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TO: Operations & Regulations Committee

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SUBJECT: Limiting the Applicability of LSC's Subgrant Rule, 45 C.F.R. Part 1627, to Exempt Certain Grants Falling Outside Section 1006(a)(1)(A) of the LSC Act

I. Background

In its report entitled, Audit of Legal Services Corporation's Technology Initiative Grant Program (TIG), dated December 8, 2010, AU-11-01 [hereinafter Audit Report], the OIG found that "LSC did not properly apply its subgrant rule when grantees provided TIG funds to third parties" Audit Report at 41. Many of the payments that the OIG identified as problematic "involved pass through grants[] in which substantially all of the grant funds were paid to a third-party entity that performed most or all of the activities called for in the grant documents." *Id.* at 42. In other instances not characterized as pass-through payments, the OIG observed that payments were made to entities that agreed "to carry out the principal ... activities for which the grant was awarded." *Id.* at 42-43. The OIG found that as written, LSC's subgrant rule, 45 C.F.R. Part 1627, required these payments to be treated as subgrants. The Audit Report expressed concern that "the practice of not requiring and approving written subgrant agreements"

as required by the language of the subgrant rule likely had the effect of “weakening LSC’s control and oversight over its grant money.” *Id.* at 43, 44. Importantly, however, the OIG did not find that LSC’s existing subgrant rule established the only possible or best mechanism for overseeing the payments in question and acknowledged that the existing rule may not be properly calibrated for dealing with TIG grants. Accordingly, among other recommendations, the OIG recommended that

[t]o the extent that the subgrant rule does not adequately account for the unique features of TIG grants, [management] initiate a process to amend LSC regulations to account for these features and provide for workable oversight of TIG funds paid to third parties.

Id. at 44 (Recommendation 29).

In response to the OIG’s recommendation, management prepared a rulemaking options paper for the Board of Directors. Rulemaking Options Paper concerning TIG Third-Party Contracting [hereinafter “ROP”], dated April 4, 2012. That ROP “address[ed] two issues ...: 1) amending the LSC regulation to ‘provide for workable oversight of TIG funds paid to third parties,’ and 2) amending the LSC regulations to account for the ‘unique features of TIG grants.’” ROP at 3 (quoting Recommendation 29 in the OIG’s Audit Report). By separate memorandum, management recommended rulemaking to resolve its disagreement with the OIG. Specifically, management recommended rulemaking to expressly incorporate into Part 1627 its “longstanding” practice of distinguishing between subgrants and ordinary contracts by looking to whether “the services contracted for are legal services.” Memorandum regarding Management Recommendations on Rulemaking Options—TIG Third-Party Contracting, dated April 4, 2012, at 1. Under management’s recommendation, most third-party payments in the TIG program would be overseen through contracting procedures that have been reworked since the OIG’s audit.

Management's ROP and recommendation was considered by both the Operations and Regulations Committee and the full Board of Directors. When taken up by the Board of Directors, the question arose as to whether management's recommendation could be implemented by means of interpretive guidance without formal regulatory action.

The OIG remains convinced that LSC's existing subgrant rule looks to the purpose for which a particular grant was awarded, *i.e.*, the program of the particular grant, in order to distinguish between third-party payments that amount to subgrants and ordinary contracts. As a result, the OIG does not believe that interpretive guidance is an appropriate mechanism for addressing the issue identified in the Audit Report. The OIG does not object to a regulatory change that would allow oversight of most third-party payments in the TIG program through adequate contracting procedures rather than subgrant procedures. The OIG continues to believe, however, that modification of the subgrant rule through regulatory action is required to achieve that goal.

II. Analysis

The OIG recognizes that there may be cogent policy considerations for exempting certain third-party payments made by TIG grantees from treatment as subgrants. It is the OIG's understanding that LSC's past practice was largely guided by these policy considerations. The OIG further recognizes that LSC's primary interest in this matter is to ensure adequate oversight of grant funds paid to third parties and that such oversight does not necessarily entail treatment of these payments as subgrants. Even so, for the reasons discussed below, the OIG is convinced that the existing text of Part 1627 cannot be read as reaching only legal service activities of the sort that characterize basic field grant recipients, *i.e.*, the provision of legal services. Because the OIG does not believe that the text of Part 1627 can support the narrow reading implied in LSC's

past practice, it does not believe that interpretive guidance is an appropriate mechanism for legitimating that practice. Accordingly, to the extent that the text of the existing subgrant rule does not adequately address the policy concerns of the Corporation, the OIG would recommend regulatory action.

A. Categories of LSC Grants

In its definition of terms, LSC's existing subgrant rule draws the line between third-party payments that will be treated as subgrants and third-party payments that will be treated as ordinary contracts. In order to develop a clear picture of how those definitions work, it is helpful to recall the statutory schema of grants that LSC is authorized to make. Section 1006 of the Legal Services Corporation Act of 1974 defines the powers of the Corporation. 45 C.F.R. § 2996e. Section 1006(a) addresses LSC's grant-making activities and authorizes LSC to make three different types of grants:

- (1) Section 1006(a)(1)(A) grants are provided "for the purpose of providing legal assistance to eligible clients" These grants have historically been funded through the "basic field programs" line of LSC's appropriation and have always constituted the vast majority of LSC's grants because their recipients are engaged in exactly the sort of activity LSC was created to support, namely, the provision legal services to eligible clients. Section 1006(a)(1)(A) grants comprise general, Native American, and migrant grants.
- (2) Section 1006(a)(1)(B) authorizes additional grants when "necessary to carry out the purposes and provisions of [the LSC Act]," and that purpose is defined in Section 1006b(a) as "providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42

U.S.C. § 2996b(a). This provision appears to be a catch-all intended to provide LSC with the flexibility to make grants that do not fit squarely into the other grant categories should it discover that such additional grants are necessary to the proper functioning of the legal services program it is charged with administering. The OIG cannot identify specific examples of grants falling into this category but, at a minimum, any such grants must be “necessary” to support the provision of legal services to eligible clients.

- (3) Section 1006(a)(3) grants are provided for activities such as “research ..., ... training and technical assistance, and ... clearinghouse [services],” provided that the funded activities are “relat[ed] to the delivery of legal assistance.” As originally contemplated, these grants were not to exceed 10 percent of LSC’s appropriation in any fiscal year. 42 U.S.C. § 2996i(d). LSC’s appropriation has in the past contained specific lines intended to fund the various activities contemplated in Section 1006(a)(3). With the heightened scrutiny of the legal services community in the mid-1990s, however, the lines traditionally intended to fund these activities were removed from LSC’s appropriation. As technical support grants, TIG grants fit most comfortably into this category of LSC grant, and, in the OIG’s understanding, they are the principal example of Section 1006(a)(3) grants currently being made by LSC on a regular basis.

42 U.S.C. 2996e(a). It is beyond dispute that LSC was established principally for the purpose of making Section 1006(a)(1)(A) grants. The very words by which the LSC Act establishes the corporation indicate as much: “There is established ... a private nonmembership corporation ... for the purpose of providing financial support for legal assistance in noncriminal proceedings or

matters to persons financially unable to afford legal assistance.” 42 U.S.C. § 2996b(i). Accordingly, the term “recipient,” as used in the LSC Act itself, is defined as “any grantee, contractee, or recipient of financial assistance described in clause (A) of Section 2996e(a)(1),” *i.e.*, Section 1006(a)(1)(A) grantees.

B. Subgrants and Programmatic Activity

Part 1627 relies on three defined terms to distinguish between subgrants and ordinary contracts for goods and services, namely, recipient, subrecipient, and subgrant. At bottom, a subgrant is a payment of LSC funds by a recipient to a third party (the subrecipient) that has agreed to conduct activities “related to the recipient’s programmatic activities.” Whether a particular payment amounts to a subgrant, therefore, depends largely on the meaning of the term “programmatic activity,” which is not itself defined in the rule. For reasons discussed in its Rulemaking Options Paper, management reads the term to be coextensive with the provision of legal assistance to eligible clients. ROP at 8. The OIG does not believe that the text of Part 1627 supports such a restricted reading. Instead, the OIG believes that the term “programmatic activity” must be read as referring to the purpose for which the particular grant in question was given or, in other words, the principal activities the grant was made to support. Ultimately, the meaning of “programmatic activity” in Part 1627 is controlled by the interplay of the defined terms that work together to delineate those third-party payments that will be treated as subgrants, the relationship between LSC’s subgrant rule and schema of grants established by the LSC Act, and the examples of programmatic activity provided in the rule itself.

As employed in Part 1627, the term “programmatic” appears to require a broad reading. The current text of LSC’s subgrant rule adopts a unique definition of the term “recipient,” opting not to follow either the statutory definition or the contemporaneously-adopted definition

generally applicable throughout LSC's regulations¹. Compare 42 U.S.C. § 2996a(6) and 45 C.F.R. § 1600.1 with 45 C.F.R. 1627.2(a). Part 1627 defines "recipient" to include not only Section 1006(a)(1)(A) grantees, which "furnish[] legal assistance to eligible clients," but also Section 1006(a)(1)(B) and Section 1006(a)(3) grantees. 45 C.F.R. § 1627.2(a). That is, where the LSC Act and Part 1600 limit the term recipient to Section 1006(a)(1)(A), Part 1627 expands the definition to include all LSC grantees, whether they are engaged in directly providing legal services to eligible clients or not.² The inclusion of Section 1006(a)(3) grantees and contractors in the definition of "recipient" for purposes of Part 1627 would be superfluous and, indeed, difficult to explain, if the term "programmatic activities" were read to include only activities programmatic to Section 1006(a)(1)(A) grantees, namely the provision of legal services.

The interplay of the terms "recipient" and "subrecipient" in Part 1627 dictates a reading of the term "programmatic activity" that is not coterminous with the provision of legal services to eligible clients. Part 1627 defines a "subrecipient" as

any entity that accepts Corporation funds from a recipient under a grant contract, or agreement to conduct certain activities specified by or supported by the recipient related to the recipient's programmatic activities. Such activities would normally include those that might otherwise be expected to be conducted directly by the recipient itself.

This definition does not tie the distinction between a subrecipient and a vendor to programmatic activities viewed in the abstract. Nor does it look to the congressional purpose for establishing

¹ The definition of recipient found in 45 C.F.R. § 1600.1 appears to have been adopted on May 21, 1984, while Part 1627 was adopted on November 1983. 45 C.F.R. § 1600.1 establishes definitions that apply throughout LSC's regulations "unless otherwise indicated."

² This more expansive definition does not appear to be a historical accident resulting from changes in the contours of LSC's grant making activities. In fact, Part 1627 refers to the statutory definition precisely in order to expand upon it: "Recipient as used in this part means any recipient defined in section 1002(6) of the Act and any grantee or contractor receiving funds under section 1006(a)(1)(B) or 1006(a)(3) of the Act." 45 C.F.R. § 1627.2(b)(1) (emphasis in original).

LSC. *See* ROP at 8. Rather, 45 C.F.R. 1627.2(b)(1) directs the focus of the subrecipient analysis toward “*the recipient’s* programmatic activities” (emphasis added). When Part 1627 refers to the programmatic activities of the recipient at issue, it is referring to the grant programs of Section 1006(a)(1)(B) and 1006(a)(3) grantees, as well as Section 1006(a)(1)(A) grantees. It looks to the activities and program of the recipient at issue, whether that recipient is a Section 1006(a)(1)(A) grantee or, as in the case of TIG grantees, a Section 1006(a)(3) grantee.

Part 1627 clearly contemplates the possibility that some recipients may not receive any LSC funds for purposes of providing legal service to eligible clients at all.³ Such recipients might, for example, provide training or technical assistance. 42 U.S.C. § 2996e(a)(3)(B). Regardless, the rule refers to the programmatic activities of each grant recipient as the main criteria for distinguishing subgrant payments from payment for goods and ordinary business services. Certainly there must be some programmatic activities engaged in by recipients of grants that fall outside of Section 1006(a)(1)(A) and do not call for the provision of legal services to eligible clients. If there were not, there would be little need for the rule to expressly include these Section 1006(a)(3) recipients in its expanded definition of the term recipient. Likewise, if Part 1627 presumed that all Section 1006(a)(3) grantees were also Section 1006(a)(1)(A) grantees and intended programmatic activities to refer to the activities of these grantees as Section 1006(a)(1)(A) grantees, references to Section 1006(a)(3) would do no work. An interpretation of the term “programmatic activities” in the current rule that restricts the meaning of that term to the provision of legal services to eligible clients would effectively rewrite the rule by deleting a portion of the definition of the term “recipient” in 45 C.F.R. § 1627(a). Such an interpretation is barred by “one of the most basic interpretive canons, that a statute should be

³ Grants of this sort may, indeed, have been more common when the subgrant rule was being drafted because the rule predates the congressional decision to defund the clearinghouse and national and state support centers.

construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Corley v. U.S.*, 129 S.Ct. 1558, 1566 (2009) (internal quotation marks and citations omitted).⁴

This reading is confirmed by the limited regulatory history related to the interpretation of the term “programmatic activity.” When adopting the final rule in 1983, LSC commented:

The definition of subrecipient is elaborated in the final rule to clarify that it includes organizations receiving funds for state support, training, and client involvement activities. The exception for transfers of funds to private attorneys or law firms on a fee-for-service or *judicare* basis is retained Aside from the exceptions in the definition, all transfers of funds on a grant or contract basis are intended to be included as transfers related to a recipient’s program. Any such transfer not “related” to a recipient’s program would be a disallowed cost anyway, since recipients are not permitted to expend Corporation funds for purposes not related to their programs.

Legal Services Corp., 45 C.F.R. Part 1627, Subgrants, Fees and Dues, Final Rule [hereinafter “Final Rule”], 48 Fed. Reg. 54206, 54207 (Nov. 30, 1983). In this public comment on its subgrant rule, LSC clearly indicated that every recipient, as defined by Part 1627, has a grant program and by implication programmatic activities, regardless of whether the recipient receives Corporate funds for the provision of legal services to eligible clients. In order for a recipient to spend funds in an allowable fashion, its expenditures must be related to its program. *See* 45 C.F.R. 1630.3(a)(2) & (b)(1) (establishing standards for the allowability of costs). It is that

⁴ It may be tempting to read the phrase “the recipient’s programmatic activities” in Part 1627 as the equivalent of the phrase “programmatic activities that are normally conducted by the recipient” in Part 1610 (Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity). Compare 45 C.F.R. 1627.2(b)(1) with 45 C.F.R. 1610.2(g). Such a reading is not, however, viable because the two rules use the term “recipient” in different ways. Unlike Part 1627, which broadens the definition of recipient to include Section 1006(a)(1)(B) and 1006(a)(3) grantees, Part 1610 uses the generally applicable definition of recipient found in Part 1600. When Part 1627 refers to the programmatic activities of recipient it is referring to the grant programs of Section 1006(a)(3) grantees, as well as Section 1006(a)(1)(A) grantees. That is, it looks to the activities and program of the recipient at issue, whether that recipient is a Section 1006(a)(1)(A) grantee or a 1006(a)(3) grantee as in the case of TIG grantees. Part 1610, on the other hand, refers only to the activities normally undertaken by Section 1006(a)(1)(A) grantees in furtherance of their grant programs. As written, there is not a complete overlap between the two rules.

program to which the subgrant refers when it uses the term “programmatic activities.” In other words, 45 C.F.R. § 1627.2(b)(1) always refers to the “recipient’s programmatic activities” not “programmatic activities” in the abstract. The rule looks in every instance to the purpose for which the recipient received the grant in question.

When construing Part 1627 and LSC’s official comment on that Part, it is important to remember that in the context of the subgrant rule, the term “recipient” comprises not only Section 1006(a)(1)(A) grantees but also Section 1006(a)(1)(B) and Section 1006(a)(3) grantees.⁵ As discussed above, Section 1006(a)(3) grantees do not receive funds under that section for purposes of providing legal services to eligible clients. Expenditures by these grantees are still allowable if they are consistent with the programmatic purpose of the grant itself, as the term “program” is used in LSC’s commentary on its rule. Likewise, expenditures outside the programmatic purpose of a Section 1006(a)(3) grant may give rise to a questioned cost, even when the money is spent directly on the provision of legal services to eligible clients. As used in LSC’s commentary on Part 1627, the program of a TIG grant would be the purpose for which the grant was issued.

LSC’s contemporaneous commentary on Part 1627 indicates that for purposes of the subgrant rule all allowable expenditures other than those expressly exempted in the definition of “subrecipient” relate to the recipient’s programmatic purpose.⁶ Final Rule, 48 Fed. Reg. at 54207. It is true that the definition of “subrecipient” contains an exception for “goods and services” provided “in the normal course of business” but, again, this exception is not stated in

⁵ Like Part 1627, Part 1630 (Cost Standards and Procedures), which establishes standards for allowable costs, defines the term recipient to include Section 1006(a)(3) grantees.

⁶ This understanding of programmatic activity goes a long way toward explaining why the drafters of LSC’s subgrant rule saw no need to define the term.

the abstract. It is tied to the activities of the particular recipient. The exception only applies “if [the] goods and services [purchased] would not be expected to be provided directly by the recipient itself.” If the goods or services in question would ordinarily be expected to be provided by the recipient itself, the exception is plainly inapplicable. LSC’s rule focuses the inquiry not on the abstract purpose for which the Legal Services Corporation itself was established, “providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford assistance,” 42 U.S.C. § 2996b(a), but on the program or purpose of the particular grant.⁷ Whatever other activities a grantee might be expected to perform for itself, it would certainly be expected to perform the core activities the grant was made to support.

Several other features of the definition of the term “subrecipient” lend further weight to the conclusion that the term “programmatic activities” as used in 45 C.F.R. Part 1627 reaches more than the provision of legal services to eligible clients. When providing examples of activities sufficiently related to programmatic activities to give rise to a subgrant, 45 C.F.R. § 1627.2(b)(1) lists activities “which provide direct support to a recipient’s legal assistance activities or such activities as client-involvement, training or state support activities.”⁸ 45 C.F.R.

⁷ There appear to be three opinions concerning Part 1627 prepared by the Office of General Counsel (OGC), the predecessor of the Office of Legal Affairs. One of the opinions was for external publication and two were internal opinions. All three addressed the applicability of the rule to payments made out of Section 1006(a)(1)(A) grant funds and are not, therefore, directly on point. The internal opinions are cursory, at best, and the external opinion focuses principally on the interpretation of the Private Attorney Involvement rule. Nevertheless, all three opinions look to the programmatic activities of the particular grantee when assessing whether a payment constitutes a subgrant. Two of the opinions expressly state as much. Internal Opinion, dated February 19, 1985; External Opinion, dated March 8, 1994, at 2; *see also* Internal Opinion, dated August 1, 1984.

⁸ It is the OIG’s understanding that, in the past, state support activities typically involved training, research, brief banks, legal area expertise consulting and co-counseling. LSC support for these activities fell under Section 1006(a)(3), and LSC received funding for them in a line or lines separate from its Section 1006(a)(1)(A) funding line. These grants did not directly support the provision of legal services as do grants made pursuant to Section 1006(a)(1)(A). While not identical with grants to fund state support activities in all respects, TIG grants are similarly situated insofar as they appear to be made pursuant to Section 1006(a)(3) of the LSC Act and they support activities other than the direct provision of legal services to eligible clients.

§ 1627.2(b)(1). The quoted language cannot be read as the functional equivalent of language used in 45 C.F.R. Part 1610 to define a transfer: “[A] payment ... for purpose of conducting programmatic activities that are normally conducted by the recipient . . . or . . . direct support to the recipient’s legal assistance activities.” 45 C.F.R. § 1627.2(g); *cf.* ROP at 7-8.⁹ The plain text of 45 C.F.R. Part 1627 goes beyond direct support for legal assistance activities in its definition of “activities ... related to the recipient’s programmatic activities.” 45 C.F.R. § 1627.2(b)(1). That is, the activities that qualify third-party payees as subrecipients for purposes of a 45 C.F.R. Part 1627 are not defined in terms of legal assistance activities or services provided to eligible clients. At a minimum the rule reaches “client-involvement, training or state support activities,” which it expressly distinguished from activities directly relating to the provision of legal assistance. 45 C.F.R. § 1627.2(b)(1).

It is also noteworthy that 45 C.F.R. § 1627.2(b)(1) speaks of the sort of activities that “would normally” characterize a subrecipient and the sort of activities that “would not normally” characterize a subrecipient. In other words, the examples provided address the usual case but are not exhaustive of the sorts of activities that can give rise to a subgrant. Similarly, the examples of activities that fall outside the scope of the rule describe the usual case but do not foreclose the possibility that the sort of activities listed may from time to time give rise to a subgrant. It is not surprising that all of these examples lean heavily on the model of a subgrant made by a Section 1006(a)(1)(A) recipient since the large majority of LSC’s grants have always fallen into this

⁹ The text of Part 1627 (Subgrants, Fees and Dues) differs from the text of Part 1610 (Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity) in another important respect. Whereas Part 1610 contains an exception for goods and services provided “in the normal course of business,” 45 C.F.R. § 1610.2(g), it omits the conditional limitation on the exception contained in Part 1627, namely, “if such goods or services would not be expected to be provided directly by the recipient itself[] ...,” 45 C.F.R. § 1627.2(b)(1). As with examples of programmatic activity, Part 1610 is similar to Part 1627 but omits nontrivial clauses that appear in the latter. These differences highlight the danger of attempting to use the later adopted Part 1610 as a key to the meaning of Part 1627.

category. The characteristics of subgrant made by a Section 1006(a)(1)(A) recipient would, no doubt, describe the normal case, but the rule does not limit the definition of “subrecipient” to such a case. Even if all the activities listed as examples of provided in 45 C.F.R. § 1627.2(b)(1) entailed “direct support to a recipient’s legal assistance activities,” which they do not, those examples are not intended to capture more unusual subrecipient relationships which nevertheless fall within the rule.¹⁰ The fact that many of the third-party payments in the TIG program satisfy the general definition of subrecipient but do not cleanly fit within the examples of subrecipient activities contained in 45 C.F.R. § 1627.2(b)(1) is entirely consistent with the phrasing of 45 C.F.R. § 1627.2(b)(1) because TIG grants are not the usual or normal grant awarded by LSC.

For the reasons discussed in this subsection, the OIG believes that the term “programmatic activity” as used in Part 1627 must be read broadly and interpreted in light of the purpose of the particular grant at issue. It is difficult to read programmatic activity in Part 1627 as completely synonymous with the provision of legal services to eligible clients.

C. An Appropriate Instance for Rulemaking

While it has been suggested that LSC could adequately address confusion concerning application of its subgrant rule to third-party payments made under the TIG program through interpretive guidance, the OIG is concerned that this approach may be foreclosed by the

¹⁰ For example, 45 C.F.R. § 1627.2(b)(1) provides that activities related to the programmatic purposes of a recipient “would normally not include” goods and services provided in the ordinary course of business. Training is certainly a common service for which business contract on a regular basis. Even so, it would be difficult to maintain that a Section 1006(a)(3) grantee who received a grant to provide training could contract for the provision of the contemplated training without triggering the subgrant rule. In the OIG’s view, a similar result would obtain for analogous third-party payments by TIG grantees. This analysis appears to be confirmed by the decision of the drafters of Part 1627 to expressly include “training or state support activities” in the category of activities “normally included” in the sort of activities undertaken by subrecipients. It should be noted that, in the OIG’s view, the converse is also true: A Section 1006(a)(1)(A) grantee that contracts for training in the use of Microsoft Office products does not thereby establishing a subgrant relationship with the trainer.

requirements of the LSC Act. Specifically, the LSC Act requires that LSC “afford notice and reasonable opportunity for comment to interested parties prior to issuing rules, regulations, and guidelines” and that it “publish in the Federal Register at least 30 days prior to their effective date all its rules, regulations, guidelines, and instructions.” 42 U.S.C. § 2996g(e). This statutory language certainly does not preclude issuance of interpretive guidance where it is needed to put the grantee community on notice of LSC’s reading of an unclear, ambiguous, or difficult-to-understand regulation. Here, however, interpretative guidance exempting the sort of third-party payments identified in the OIG’s Audit Report from LSC’s subgrant rule appears to be at odds with the language of that rule, which requires a broader reading of the term “programmatic.” Such guidance would effectively narrow the definition of recipient found in the rule, 45 C.F.R. § 1627.2(a), and/or shift the focus of 45 C.F.R. § 1627.2(b)(1) from “*the recipient’s* programmatic activities” (emphasis added) to the more general programmatic purpose of LSC as a whole. Interpretive guidance along these lines would be difficult to distinguish from a *de facto* amendment of the rule.

D. Grants Related to the Provision of Legal Services

Even if it were possible to interpret the term “programmatic activity” in LSC’s subgrant rule as referring exclusively to the provision of legal services to eligible clients, such an interpretation would not, in all likelihood, put the third-party payments identified as subgrants in the OIG’s TIG Audit beyond the reach of LSC’s subgrant rule. A more substantial regulatory change would be required to achieve that outcome.

As discussed above, the subgrant rule defines a “subrecipient” as “any entity that accepts Corporation funds from a recipient ... to conduct certain activities ... *related to* the recipient’s programmatic activities.” 45 C.F.R. § 1627.2(b)(1) (emphasis added). If programmatic

activities were interpreted as referring solely to the provision of legal services, one would still need to determine which activities of third-party payees “relate” to the provision of legal services in order to decide whether a third-party payment made to carry out the central purpose of a TIG grant, or a Section 1006(a)(3) grant more generally, constitutes a subgrant.

Recipients, for purposes of Part 1627 include both Section 1006(a)(1)(A) grantees and Section 1006(a)(3) grantees. Section 1006(a)(1)(A) grants are provided “for the purpose of providing legal assistance to eligible clients” As such, the purpose of such grants and the principal activities they are made to support clearly relate to the provision of legal assistance.¹¹ Unlike Section 1006(a)(1)(A) grants, which are provided “for the purpose of providing legal assistance to eligible clients ...,” Section 1006(a)(3) grants, including TIG grants, are not provided to directly fund the provision of legal services to eligible clients. Rather they fund activities such as “research ..., ... training and technical assistance, and ... clearinghouse [services].” 42 U.S.C. § 2996e(a)(3). The activities supported by Section 1006(a)(3) grants are defined by the LSC Act as “relating to the delivery of legal assistance.” That is, all Section 1006(a)(3) grants must be made to support activities related to the provision of legal assistance regardless of their immediate purpose or the nature of the principal activities they directly fund. Consequently, any third-party payees who receive LSC funds to carry out the immediate purpose of a Section 1006(a)(3) grant or to carry out the central activities it was intended to fund must be conducting activities related to the provision of legal assistance. If LSC were to define or interpret “programmatic activity” as referring to the provision of legal assistance, the activities of

¹¹ A similar analysis applies to Section 1006(a)(1)(B) grantees, which are also recipients within the meaning of Part 1627. Section 1006(a)(1)(B) grants must be “necessary to carry out the purposes and provisions of [the LSC Act].” The purpose of the LSC Act is defined in 42 U.S.C. § 2996b(a) as “providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.” As a matter of logic, one must conclude that the purpose of any Section 1006(a)(1)(B) grant is necessarily related to the provision of legal assistance.

third-party payees that carry out the purposes Section 1006(a)(3) grants, including TIG grants, would still be, by definition, “related to” that programmatic purpose. Such third-party payees would qualify as subrecipients within the meaning of Part 1627.

Given the definition of “recipient” adopted in Part 1627, the authorizing language describing LSC’s grant-making powers in the LSC Act, and the language of relation adopted in 45 C.F.R. § 1627.2(b)(1), a regulatory fix for the problem identified in the TIG Audit Report would have to be more extensive than simply equating “programmatic activity” with the provision of legal services. It appears, therefore, that LSC would have to engage in regulatory action if it chooses to exempt the third-party payments of the sort identified in the Audit Report as “subgrants” from treatment as subgrants under Part 1627.

III. Conclusion

Under LSC’s existing subgrant rule, payments made by TIG grantees to third parties who carry out the purpose of the TIG grant in question are properly characterized as subgrants. The OIG recognizes that it may be desirable to exempt certain third-party payments in the TIG program from treatment as subgrants for administrative reasons. In the OIG’s view, an exemption of this sort would require substantial changes to the existing rule. The LSC Act appears to foreclose recourse to interpretive guidance as a mechanism for accomplishing this sort of substantive regulatory modification. To the extent that LSC decides it is desirable to exempt certain third-party payments in the TIG program from its subgrant rule, such an exemption is properly accomplished through a regulatory process that amends the text of Part 1627.