participation will materially assist in proper determination of the issues.

(1) A person or organization wishing to intervene in a hearing shall request permission from the presiding officer, stating the reason for the request, and the nature of the evidence or argument to be offered; and shall notify the Corporation and the recipient of its request.

(2) The presiding officer shall notify the Corporation, the recipient, and the person or organization requesting intervention whether the request has been granted.

(3) The presiding officer will allow only written presentation by intervenors, except when, in his or her judgment their verbal participation is desirable. The presiding officer may impose other limitations on the scope or form of intervention.

(f) The Corporation and the recipient each may present its case by written or oral documentary evidence, conduct examination and cross-examination of witnesses, examine any document submitted by another party, and submit rebuttal evidence.

(g) If a party fails, with good cause, to produce a person or document required under § 1625.8(b), the presiding officer may make a finding adverse to the party, or any lesser determination may be made.

(h) Technical rules of evidence shall not apply. The presiding officer shall make any procedural or evidentiary ruling that may help to insure full disclosure of the facts, to maintain order, or to avoid delay. Irrelevant, immaterial, repetitious or unduly prejudicial matter may be excluded.

(i) Official notice may be taken of published policies, rules, regulations, guidelines, and instructions of the Corporation, of any matter of which judicial notice may be taken in Federal court, or of any other matter whose existence, authenticity, or accuracy is not open to serious question.

(j) A stenographic or electronic sound record, or a summary of the hearing shall be made in a manner determined by the presiding officer, and a copy shall be made available to a party upon payment of its cost.

§ 1625.10 Burden of proof.

At an informal hearing under § 1625.9:

(a) The Corporation shall present its evidence showing the grounds for the denial of refunding under § 1625.3, and

(b) Thereafter, on all issues, the recipient shall have the obligation and burden of establishing by a preponderance of the evidence a basis for continuation of funding; except that

(c) The President or the Board of Directors must show a reasonable basis for concluding that another recipient can better serve eligible clients.

§ 1625.11 Post-hearing arguments.

In particularly complex cases, at the discretion of the presiding officer, the parties may submit to the presiding officer, with service on all other parties, proposed findings of fact and conclusion

of law. Such arguments shall be submitted within 10 days of the conclusion of the hearing.

§ 1625.12 Recommended decision.

(a) As soon as practicable after the hearing, and normally within 15 days after its conclusion, the presiding officer shall issue a written recommended decision.

(b) The decision shall:

- (1) Deny refunding; or
- (2) Grant refunding; or grant refunding subject to modification or conditions which appear necessary on the basis of information disclosed at the hearing; or
- (3) Recommend another recipient to serve eligible clients.

(c) The recommended decision shall contain findings of the significant and relevant facts and shall state the reasons for the decision. Findings of fact shall be based solely on the evidence adduced at the hearing or on matters of which official notice was taken.

§ 1625.13 Final decision.

(a) If neither the Corporation nor the recipient requests review by the President, a recommended decision shall become final 10 days after receipt by a recipient.

(b) The recipient or the Corporation may seek review by the President of a recommended decision. A request shall be made in writing within 10 days after receipt by the party of the recommended decision, and shall state in detail the reasons for seeking review.

(c) As soon as practicable after receipt of a request for review of a recommended decision, and within 30 days, the President shall adopt, modify, or reverse the recommended decision, or direct further consideration of the matter. In the event of modification or reversal, the President's decision shall conform to the requirements of § 1625.12(c).

(d) A decision by the President shall become final upon receipt by a recipient.

§ 1625.14 Extension of time and waiver.

(a) Any period of time provided in these rules may, upon good cause shown and determined, be extended:

(1) By the presiding officer, prior to the issuance of a recommended decision; or

(2) By the President at any time.

(b) Requests for extension of time shall be considered in light of the overall objective that the procedures prescribed by this part ordinarily shall be concluded within 60 days of the preliminary determination.

(c) As to any recipient, any provision of these rules may be waived or modified:

(1) By the presiding officer with the assent of the recipient, and of counsel for the Corporation after consultation with the President; or

(2) By the President upon good cause shown and determined.

§ 1625.15 Right to counsel.

At a hearing under § 1625.9, the Corporation and the recipient each shall be entitled to be represented by counsel, or by another person. The attorney designated may be an employee, or may be outside counsel retained for the purpose. Unless prior written approval is received from the Corporation, the fee paid to outside counsel shall not exceed the hourly equivalent of the rate of level V of the executive schedule specified in

section 5316 of title 5, United States Code.

§ 1625.16 Reimbursement.

If refunding is granted after a preliminary determination has been issued under § 1625.4, a recipient shall receive reimbursement by the Corporation, to the extent it has prevailed, for reasonable and actual expenses that were required in connection with proceedings under this part.

§ 1625.17 Interim funding.

Failure by the Corporation to meet a time requirement of this part shall not entitle a recipient to refunding. Pending a final determination under this part, the Corporation shall provide the recipient with interim funding necessary to maintain its current level of legal assistance activities under the Act.

§ 1625.18 Termination funding.

After a final determination to deny refunding, and without regard to whether a hearing has occurred, the Corporation may authorize temporary funding if necessary to enable a recipient to close or transfer current matters in a manner consistent with the recipient's professional responsibility to its present clients.

§ 1625.19 Notice.

A notice required to be sent to a recipient under this part shall go to the director of the recipient, and may be sent to the chairperson of its governing body.

Mary F. Wieseman,

Acting General Counsel.

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