

As stated previously, the May 17, 1994 proposed rule to establish a tolerance for amitraz in/on imported hops was not finalized because the amitraz reregistration activities indicated the potential for an acute risk of concern. Using the voluntary human study submitted by the company, a revised dietary exposure analysis was performed assessing the acute risk from the proposed use of amitraz on dried hops. Acute exposure from beer was calculated by multiplying individual, single day consumption estimates taken from the USDA's 1977-1978 Nationwide Food Consumption Survey by a residue of 0.22 ppm to derive a distribution of acute exposures for the two subgroups previously identified as being most highly exposed to amitraz through beer, "Males 13 years and older" and "Females 13 years and older." Because hops are mixed as part of the brewing process, a residue value in beer reflecting the average residue in hops was deemed more appropriate than using a residue value in beer based on the tolerance on hops.

The Margin of Exposure (MOE) is a measure of how closely exposure comes to the NOEL (the highest dose at which no effects were observed in the study), and is calculated as the ratio of the NOEL to the exposure (NOEL/exposure = MOE). The Agency normally considers an MOE of 10 or greater acceptable when the NOEL is based on a human study. MOEs at the 99th percentile from amitraz in beer were 10 for "Males, 13 +" and 15 for "Females, 13 +". Only those consumers within both subgroups having consumption greater than the 99th percentile consumer would have MOEs for beer which are below 10. Additionally, the acute risk assessment assumed that 100 percent of all imported beer and 100 percent of all imported hops used in domestic beer production would contain amitraz. The Agency considers this to be extremely unlikely.

The Agency expects a brewing study providing additional residue data to be submitted which may enable further refinement and reevaluation of the risk. At this time, no residue data supporting domestic use have been submitted for the U.S., and there are no U.S. registrations for the use of amitraz on hops. The Agency will not consider any applications for registration of amitraz to be used on hops in the U.S., nor will EPA consider any Special Local Needs Registrations (FIFRA section 24(c)) until acceptable U.S. residue data are submitted and reviewed and a risk/benefit analysis is performed.

Based on the above information considered by the Agency, the tolerance

established by amending 40 CFR part 180 would protect the public health. Therefore, it is proposed that the tolerance be established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide under FIFRA, as amended, which contains any of the ingredients listed herein may request within 30 days after publication of this document in the Federal Register that this rulemaking proposal be referred to an Advisory Committee in accordance with FFDCA section 408(e).

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [PP 4E4349/P599]. All written comments filed in response to this petition will be available in the Public Docket and Freedom of Information Section, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Recording and recordkeeping requirements.

Dated: January 12, 1995.

Stephen L. Johnson,  
Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that part 180 be amended as follows:

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. In § 180.287, by amending the table therein by adding and alphabetically inserting the raw agricultural commodity dried hops, to read as follows:

**§ 180.287 Amitraz; tolerances for residues.**  
\* \* \* \* \*

Commodity	Parts per million
* * * * *	* * * * *
Hops, dried .....	60
* * * * *	* * * * *

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**LEGAL SERVICES CORPORATION**

**45 CFR Part 1611**

**Eligibility**

**AGENCY:** Legal Services Corporation.

**ACTION:** Proposed rule.

**SUMMARY:** The Legal Services Corporation ("LSC" or "Corporation") proposes to amend regulations relating to eligibility for LSC-funded legal services. This regulation has been substantially revised and reordered, in part to simplify the regulation and clarify current Corporation policy and in part to revise Corporation policy, particularly with respect to access by LSC to client records.

**DATES:** Comments may be submitted on or before March 20, 1995.

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

**FOR FURTHER INFORMATION CONTACT:** Victor Fortunato, General Counsel, (202) 336-8810.

**SUPPLEMENTARY INFORMATION:** The Operations and Regulations Committee of the LSC Board ("Committee") held public hearings on June 20, 1994, and September 17, 1994, in Washington, DC, to consider a draft of proposed revisions to 45 CFR part 1611, LSC's regulations on eligibility for LSC-funded legal assistance. At a meeting in Washington, DC, on October 28, 1994, the Committee approved a draft to be published in the Federal Register as a proposed rule for public comment.

Under this proposal, part 1611 has been substantially revised and reordered to make the regulation less complex and easier for recipients to apply. While there are numerous proposals for substantive change, the majority of the revisions reflect the Committee's desire to make this rule more comprehensible and less subject to confusion and misinterpretation than is the current regulation. Throughout the rule, there are slight changes in language to clarify the rule or to make it consistent with

prior interpretations. Unless noted below, these minor revisions do not make any substantive change in the rule and are not described in detail.

The Committee recognizes that Congress may consider legislation that would amend the LSC Act and reauthorize appropriations for the Corporation. Whenever Congress does pass a new LSC Act, the Corporation's regulations will be revisited and revised accordingly.

The Corporation is extending the customary 30-day comment period to 60 days.

#### Section Analysis

##### *Authority*

This section has been revised to include a reference to Sec. 1006(b)(3) of the LSC Act, 42 U.S.C. 2996e(b)(3). This provision states that the Corporation shall not interfere with any attorney in carrying out the attorney's professional responsibilities to a client or abrogate the authority of a State or other jurisdiction to enforce the standards of professional responsibility applicable to attorneys in that jurisdiction.

##### *Section 1611.1 Purpose*

The purpose section was revised to clarify that it is intended to deal with financial and other factors that may be used to determine eligibility for LSC-funded legal services. In addition, the Committee removed the language in the current regulation that gives preference to those least able to obtain legal assistance. Although the original LSC Act contained language indicating some priority for those who were poorest, that language was deleted when the Act was reauthorized in 1977. There is nothing in the current Act that requires a program to give preference to those "least able to obtain legal assistance" and the Committee felt that it should not be a part of the statement of purpose for the regulation.

##### *Section 1611.2 Definitions*

##### Section 1611.2(a) "Applicable Rules of Professional Responsibility"

This new definition was added to make it clear that the references in the regulation are intended to refer to the rules of ethics and professional responsibility applicable to attorneys in the jurisdiction where the recipient either provides legal services or maintains its records. If more than one jurisdiction is involved and there is a difference in the rules of disclosure between the jurisdictions, the Committee wished the Commentary to make clear that, in the Corporation's view, the rule that was more protective

of client confidentiality should govern the disclosure of information to the Corporation. It recognized, however, that the applicable law governing conflict of laws may differ from that view and would control. The Corporation seeks comments regarding any conflict of laws issues that might arise. The new definition is consistent with section 1006(b)(3) of the Act that states that LSC cannot abrogate the authority of the pertinent jurisdiction to enforce the applicable rules.

##### Section 1611.2(b) "Assets"

This new definition was intended to give programs some guidance as to what needs to be included in a program's consideration of an applicant's assets, but leaves substantial discretion to the recipient to come up with a description of assets that meets local concerns and conditions. This is a minimal definition that includes only liquid resources, but local programs may include non-liquid assets, as are included under the current requirement, if they decide that inclusion is appropriate. LSC added the regulatory requirement for consideration of non-liquid assets when it revised part 1611 in 1983, but the LSC Act, section 1007(a)(2)(B)(i), only requires that recipients take into account liquid assets.

The proposed definition requires inclusion of only those liquid assets or other resources that are "readily convertible to cash, which are currently and actually available to the applicant and which could be used to hire private counsel." Thus, assets that are in the applicant's name, but are being held in trust until the applicant reaches a certain age or status need not be considered. Similarly, assets that are controlled by a guardian or conservator need not be considered, although income from the trust that is distributed by the guardian or conservator to the applicant should be included in total cash receipts. A recipient could make a case-by-case determination of whether resources that could be sold, pawned or mortgaged should be considered to be resources that are "readily convertible to cash" or whether an individual should be required to borrow against a pension or other asset.

##### Section 1611.2(c) "Governmental program for low-income individuals or families"

The Committee changed the term that is used in the regulation from "governmental program for the poor" although the definition remains unchanged.

##### Section 1611.2(d) "Income"

The Committee revised this definition to include total cash receipts of a "household" as an alternative to "family unit," and to permit programs to choose to use whichever term is more appropriate for the individual or local circumstances. Income is reviewed on an annual basis, rather than at a particular point in time because the Federal Poverty Guidelines, upon which the maximum income levels are based, are stated in terms of annual income. Thus, if an applicant for services currently has a low-wage job, but was unemployed with no other income for several months, income should be adjusted to take account of overall income over the prior year. Similarly, if an applicant's income is sporadic, as with temporary or day workers, income should be estimated on an annual basis, rather than on income for the current week or month. The Committee requests comments from the public on any additional guidance that may be needed by field programs in applying this definition.

##### Section 1611.2(e) "Total Cash Receipts"

The Committee revised this definition by removing much of the detailed information contained in the current definition and adding general language that describes the kind of resources that should be considered as part of income. The Committee felt that by including the detail in the regulation itself, the language could be viewed as a rigid framework for compliance that did not permit consideration of other possible income sources or the particular circumstances of the individual applicant. The new definition makes it clear that "total cash receipts" means money received by and currently available to an applicant for services. Thus, it would not include food or rent in lieu of wages, rent subsidies, food stamps, health insurance premiums paid by an employer, Medicaid payments to a health care provider, or other non-cash benefits or payments made to a third party on behalf of the applicant, over which the applicant has no control. The revised language refers to "net income from self-employment" rather than specifying the deductions. Finally, the revised language refers to "other regular or recurring sources of financial support that are actually available to the applicant." These would include such things as social security, public or private pension payments; regular insurance or annuity payments; unemployment or worker's compensation payments; strike benefits

from union funds; veterans benefits; alimony, child support, military family allotments or other regular support from an absent family member or some other third party not living in the household; or income from dividends, interest, rents, royalties, estates or trusts that are available to or used for the benefit of the applicant for service.

Total cash receipts would not include the income of an absent, non-contributing spouse, nor would it include such one-time items as money withdrawn from a bank, tax refunds, gifts, insurance payments or cash settlements for injuries sustained unless paid out over time on a regular basis. These one-time items, however, should be considered by the recipients when reviewing an applicant's assets before determining eligibility. The question of how to treat income taxes that are withheld from salary or paid periodically is dealt with in a later section. The current regulation includes "training stipends" as part of "income." A recipient should be able to decide whether a particular training stipend, fellowship, scholarship or similar payment constitutes income to the applicant. That determination may depend on whether the payment is paid to the applicant or directly to an educational or training institution; whether the payment is intended to cover tuition or living expenses; and other similar considerations. Finally, a recipient should be able to determine whether money is actually and currently available to the applicant. For example, money paid in trust to an applicant, but not available until the applicant reaches a particular age or status, may not be income.

### Section 1611.3 Eligibility Policies or Guidelines

#### Section 1611.3(a)

This subsection is based on language that appears in § 1611.5(a) of the current part 1611, but it is substantially revised and relocated. The provision does not simply refer to the annual income ceiling, which is dealt with in the next section. Rather, it refers to the overall set of policies or guidelines that a recipient follows to establish eligibility for LSC-funded services, including both financial and non-financial considerations. While the Committee agreed that a recipient ought to review its annual income ceilings annually in light of revisions to appendix A, the Committee felt that the eligibility guidelines themselves needed to be reviewed less frequently. An annual review requirement, such as that under the current regulation, often encourages

a mere *pro forma* review. The Committee felt that a less frequent review would encourage more thoughtful analysis.

#### Section 1611.3(b)

This subsection is based on § 1611.5(b)(2)(D) of the current regulation, but the provision has been moved up in the proposal to guide the recipient through the process of determining financial eligibility in a more logical manner. It makes it clear that under the LSC Act recipients must consider an applicant's assets before determining that the applicant is financially eligible.

#### Section 1611.3(c)

This subsection is based on the remaining factors listed in § 1611.5(b) of the current regulation. It discusses those additional factors that a recipient may consider before determining that an applicant who might be financially eligible on the basis of income alone should be served. While these are factors that the recipient would generally use to disqualify an otherwise financially eligible applicant, the Committee recognized that they might also be weighed against one another to permit a recipient to determine that a particular applicant should be served. For example, a recipient might interview an applicant for services whose current income is below the recipient's income ceiling, but who anticipates a significant increase in income because he or she has been promised a job that is scheduled to start in several weeks. Looking only at income and income prospects, the recipient might determine not to provide service to that applicant. If, however, the applicant is seeking emergency legal assistance to prevent the loss of the family's home, the recipient could weigh the severity of the consequences for the individual if legal assistance is denied and decide that, on balance, it should undertake the representation. However, if, during the course of the representation, the promised job materializes, the recipient would have to determine whether the change in circumstances requires that assistance be discontinued, pursuant to § 1611.10.

The Committee added language regarding the recipient's priorities, as well as other case acceptance criteria to make it clear that financial eligibility based on income and assets does not create an entitlement to legal services. Financial eligibility is only one piece in the puzzle that determines whether a recipient will actually represent any particular applicant for service. A

recipient should look to its own priorities as well as any other case acceptance criteria that it has adopted to manage its caseload, including conflicts considerations and factors used in determining whether a case has sufficient merit to justify expenditure of scarce resources.

### Section 1611.4 Annual Income Ceilings

The Committee changed the name of this section, which is found in § 1611.3 in the current regulation, from "maximum income level" to "annual income ceilings." The term "maximum" is used twice in this section of the current regulation with respect to two different sets of numbers and is confusing and misleading. Under the current rule, LSC is required to set a "maximum" income level, currently 125% of the Federal Poverty Income Guidelines, but recipients can set their own ceilings (or maximum) on income at any level at or below the LSC "maximum." In addition, the current regulation permits recipients to make exceptions to the "maximum" income level to take account of factors that limit an applicant's ability to afford legal services, so the recipient's income level may not really represent a maximum. The Committee felt that the use of the term "annual income ceilings" was more appropriate to describe how the section was to be applied, and it is consistent with the term "asset ceilings" that is used later in the regulation.

#### Section 1611.4(a)

The Committee added language to emphasize that the recipient's annual income ceiling is applicable only to legal assistance supported by LSC funds. Other funders may set their own income eligibility levels, and many have done so or have based eligibility for services on some other basis, such as age or status. Some funders have chosen to adopt LSC financial eligibility guidelines to determine eligibility for services supported with their funds. This additional language does not represent any substantive change from current law, but does emphasize what was not always clear under the current regulation, i.e., that other funders are not bound by LSC eligibility guidelines and recipients may use whatever eligibility standards the non-LSC funder prescribes.

The Committee also added language to make it clear that both income and assets are to be used to determine financial eligibility, but that financial eligibility does not entitle a particular applicant to receive legal services, since a recipient may also consider other

factors in making a determination of whether or not to provide services.

#### Section 1611.4(b)

The language of this section was revised to clarify its meaning, but no substantive changes are intended. The Committee felt that while the recipient's annual income ceiling did need to be reviewed annually to insure that the program had considered the current figures in appendix A, programs should not be required to raise their income levels consistent with the changes in Appendix A.

The Committee discussed whether it should consider raising the LSC maximum for income ceilings from the current 125% of the Federal Poverty Guidelines to take account of the reality that those guidelines have not kept up with the cost of living nationally and that people need substantially more than 125% of those guidelines to live above poverty. At the same time, the Committee acknowledged that limited resources prevent recipients from serving most of the applicants for service who are eligible at 125% of the official poverty level. They also discussed whether they should revisit the issue of including some differential to take account of urban and rural differences in the cost of living. Section 1007(a)(2)(A) of the LSC Act requires LSC to take account of family size, rural and urban differences as well as substantial cost-of-living variations. At present there are different levels depending on family size, and there are higher income levels to take account of the acknowledged higher cost of living in Alaska and Hawaii, but there is no differential for urban versus rural poverty. The Committee decided that it would recommend no change for purposes of revising part 1611, but recommended that the Board look into the issue and decide whether it wished to make any changes. The Committee welcomes comments on these issues.

#### Section 1611.4(c)

This section was revised to reflect the fact that the "cost of living" factor is the only factor listed in this provision that is specifically required by the Act to be considered by recipients in setting the annual income ceiling. Other factors that are relevant to a particular recipient must also be considered but it will be up to the recipient to determine which other factors are relevant to its service area.

#### Section 1611.4(d)

This subsection is based on § 1611.3(d) of the current rule. Additional language was added to

emphasize that the recipient's annual income ceiling is applicable only to legal assistance supported by LSC funds. Legal assistance supported in whole by non-LSC funds may be provided to applicants for service who do not meet LSC income guidelines. Other funders may set their own income eligibility levels. Nevertheless, to the extent that LSC funds are used to support the legal assistance, only financially eligible clients may be served.

The Committee wanted the Commentary to make clear that this section does not prevent a recipient from using LSC funds to support its intake system, even though some applicants for service will clearly be ineligible. Performing intake to determine eligibility is not the same as providing legal assistance. Nor does the section prohibit recipients from providing some limited service to applicants who are financially ineligible. For example, if after completing intake, a recipient finds an applicant to be ineligible, the recipient may provide the applicant with referrals to other sources of legal or other assistance that could be helpful, may provide pamphlets or other written materials that are available to assist the applicant, or may provide some simple, basic advice that would enable the applicant to handle his or her own problem without legal assistance.

#### *Deletion of Current § 1611.5 Determination of Eligibility*

The provisions of this section have been incorporated into other sections of the proposal to simplify the regulation and give it a more logical and easy-to-follow structure.

#### *Section 1611.5 Authorized Exceptions to the Recipient's Annual Income Ceilings*

This section includes subsections from §§ 1611.4 and 1611.5 of the current regulation, but they have been reordered and revised. These factors, which may be considered here, should be viewed as limitations on an applicant's use of his/her income that would permit a recipient to deem the applicant as falling below the income ceiling.

#### Section 1611.5(a)

The changes were designed principally to simplify the language of the regulation, although the revisions contained in the introductory language to the section do provide recipients with slightly more flexibility in deciding which applicants for service whose unadjusted income exceeds 125% of the official poverty line nevertheless may be

deemed to be financially eligible. The current regulation permits consideration of applicants for service whose unadjusted income is below 150% of the national LSC eligibility level, or 187.5% of the official poverty line. This proposal simplifies the calculation and raises the outside limit for unadjusted income to 200% of the official poverty line. The introduction also makes it clear that the applicant must still meet the asset limit test in § 1611.3(b) and that the recipient should still consider the factors in § 1611.3(c) before deciding whether to serve any particular person.

#### Section 1611.5(a)(1)

The language of this subsection was revised to make it clear that recipients could serve persons up to 200% of poverty if the person was seeking to maintain benefits as well as to secure them in the first instance.

#### Section 1611.5(a)(2)

This new subsection was added to permit recipients to serve persons with incomes up to 200% of poverty to secure or maintain disability benefits, but only if without those benefits the person would be otherwise eligible. The Committee felt that for many disabled persons, disability benefit programs provided only subsistence support and those individuals should be treated in the same way as those seeking to secure or maintain benefits available on the basis of financial need. The Committee also recognized, however, that many disabled individuals who are eligible for disability benefits may not be particularly economically disadvantaged, and should not be eligible for legal assistance simply by virtue of their eligibility for those benefits.

#### Section 1611.5(a)(3)

This subsection lists those factors that a recipient should consider in making a determination that a particular applicant for service whose income is between 125% and 200% of poverty should be deemed eligible for LSC-funded services. The factors are, with several changes discussed below, the same as those factors that appear in § 1611.5 (b) of the current regulation.

Paragraph (B) has been revised to make it clear that if a person's medical expenses are reimbursed, through insurance or a government program such as Medicare or Medicaid, those reimbursed expenses cannot be deducted in determining eligibility; if, however, if a person has paid bills and is awaiting future reimbursement, those expenses could be deducted. In that case, when the actual reimbursement is

received, there would be an increase in assets and a potential change in circumstances, see § 1611.10. In addition, the language has been changed so that it is clear that a person whose income is devoted primarily to payment of medical expenses may be considered eligible for LSC services without regard to income, but only if the applicant's income does not exceed the recipient's annual income ceiling after unreimbursed expenses are deducted.

Paragraph (C) has been revised in several respects. First, the proposal removes the discrimination against the working poor that is inherent in the existing rule, which does not exclude current taxes from the calculation of available income. Second, since alimony and/or child support payments made to a current or former spouse or custodial parent are included in the current definition of income for those who receive them, the Committee agreed that they should also be deducted from income for those who pay them. Another issue that has arisen from time to time is the treatment of rent versus mortgage payments under this provision. In general, rent for housing has not been included as a fixed obligation under this section, but several General Counsel's opinions have treated mortgage payments as fixed debts, creating a discrimination against renters in favor of homeowners. In order not to discriminate against renters, both rent and mortgage payments should be treated the same way. The Committee seeks comments on whether both rent and mortgage payments should be permitted as factors. The Committee also seeks comments on any other types of fixed debts or obligations that should be specifically included in the language of the rule or in the Commentary.

Paragraph (D) has been revised to provide explicitly that educational or job training expenses necessary to prepare a person for work should be treated the same as expenses related to actual employment.

Paragraph (E) has been revised to make it clear that not all expenses that can reasonably be attributable to age or disability are deductible, but only those that are unusual. Programs can make that determination on a case-by-case basis.

Paragraph (F) has been revised to make it clear that the recipient has discretion to consider other factors to deem a particular applicant eligible for services, even though the applicant is over the program's annual income ceiling, but below 200% of poverty.

#### Section 1611.5(b)

The Committee proposes to revise the provision in the current regulation that requires recipients to maintain specific documentation relating to decisions to provide representation to individuals whose income is between 125% and 187.5% of poverty. The Committee believes that requiring the recipient to keep this information in the client's file, as is the case under the current regulation, could interfere with LSC's ability to have access to the information that it needs without going into the client case files and possibly compromising confidentiality. Thus, the record that the recipient keeps to meet the requirement of this section for purposes of informing LSC about the exceptions should be maintained separate from any client case files. The Committee also believes that the current provision does not contain sufficient protection to insure that LSC would not have access to any client information that should be protected under applicable rules of professional responsibility, and has incorporated a reference to § 1611.8(d) that delineates the parameters of LSC's access to such information. The Committee noted that, under the proposed regulation, the applicable rules were those of the jurisdiction where the records were kept or where the services were provided, whichever were more protective of the client's privacy. However, the Corporation seeks comments on any conflict of laws questions that would be raised by the proposed provision.

#### *Section 1611.6 Asset Ceilings*

##### Section 1611.6(a)

The requirement for annual establishment of asset ceilings and transmittal to LSC has been deleted in keeping with the Committee's effort to eliminate unnecessary reporting requirements. Compliance with the asset ceiling guideline requirement can be assured through periodic monitoring, self-assessments, or other compliance processes. The proposed revised subsection requires that recipients review their asset ceilings as part of the overall review of eligibility policies or guidelines that must be done at least once every three years under § 1611.3(a) of this proposed regulation. In addition, language has been added to make it clear that asset guidelines must be considered in determining eligibility for service, whether the applicant's income is below 125% of poverty or below 200% of poverty. Finally, the Committee deleted the language that required recipients to consider non-liquid assets. The LSC Act, section

1007(a)(2)(B)(i), only requires that LSC guidelines ensure that recipients take into account liquid assets; it does not mention non-liquid assets. When part 1611 was amended in 1983, LSC added the requirement for consideration of non-liquid assets. When read with the definition of assets contained in § 1611.2, this proposal goes back to the original treatment of assets in the first regulation and in the LSC Act.

##### Section 1611.6(b)

The Committee deleted the specific items that the current regulation requires be considered in establishing asset guidelines and those that the current regulation permits to be exempted from the asset guidelines. The Committee felt that this level of detail was not required by the Act and was inappropriate to include in the regulation, and that recipients should be able to establish asset guidelines based on their determination of local conditions, with flexibility to consider the circumstances of a particular applicant for service as well as local economic conditions and other local concerns. In addition, the Committee felt that it was appropriate to explicitly permit recipients to look to other existing federal or state asset exemption schemes for guidance in setting their own guidelines.

##### Section 1611.6(c)

The language of this subsection has been revised to correct a reference in the current regulation to "minimum", rather than "maximum" asset ceilings. In addition, the subsection was revised to make it clear that the director of a recipient could designate another staff member to make the determination to waive the asset ceilings in unusual situations, and to remove the requirement that documentation for such waivers be maintained in the individual client's file. This was done to protect materials in the case file from inadvertent and improper disclosure to LSC.

##### Section 1611.6(d)

This documentation provision has been revised to refer to § 1611.8(d) to describe the general limitations on LSC's access to records and information.

#### *Section 1611.7 Group Eligibility*

This proposed section deals with the issue of group eligibility that is addressed in § 1611.5(b)(2)(C) of the current regulation. The Committee decided to treat this issue in a separate section to make it clear that different criteria apply to the consideration of whether or not a group is eligible for

LSC-funded legal assistance. This proposal incorporates a number of revisions to the current language. This new language is based on the original group representation provision that was in effect from 1976 until 1983. While the new proposal is based on the 1976 provision, there are several changes. In order to clarify the provision, the order was changed and some of the language was revised.

#### Section 1611.7(a)

The Committee added a reference to "financial" eligibility of group members in paragraph (1) To make it clear that group members had only to be financially eligible for services, not that they would actually receive services for a particular matter. Paragraph (2) which includes the "primary purpose" provision, was revised to make it clear that a group could be served as long as its main function or activity is the furtherance of the interests that benefit people in the community who would be eligible for legal assistance under the Act, and the representation relates to such a function or activity.

#### Section 1611.7(b)

This new provision was added to emphasize that recipients may use non-LSC funds to provide legal assistance to groups that do not meet the criteria of this section.

The Committee discussed whether the group representation provisions were sufficient to take account of the uniqueness of Indian tribes and raised the issue of whether the regulation should include special treatment for tribes under this section. While the Committee did not propose adding any specific language to the proposal, it would welcome comments from members of the Native American community and others on the degree to which the proposed language meets the concerns of that community.

#### *Section 1611.8 Manner of Determining Financial Eligibility.*

##### Section 1611.8(a)

Many of the revisions in this section are intended to simply clarify the language. The principal changes relate to the role of LSC in reviewing intake forms and financial information provided to recipients by applicants for services. Under the current regulation, the Corporation has authority to approve both the forms and procedures that a recipient uses to determine eligibility. That authority is no longer contained in this proposal. In addition, the proposed § 1611.8(a) refers to

§ 1611.8(d) regarding LSC's access to client information.

##### Section 1611.8(b)

The revisions to this provision are intended to clarify the language of the provision, but no substantive changes are intended.

##### Section 1611.8(c)

This new provision was added to make it clear that national and state support centers can provide assistance to local field programs or co-counsel with them in cases without making independent eligibility determinations for clients referred by field programs. The support center should, of course, be able to satisfy itself that such a determination was actually made by the field program. The Committee wished to make clear that a support center was free to review a client's eligibility before undertaking representation, if it so chose, but it was not required to do so if satisfied by the actions taken by the original recipient.

##### Section 1611.8(d)

This subsection has been substantially revised in the proposed new regulation. The Committee believes that the provisions on access to client eligibility information contained in the current regulation may have been applied in a manner that was inconsistent with the applicable rules of professional responsibility and section 1006(b)(3) of the LSC Act that prohibits LSC from abrogating the authority of states and local jurisdictions to enforce those rules. The ABA's Standing Committee on Legal Aid and Indigent Defendants ("SCLAID") expressed great concern about the protection of client confidences, secrets, and other information gained in the course of representation. SCLAID urged the Committee to adopt rules that would permit LSC to have access to information only in a manner consistent with the applicable rules of professional responsibility. The Committee proposal makes it clear that information disclosed by a client or applicant for service in order to establish eligibility for services should not be disclosed to LSC or to any third party without the express written permission of the client or applicant, unless disclosure is permitted by and would not violate the attorney-client privilege and the applicable rules of professional responsibility. The Committee recognized that such a provision might mean that LSC could be subject to somewhat different rules in each jurisdiction, but agreed that Congress, in enacting section 1006(b)(3) of the Act,

clearly intended that the state or local rules would govern. The Committee noted that LSC would have to discharge its responsibilities for ensuring that LSC funds were used to serve only financially eligible clients and in a manner consistent with the disclosure requirements of each jurisdiction. LSC is working to develop general procedures to permit it to fulfill its obligations in this regard. The Committee welcomes comments that would assist the Corporation in designing such procedures.

Finally, the Committee proposal noted that recipients may reveal to third parties information provided by a client or applicant to establish eligibility when the disclosure of the information is implicitly authorized in order to carry out the representation, as permitted by Rule 1.6(a) of the ABA's Model Rules of Professional Conduct, subject to any variations in the rules adopted by various states or local jurisdiction. There are many situations where the client either wants such disclosures made or where it can be assumed that the client wants disclosure made in order to advance the task the lawyer has been asked to carry out on behalf of the client. Examples include sharing financial information about a client with the court or counsel for the opposing party in a divorce action where necessary to establish appropriate alimony or child support payments or with an administrative agency that has cut off welfare benefits based on the alleged existence of other income. Clearly, by seeking representation in these cases, a client has implicitly authorized the limited sharing of information needed for full representation, but has not authorized the disclosure of that information for other purposes not directly related to the case or matter.

The Committee discussed the possible need for LSC to develop a records retention policy to ensure that recipients maintained records relating to eligibility for a sufficient period to guarantee accountability. The Committee did not recommend any particular policy, but would like to receive comments on whether such a policy would be desirable and what should be included in such a policy.

#### *Section 1611.9 Retainer Agreement*

##### Section 1611.9(a)

While keeping the requirement for recipients to execute written retainer agreements with all clients who are represented by the recipient, the Committee decided to delete the requirement that LSC approve or reject

the particular form of a recipient's agreement. The language makes it clear that retainers are needed only when the recipient actually undertakes representation. Some forms of legal assistance, such as *pro se* clinics or community legal education, do not require the recipient to obtain retainer agreements from everyone who attends. The proposal acknowledges that many jurisdictions have their own rules or practices regarding retainer agreements, and that recipients should make sure their retainers are consistent with those rules, as well as with local practice, where applicable. Nothing in the current LSC Act requires retainer agreements, although all of the current LSC reauthorization bills would include such a requirement, and the Committee acknowledged that it is good practice in most instances to have a written retainer.

#### Section 1611.9(b)

The Committee decided to remove the language relating to emergencies, in recognition of the fact that there may be numerous circumstances when a recipient could not immediately execute a retainer before taking action on behalf of a client. The Committee also decided to delete the specific information that needed to be included in a retainer agreement, recognizing that such requirements could be inconsistent with requirements governing retainer agreements in state rules of professional responsibility.

#### Section 1611.9(c)

This provision was revised in response to a concern that, if the retainer was required to be included in the client's file and was subject to examination by LSC during monitoring, it might give LSC an opportunity to review the whole file, which could violate the restrictions on LSC access to client information, even though the current rule suggests that client identity is protected. As with eligibility information, this section requires that disclosure of information be consistent with the attorney-client privilege and the applicable rules of professional responsibility. The Committee recognized that in most instances, the recipient could simply redact the names and other identifying information from the retainer agreement to meet the standard set out in this section. However, there might be instances where a particular retainer agreement includes more information about the actual representation than would a financial intake sheet. The retainer agreement, for example, might reveal so much information about the client or

case that it would be impossible to protect client identity by redacting only client identifying information such as name and address. In such a case, all additional information that could indirectly reveal client identity would have to be redacted as well.

In cases where the identity of the client is already known, review of a retainer agreement could reveal substantial information that relates to representation. SCLAD reiterated its concern about protection of client information. Clearly, the Corporation would need to devise procedures that would balance its need to ensure that retainer agreements are being properly executed and maintained, while appropriately protecting client information. The Committee welcomes comments on such procedures.

#### Section 1611.9(d)

The Committee adopted additional language in its revision of this provision to expand the explanation of the circumstances under which a retainer agreement was not necessary, such as when the service was of brief duration or very limited in scope. This provision would be particularly important for programs that operate telephone hotlines, where, in many instances, the services consist of limited advice or consultation and the only contact with the client is via telephone. The issue is where to strike the balance between protecting the interests involved and limiting the administrative burdens on recipients. The Committee invites public comment on this issue.

#### Section 1611.9(e)

This provision was added to deal with the situation where a state or national support center has joined a case brought by a local recipient as co-counsel. This provision makes it clear that the client must have notice that another program is assisting in the representation, and the original retainer agreement must be broad enough in scope to encompass the new services that are being provided. The Committee wanted to distinguish the co-counseling situation from the case where a local field program turned the representation over to a support center or other recipient, with the original recipient no longer serving as counsel in the case. The Committee felt that a new retainer agreement should be required in that situation, but invites comments on the issue. Nothing in this provision would prevent a support center from executing a new retainer agreement with a client, even when the relationship is clearly one where the support center is only a co-counsel in the case, and there may be situations

where it would be necessary or prudent for it to do so.

The Committee also wished the Commentary to make clear that this provision was not applicable to situations where a recipient does intake and financial eligibility screening for an applicant for service and then refers the applicant to another attorney who has agreed to represent the applicant on a pro bono basis, either through the recipient's PAI program or on some other basis. In that instance, the private attorney, not the recipient, is representing the client, and any retainer agreement should be made between the client and the private attorney, subject to any appropriate standards governing pro bono practice. The Committee invites additional comments on this or other situations that may arise where other attorneys are involved in the representation of eligible clients.

#### *Section 1611.10 Change in Circumstances*

The Committee proposes two revisions to the current language. The first changes the phrase "is sufficiently likely to continue" to "is sufficient and is likely to continue," in order to clarify what is meant by the phrase. The second revision expands the language regarding professional responsibilities. The recipient may have obligations to the client beyond those of the individual attorney and ethical concerns might be broader than professional responsibilities. In addition, the Committee invites comments from the public as to whether this provision is adequate to deal with the issue of when a change in a client's circumstances would require discontinuation of representation by the recipient and what procedures a recipient should follow to effect such discontinuation.

#### List of Subjects in 45 CFR Part 1611

Legal services.

For reasons set forth in the preamble, LSC proposes to revise 45 CFR part 1611 to read as follows:

#### **PART 1611—ELIGIBILITY**

Sec.

- 1611.1 Purpose.
- 1611.2 Definitions.
- 1611.3 Eligibility policies or guidelines.
- 1611.4 Annual income ceilings.
- 1611.5 Authorized exceptions to the recipient's annual income ceiling.
- 1611.6 Asset ceilings.
- 1611.7 Group eligibility.
- 1611.8 Manner of determining financial eligibility.
- 1611.9 Retainer agreement.
- 1611.10 Change in circumstances.

## Appendix A—Legal Services Corporation Poverty Guideline

Note: Appendix A: The Corporation is not requesting comments on the current Appendix. The Appendix is revised annually, after the Corporation receives the new Federal Poverty Guidelines. Accordingly, the Appendix will be revised for 1995 at a later date.

Authority: 42 U.S.C. 2996e(b)(1), 2996e(b)(3), 2996f(a)(1), 2996f(a)(2).

### § 1611.1 Purpose.

This part is designed to ensure that a recipient will determine eligibility for legal assistance according to financial and other criteria that take account of factors that influence an individual's or group's ability to obtain legal assistance, and to afford sufficient latitude for a recipient to consider local circumstances and its own resource limitations. This part also seeks to insure that eligibility is determined in a manner conducive to development of an effective attorney-client relationship.

### § 1611.2 Definitions.

(a) *Applicable rules of professional responsibility* means the rules of ethics and professional responsibility generally applicable to attorneys in the jurisdiction where the recipient either provides legal services or maintains its files.

(b) *Assets* means, at a minimum, cash or other liquid assets or resources that are readily convertible to cash, which are currently and actually available to the applicant and which could be used to retain private counsel.

(c) *Governmental program for low income individuals or families* means any Federal, State or local program that provides benefits of any kind to persons whose eligibility is determined on the basis of financial need.

(d) *Income* means actual current annual total cash receipts before taxes of all persons who are resident members of, and contribute to the support of a household or family unit.

(e) *Total cash receipts* include, but are not limited to, money, wages and salaries before any deduction; net income from self-employment; regular cash payments from public assistance and other benefit programs; and other regular or recurring sources of financial support that are currently and actually available to the applicant for service.

### § 1611.3 Eligibility policies or guidelines.

(a) The governing body of a recipient shall adopt eligibility policies or guidelines, consistent with this part, for determining the eligibility of persons and groups seeking legal assistance under the Act. The governing body shall

review its eligibility policies or guidelines at least once every three years and make adjustments if necessary.

(b) In addition to consideration of income under §§ 1611.4 and 1611.5, the recipient's eligibility policies or guidelines shall provide that, before undertaking representation or providing services to an applicant, the recipient shall consider the existence of assets available to the applicant, and shall disqualify any applicant for service whose assets are in excess of the asset ceiling set by the recipient pursuant to § 1611.6, unless a waiver is granted pursuant to § 1611.6(c).

(c) The recipient's eligibility policies or guidelines may also provide for consideration of the following factors which may be used by the recipient to determine whether or not to provide services to a particular financially eligible applicant for service:

(1) The applicant's current income prospects, taking into account seasonal variations in income;

(2) The availability of private or other legal representation at low or no cost with respect to the particular matter in which assistance is sought;

(3) The consequences for the individual or group if legal assistance is denied;

(4) Other significant factors that affect an individual's financial inability to afford legal assistance, which may include evidence of a prior administrative or judicial determination that a person's present lack of income results from refusal or unwillingness, without good cause, to seek or accept suitable employment; and

(5) Any other case acceptance criteria, in addition to the recipient's priorities established under Part 1620 of these regulations, that the recipient may utilize to determine which cases to accept from among cases of financially eligible persons or groups. Such criteria shall include, but are not limited to, consideration of the merits of the applicant's claim and any conflicts of interest that may exist.

### § 1611.4 Annual income ceilings.

(a) Every recipient shall establish an annual income ceiling. Unless disqualified on the basis of assets under § 1611.3(b), applicants for services whose income falls below the recipient's annual income ceiling will be considered financially eligible to receive legal assistance supported with funds provided under the Act, subject to the recipient's consideration of the factors described in § 1611.3(c).

(b) Unless specifically authorized by the Corporation, a recipient shall not

establish an annual income ceiling that exceeds a maximum of one hundred and twenty-five percent (125%) of the current official Federal Poverty Guidelines. The calculations of 125% of the current Federal Poverty Guidelines are set forth in Appendix A to this part as revised annually. The recipient's governing body shall review the recipient's annual income ceiling annually and consider any changes made in Appendix A to this part.

(c) Before establishing its annual income ceiling, a recipient shall consider cost of living in the service area. The recipient shall also consider other factors that it determines are relevant. These factors may include, but are not limited to:

(1) The number of clients who can be served by the resources of the recipient;

(2) The population who would be eligible at and below alternative income ceilings; and

(3) The availability and cost of legal services provided by the private bar in the area.

(d) Unless authorized by § 1611.5, no person whose income exceeds the annual income ceiling established by a recipient shall be eligible for legal assistance supported with funds provided under the Act, but this part does not prohibit a recipient from providing legal assistance to an applicant for service whose annual income exceeds the annual income ceiling established by the recipient, if the legal assistance provided to the person is supported in whole by funds from a source other than the Corporation.

### § 1611.5 Authorized exceptions to the recipient's annual income ceiling.

(a) Subject to the recipient's consideration of the factors described in § 1611.3(c), an applicant for service whose income exceeds the annual income ceiling established by a recipient, but does not exceed 200% of the Federal Poverty Guidelines, may be provided legal assistance supported by funds provided under the Act if the applicant would not be disqualified on the basis of assets under § 1611.3(b), above; and

(1) The applicant is seeking legal assistance to secure or maintain benefits provided by a governmental program for low income individuals or families;

(2) The applicant is seeking legal assistance to secure or maintain benefits provided by a governmental program for the disabled, but only if without those benefits the applicant's income would not exceed the recipient's annual income ceiling; or



(3) The recipient determines that the applicant should be deemed to be eligible for services on the basis of one or more of the following factors that restrict the applicant's financial ability to afford private legal assistance:

(i) The applicant's current income prospects, taking into account seasonal variations in income;

(ii) Unreimbursed medical or nursing home expenses, but if an applicant's income is primarily committed to medical or nursing home expenses, the applicant may be served if his or her income is over 200 percent of the Federal Poverty Income Guidelines but does not exceed the recipient's annual income ceiling after such expenses are deducted;

(iii) Fixed debts and obligations, including but not limited to, current Federal, state or local taxes withheld from salary or paid periodically, unpaid Federal, state or local taxes from prior years, child support or alimony payments made to a current or former spouse, custodial parent, guardian or other custodian of a dependent minor child;

(iv) Child care, transportation, and other expenses necessary for employment, job training or educational activities in preparation for employment;

(v) Unusual expenses associated with age or disability of a resident family member; or

(vi) Other significant factors that the recipient finds are related to the applicant's financial ability to afford private legal assistance.

(b) In the event that a recipient determines that it will provide legal assistance pursuant to § 1611.5(a), the recipient shall document the specific factor(s) relied on to make the determination. The recipient shall keep such records as are necessary to inform the Corporation as to the number of such cases and the specific factors relied on to make such determinations, consistent with the restrictions on disclosure contained in § 1611.8(d).

#### § 1611.6 Asset ceilings.

(a) The governing body of the recipient shall establish guidelines incorporating reasonable asset ceilings to be utilized in determining eligibility for services under §§ 1611.3(b), 1611.4 and 1611.5. As part of the review required under § 1611.3(a), the recipient shall review its asset ceiling guidelines at least once every three years and adjust them as necessary.

(b) In establishing such guidelines, the recipient may consider asset exemptions which may be available under State or Federal law.

(c) The asset ceiling guidelines may provide authority for the director of the recipient or the director's designee to waive the ceilings on maximum allowable assets in unusual situations.

(d) In the event such a waiver is granted, the recipient shall document the factors considered in granting the waiver. The recipient shall keep such records as are necessary to inform the Corporation as to the number and the specific factors considered in granting such waivers, consistent with the restrictions on disclosure contained in § 1611.8(d).

#### § 1611.7 Group eligibility.

(a) A recipient may provide legal assistance to a group, corporation, association or other entity if such group or entity provides information showing that it lacks, and has no practical means of obtaining, funds to enable it to obtain private counsel in the matter on which representation is sought, and that it:

(1) Is primarily composed of persons who are financially eligible for legal assistance under the Act and this part; or

(2) Has as its principal function or activity the furtherance of interests that benefit those persons in the community who would be financially eligible for legal assistance under the Act and this part, and the representation sought relates to such a function or activity.

(b) This part does not prohibit a recipient from providing legal assistance to a group or entity that does not meet the requirements of this section if the legal assistance is supported in whole by funds from a source other than the Corporation.

#### § 1611.8 Manner of determining eligibility.

(a) A recipient shall adopt simple intake forms and procedures to obtain financial and other information from individuals and groups to determine eligibility in a manner that promotes the development of trust between attorney and client. The forms shall be preserved by the recipient and information contained in the forms may be disclosed only in a manner that is consistent with § 1611.8(d).

(b) If there is substantial reason to doubt the accuracy of the financial or other eligibility information provided by an individual or group client or applicant for service, a recipient shall make appropriate inquiry to verify the information, in a manner consistent with the attorney-client relationship.

(c) When one recipient has determined that a client is eligible for service in a particular case or matter, that recipient may request another recipient to extend legal assistance or

undertake representation on behalf of that client in the same case or matter in reliance upon the initial eligibility determination. The subsequent recipient is not required to review or redetermine the client's eligibility unless there is a change of circumstances as described in § 1611.10 or there is substantial reason to doubt the validity of the original determination.

(d) Information furnished to a recipient by a client or an applicant for service to establish eligibility shall not be disclosed to the Corporation or to any third party who is neither employed nor retained by the recipient, nor associated with the recipient as co-counsel in the representation of the client, without the express written consent of the client or applicant except as such disclosure may be permitted without violation of the attorney-client privilege or applicable rules of professional responsibility. Nothing in this paragraph would prohibit an attorney from revealing information provided by a client that is implicitly authorized to be revealed in order to carry out the representation.

#### § 1611.9 Retainer agreement.

(a) A recipient shall execute a written retainer agreement with each individual or group client or named class representative who is represented by the recipient, in a form consistent with the applicable rules of professional responsibility and prevailing practices in the recipient's service area.

(b) The retainer agreement shall be executed when representation commences or as soon thereafter as is practicable.

(c) The recipient shall retain the executed retainer agreement and shall make the agreement available for review by the Corporation in a manner that protects from disclosure any information protected by the attorney-client privilege or the applicable rules of professional responsibility.

(d) A recipient is not required to execute a written retainer agreement when only providing limited advice, consultation, or brief service.

(e) When one recipient has executed a retainer agreement with a client, another recipient acting as co-counsel may extend legal assistance or undertake representation on behalf of that client in the same case or matter at the request of the original recipient without executing a separate retainer agreement, as long as—

(1) The additional legal assistance or representation is within the scope of the original retainer agreement; and

(2) the client has received written notification that another recipient is

providing additional legal assistance or representation in the matter.

**§ 1611.10 Change in circumstances.**

If an eligible client becomes ineligible through a change in circumstances, a recipient shall discontinue representation if the change in circumstances is sufficient, and is likely to continue, to enable the client to afford private legal assistance, and discontinuation is not inconsistent with applicable rules of professional responsibilities.

Dated: January 10, 1995.

Victor M. Fortuno,

General Counsel.

[FR Doc. 95-1071 Filed 1-18-95; 8:45 am]

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**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Chapter I**

[MD Docket No. 95-3; FCC 95-14]

**Assessment and Collection of Regulatory Fees For Fiscal Year 1995**

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of proposed rule making.

**SUMMARY:** The Commission is proposing to revise its Schedule of Regulatory Fees in order to recover the amount of regulatory fees that Congress has required it to collect for fiscal year 1995. Section 9 of the Communications Act of 1934, as amended, provides for the annual assessment and collection of regulatory fees. For fiscal year 1995 sections 9(b) (2) and (3) provide for annual "Mandatory Adjustments" and "Permitted Amendments" to the Schedule of Regulatory Fees. The proposed revisions will further the

National Performance Review goals of reinventing Government by requiring beneficiaries of Commission services to pay for such services.

**DATES:** Comments must be filed on or before February 13, 1995 and reply comments must be filed on or before February 28, 1995.

**FOR FURTHER INFORMATION CONTACT:** Peter W. Herrick, Office of Managing Director at (202) 418-0443, or Terry D. Johnson, Office of Managing Director at (202) 418-0445.

**SUPPLEMENTARY INFORMATION:**

In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1995; Notice of Proposed Rulemaking

[MD Docket No. 95-3]

Adopted: January 10, 1995; Released: January 12, 1995

Comment Date: February 13, 1995  
Reply Date: February 28, 1995

By the Commission:

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