

COMMENT ON NOTICE OF PROPOSED RULEMAKING

PART 1611 – FINANCIAL ELIBILITY

SUBMITTED BY
THE CENTER FOR LAW & SOCIAL POLICY
ON BEHALF OF
THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

June 14, 2005

These comments are submitted to the Legal Services Corporation (LSC) by the Center for Law and Social Policy (CLASP) on behalf of the National Legal Aid and Defender Association (NLADA). NLADA is a membership organization that represents civil legal services programs, including those funded by LSC. CLASP serves as counsel to NLADA.

On May 24, 2005, LSC published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* (70 FR 29695) for Part 1611 (Financial Eligibility) of the LSC regulations. The NPRM seeks comments on the proposal. Comments are due on June 23, 2005.

The current NPRM is the product of a multi-year effort that began with a negotiated rulemaking (reg-neg) process initiated in 2001 when LSC convened a reg-neg working group consisting of representatives from NLADA, CLASP, the ABA's Standing Committee on Legal Aid and Indigent Defense (SCLAID) and numerous field program representatives, as well as representatives of the LSC staff and the LSC Office of Inspector General (OIG). The full reg-neg group held three two-day meetings between January and April 2002 that resulted in a NPRM that was published for notice and comment in November 2002. The LSC Board was scheduled to review the comments and adopt a final version of the revised regulation at its meeting at the end of January 2003, but tabled the process after receiving objections from Congress. With the confirmation of the new LSC Board, the process of revising Part 1611 was resumed, and more recent versions of the NPRM were considered on numerous occasions over the last several meetings of the LSC Board and its Operations and Regulations Committee. At its April 30, 2005 meeting, the Board adopted the recommendation of the Operations and Regulations Committee to publish the current version of the NPRM for notice and comment.

The NPRM completely reorganizes Part 1611, to make it simpler, clearer and easier for recipients and their staffs to apply, as well as for LSC to enforce. The proposed rule provides additional flexibility for recipients to determine whether a particular applicant for service is eligible for LSC funded assistance. In addition, the NPRM eliminates several unnecessary administrative requirements that have proven to be burdensome for recipients, including the requirement for retainer agreements in PAI cases and the submission to and approval by LSC of numerous program guidelines and

forms, including retainer agreements. Finally, the NPRM expands the circumstances under which recipients may provide legal assistance to group clients.

We believe that the new version of Part 1611 represents a major improvement over the current rule. It effectively addresses most of the significant concerns that field representatives raised during the reg-neg process and at later points in the process, and we urge the Board to adopt it as a final rule, with the relatively minor revisions discussed below.

KEY ISSUES

There is one issue that was discussed in the reg-neg working group, but does not appear in the text of the proposed rule. The OIG representative to the reg-neg working group urged the incorporation into the rule of the language of section 509(h) of the LSC appropriations act that gives LSC auditors and monitors access to eligibility records and client names as well as certain other records. The NPRM eliminated any reference to access to records, although there is a discussion of the rationale in the Supplementary Information for the decision to not include the statutory language on access to records in the text of the rule. We support the decision not to incorporate the statutory provision into the rule, and we urge the Board to not include any reference to access to records in the text of the rule.

The second key issue that was the subject of significant discussion in the reg-neg group as well as within the Operations and Regulations Committee was the retainer agreement requirement. Although the earlier NPRM, consistent with the position taken by NLADA and representatives of field programs, had eliminated the retainer agreement requirement in its entirety, the Operations and Regulations Committee accepted the LSC staff's position that a retainer should be required in extended service cases. However, the Committee did not adopt the LSC staff proposal to require a client service notice for brief service and decided to make it explicit that no such notice or retainer was required for brief service cases. In addition, the elements that were required in the retainer requirement were simplified, and the retainer requirement was eliminated entirely for all PAI cases.

Although we believe that retainer agreements may be appropriate and desirable under certain circumstances, we think that the decision to use a retainer agreement should be made by the recipient and should not be required as a matter of regulatory compliance, and we once again urge the Board to eliminate the retainer agreement requirement in its entirety.

Nevertheless, if the Board determines that it will keep a retainer agreement requirement in the rule, we believe that the version that is contained in the current NPRM is far superior to the retainer agreement requirement that is in the current Part 1611, particularly as it is now clear that retainers are not required in either brief service or PAI cases. The application of the retainer requirement to PAI cases has been a particular problem in the past, and we urge the Board to adopt the version of the

retainer agreement that makes it clear that the requirement does not apply to PAI cases.

The final key issue is the revision of the section on group representation. Under the current Part 1611, recipients are only permitted to use LSC funds to represent groups that are “primarily composed of” LSC eligible clients. LSC has interpreted this provision to mean that at least 51% of a group's membership must be financially eligible for LSC services. Field program representatives on the reg-neg working group had urged that the rule be revised to significantly expand the circumstances under which a recipient could represent a group, and the NPRM published in 2002 had incorporated the field position. When the proposal came back before the new Operations & Regulations Committee, the OIG reiterated its position that group representation should be substantially circumscribed, even beyond the limits in the current rule. The version of the group representation provision that emerged as a result of the Committee's deliberation is a compromise, although it is one that is much closer to the field position and clearly rejects the position espoused by the OIG. In addition to groups that are primarily composed of eligible clients, the NPRM permits recipients to use LSC funds to represent groups that have as a primary activity, the provision of services to financially eligible clients. We believe that this compromise will permit programs to serve most of the appropriate groups in their service areas. Group representation is crucial for legal services programs to effectively serve their client communities, and we urge the Board to adopt the provision on group representation that is contained in the NPRM.

SECTION-BY-SECTION ANALYSIS OF REVISIONS

Section 1611.1 Purpose: We support the revisions to this provision.

Section 1611.2 Definitions: We generally support the revisions that were made in the definitions section and the new definitions that were added to the rule. We believe that they help clarify the terms used in the rule and make the rule easier to apply. We have some relatively minor concern about the language of the preamble that accompanies the discussion of the definitions.

In order to interpret the retainer provision requirement, LSC has added definitions of “advice and counsel” (§1611.2(a)), “brief services” (§1611.2(e)) and “extended service” (§1611.2(f)). We believe that the text of these definitions is generally helpful. Nevertheless, we are concerned that the discussion in the preamble of the definition of “advice and counsel” focuses too much attention on the notion that advice and counsel should be time-limited, indicating that it “would generally be characterized by a one-time or very short-term relationship.” In many instances, programs provide advice and counsel to clients over a more extended period of time, and we think that the preamble should focus on the nature of the service provided by the grantee, rather on the period of time over which it is provided. We would suggest that the preamble simply remove the sentence that includes the reference to a “one-time or very short term relationship between the attorney and the client.”

We are particularly supportive of the new definition of "assets" (§1611.2(d)) that eliminates the distinction in the current rule between liquid and non-liquid assets and provides more practical guidance on the kinds of assets that should be considered in determining eligibility. We urge the Board to retain this new definition.

LSC specifically invited comments on the issue of whether "income" (§1611.2(h)) should be defined as gross income or income net of payroll taxes. LSC's position is that the current use of gross income is consistent with LSC's practice and with the definition of the term used in setting the federal poverty level and should be maintained. The field representatives on the reg-neg working group and testifying before the LSC Board had argued that payroll taxes should be deducted from gross income at the outset for purposes of determining whether an applicant for service is eligible under the program's annual income ceiling or may be served under the exceptions to the annual income ceiling. Because our client community now includes many more working poor whose disposable income is substantially reduced by payroll taxes that are involuntarily withheld from their paychecks, we believe that the definition of "income" should be revised to reflect income net of payroll taxes rather than gross income. This change would make the calculation of income much easier for both clients and program intake workers who can look to take-home pay, rather than gross salary. It would remove the apparent preference for applicants whose income does not come from work over those whose income from work is reduced as a result of payroll taxes. In addition, it would permit recipients to serve those working poor whose gross income is marginally above the current upper limit on income. We urge the Board to change the definition of "income" to "actual current annual total cash receipts after taxes...."

Section 1611.3 Financial Eligibility Policies: We generally support this new section that is based on requirements found in several disparate sections of the current rule. The new section concentrates in one provision all of the recipient's responsibilities for adopting and implementing financial eligibility policies, simplifying and clarifying the requirements of the rule. These provisions are in most respects identical or very similar to the requirements in the current rule, although the proposal does make the requirement that programs adopt financial eligibility policies more explicit than it is under the current rule. The proposal replaces the current requirement for an annual review of program eligibility policies with a triennial review (§1611.3(a)). The section also includes several new provisions not found in the current rule. One provision permits recipients to determine that an applicant is financially eligible based on the applicant's eligibility for another low-income governmental benefits program (§1611.3(f)). The LSC appropriations act for FY 1998 included a provision regarding victims of domestic violence that required recipients to consider only the victim's assets in determining eligibility. That provision is incorporated into section (§1611.3(e)). In addition, under the new rule recipients would no longer be required to submit their asset levels to LSC, and recipients may permit waivers of assets ceilings under a more flexible standard than under the current rule (§1611.3(d)(2)). We support all of these provisions and urge the Board to adopt them as part of the final rule.

With regard to assets, the new provision provides an expanded list of assets that may be excluded from consideration under a program's asset ceiling (§1611.3(d)(1)).

The field representatives on the reg-neg working group and those testifying before the Committee urged that these exclusions should be treated as illustrative rather than exhaustive, so that other exclusions could be considered by recipients if appropriate in their client communities. LSC rejected that position, but seeks comments on the issue as well as suggestions for other specific assets that should be added to the list of possible exclusions. We believe that recipients should have flexibility to determine those assets that should be excluded from consideration and we understand that many programs now do exclude other kinds of assets that are not explicitly included in the list in the current regulations. We urge the Board to adopt language that would make the list of excludable assets illustrative, rather than exhaustive so the programs can tailor their asset policies to the circumstances of their local client community.

Section 1611.4 Financial Eligibility for Legal Assistance: This section of the proposed rule sets forth the basic eligibility criteria for LSC-supported legal assistance. Substantively, it is consistent with provisions found in the current rule. However, the proposed section makes the process of determining basic eligibility (i.e., below 125% of the Federal Poverty Level) much less complex than it is under the current rule. We support these changes and urge the Board to adopt them as part of the final rule. The principal substantive change is the addition of a provision that permits a recipient to determine that an applicant is eligible for service without making an independent determination of income and assets if the applicant's income is derived solely from a governmental program for low-income individuals or families, provided that the recipient's governing body has determined that the program has an asset test and its income standards are at or below 125% of the Federal Poverty Level (§1611.4(c)). We support this addition and urge the Board to include it in the final rule.

Section 1611.5 Authorized Exceptions to the Annual Income Ceiling: This section of the rule has been revised substantially under the NPRM and contains several new provisions. It deals with those instances where a recipient may serve an applicant whose income exceeds the recipient's annual income ceiling. Under the proposal there are two situations where a recipient may serve an applicant whose income is above the recipient's annual income ceiling without regard to any absolute upper limit on income. First, a recipient may provide legal assistance where an applicant has been receiving governmental benefits for low-income individuals and families and seeks legal assistance to maintain those benefits, regardless of income (§1611.5(a)(1)). This is a new provision which we support. It will permit recipients to assist the working poor whose income is supplemented by public benefits to retain those benefits even if their total income exceeds the LSC limits. Second, where an applicant's income is primarily devoted to medical or nursing home expenses, a recipient may represent the applicant as long as the Executive Director or designee determines that, after deducting those expenses from income, the applicant would be financially eligible for services. (§1611.5(a)(2)). This provision is a revised version of a section in the current regulation that tightens the exception to make it less available to higher income applicants for service who have significant medical or nursing home expenses but also have remaining income above the levels that would normally make them eligible for LSC funded services. We support the revision, although we would prefer that the Executive

Director or designee not specifically be required to make the determination. We believe that requirement is an unnecessary administrative burden.

Under the current regulation, recipients may serve applicants whose income is above 125% of poverty, but does not exceed 187.5% of the Federal Poverty Level under certain circumstances. Under the proposed rule the outside income limit is raised to 200% of the Federal Poverty Level, making the calculation much simpler and slightly expanding the pool of applicants who may be eligible for LSC-funded services (§1611.5(a)(3)and(4)) to include more of the working poor that are an ever increasing part of the low-income community. We strongly support this increase in outside income limit and urge the Board to incorporate it into the final rule.

The proposed rule also contains a new provision that permits recipients to serve individuals with incomes up to 200% of poverty who are seeking to obtain or maintain governmental benefits for persons with mental and/or physical disabilities (§1611.5(a)(3)(ii)). The NPRM retains the other exceptions included in the current rule, although several are simplified and clarified (§1611.5(a)(4)). We support these revisions and urge the Board to incorporate them into the final rule.

Under the current rule the exception for "fixed debts and obligations" explicitly includes unpaid taxes as a fixed debt, but has been interpreted to exclude current taxes paid or withheld from income. The proposed rule eliminates the reference to past taxes in the "fixed debts and obligations" section and includes a new provision for current taxes (§1611.5(a)(4)(vi)). Under previous versions of the preamble to NPRM, current taxes were considered to be a "fixed debt," but the Board determined that it would be preferable to separate them out in the text of the rule as an explicit factor to be considered. Although we prefer that payroll taxes be excluded from income in the first instance (see discussion of the definition of "income" above), if LSC does not ultimately concur, we support the change that permits current taxes to be considered as a factor to be considered in making an exception to the annual income ceiling. However, we are concerned that the NPRM does not define "current taxes", nor does it give specific examples of the kinds of taxes that should be considered. Since this is an entirely new provision, we believe that it would be helpful for the commentary to include examples of the kinds of current taxes that could be considered and we urge the Board to direct the staff to include in the preamble specific examples of the kinds of taxes that should be included, including local, State and federal income tax withholding, Social Security and Medicare taxes.

In addition, the Supplementary Information notes that LSC intends to treat rent in the same way that it has treated mortgage payments in the past. Both will be treated as fixed obligations that may be considered in determining to serve an applicant whose income exceeds the recipient's annual income ceiling but is below 200% of poverty. We support this change in the LSC's interpretation of the rule.

Field programs representatives on the reg-neg working group also urged LSC to consider basic utility costs as "fixed debts or obligations" that can be considered when determining whether to make an exception to the income ceiling. LSC argued that

these expenses were not fixed as to time and amount, were expenses of daily living rather than unusual expenses and should not be included. LSC has asked for comment on whether utilities should be included within the category of fixed debts and obligations, or whether utilities or other factors should be added to the list to be considered when determining whether to make an exception to the income ceiling. We believe that LSC should, at a minimum, include in the preamble a statement to the effect that unusually high utility costs should be permitted to be considered under the section of the rule that permits recipients to make an exception where there are "other significant factors that the recipient has determined affect the applicant's ability to afford legal assistance." (§1611.5(a)(vii)). Such a statement would be consistent with LSC's concern that the exceptions should generally reflect unusual circumstances.

Section 1611.6 Representation of Groups: The field representatives participating in the reg-neg working group and those testifying before the Committee had urged LSC to adopt provisions that would broaden the circumstances under which recipients could represent groups. As discussed in the "Key Issues" section of the comment, the LSC Board ultimately adopted a version of the group representation provisions that was narrower than the field representatives' proposal, but is more flexible than the provision in the current rule.

Under the NPRM recipients may use LSC funds to represent groups that lack the means to obtain private counsel if (1) at least a majority of the group's members (or if not a membership group, then a majority of its organizing or operating group) are financially eligible for LSC-funded assistance (§1611.6(a)(1)); or (2) the group has as a primary activity the delivery of services to eligible persons in the community and the legal assistance sought relates to such activity (§1611.6(a)(2)). This revision is similar to the version of the group representation rule that was in effect before Part 1611 was revised in 1983, although the language is more narrowly drawn and less subject to misinterpretation. It would permit recipients to provide groups with representation that relates to the specific activity, including representation on structural issues, such as incorporation and bylaws, that would permit the group to engage in the specific activity.

Although narrower than originally proposed by the field representatives, NLADA believes that this version represents a reasonable compromise on group representation that will permit recipients to use their LSC funds to represent most, if not all, of the appropriate groups in the community. Thus, we are supportive of these provisions on group representation, and we urge the Board to include them in the final version of the rule.

Several last minute changes were made in the group representation provisions regarding how determinations of eligibility are to be made. First, the provision now requires the recipient to consider the resources available to the group such as income and income prospects, assets and obligations (§1611.6(b)(1)). We have no objection to this part of the provision.

Second, language was added that requires recipients to consider, for groups primarily composed of eligible individuals, "whether the characteristics of the persons

comprising the group are consistent with financial eligibility under the Act” (§1611.6(b)(1)(i)) and, for groups having as a primary activity the delivery of services to eligible persons, “whether the characteristics of the persons served by the group are consistent with financial eligibility under the Act and whether the legal assistance sought relates to the primary activity of the group” (§1611.6(b)(1)(ii)). These provisions were added to address concerns expressed by the OIG that the language of the rule requiring recipients to collect information that “reasonably demonstrates that the group...” meets the rule’s eligibility criteria (§1611.6(b)(2)) contained inadequate standards for demonstrating group eligibility. We believe that a reasonability test is adequate and that recipients with limited resources have no incentive to serve inappropriate groups. We are concerned that the purpose of the new language is unclear and will cause significant confusion among recipients. In addition, we are concerned that LSC could use this language to second-guess determinations that are more appropriately made by the recipient. We urge the Board to eliminate this language from the rule and to rely on the combination of the reasonability test and the requirement that the recipient consider the resources available to the group such as income and income prospects, assets and obligations.

Section 1611.7 Manner of Determining Eligibility: There are three significant revisions to this provision. First, the current requirement that eligibility forms and procedures must be approved by LSC has been eliminated. This is a requirement of the current rule that places an unnecessary administrative burden on both LSC and its grantees, and it does not serve any apparent purpose. Second, a provision has been added that permits one recipient to rely on the eligibility determination made by another recipient that referred a case (§1611.7(d)). This new provision would assist programs in their efforts to collaborate with other programs within their state justice communities. We support both of these revisions and urge the Board to include them in the final rule.

The third revision involves the deletion of the provisions of the current rule that limited access by LSC to client financial eligibility records. These provisions were superseded in 1996 by Section 509(h) of the LSC appropriations act that gave LSC access to client eligibility records not covered by the attorney-client privilege. As noted above, we support the decision not to incorporate the provisions of §509(h) in the rule. Although we would prefer that the law governing access to records would be more protective of client eligibility information, we understand that the appropriations act has made the provisions of the current rule no longer effective.

Section 1611.8 Change in Financial Eligibility Status: The NPRM adds language to this section to address the situation where a recipient learns of information that indicates a client was not, in fact, financially eligible at the outset of representation (§1611.8(b)). The new provision of the rule is parallel to the current rule where there is a change in circumstances and would require that the recipient discontinue LSC-funded representation in a manner consistent with applicable rules of professional responsibility. In either situation, the recipient could continue the representation with non-LSC funds. In addition, if it is not possible to discontinue the LSC-funded representation because alternative funds are not available and to do so would violate professional responsibility, the recipient may continue to support the representation with

LSC funds. There is no obligation in the rule for the programs to make affirmative inquiry, after accepting a client, seeking information that would indicate either a change in circumstances or additional information regarding inaccuracies in the client's financial circumstances that were described at the outset of the assistance. We support this provision and urge the Board to include it in the final rule.

Section 1611.9 Retainer Agreements: Although the earlier version of the NPRM eliminated the retainer agreement requirement entirely, the new Board disagreed with the conclusion reached by its predecessor Board and reinstated the requirement. While we believe that retainers are often a matter of good practice, we do not believe that they should not be mandatory regulatory requirements. We nevertheless support the proposed retainer agreement requirement as an alternate to the provisions in the current rule in the event that the Board ultimately determines that there should be a mandatory retainer agreement provision in the rule.

The proposal makes it clear that retainer agreements are required only in extended service cases (§1611.9(a)) which go beyond advice or brief service and that no retainer or client notice is required for those cases. The proposed provision also makes it clear that no written retainer agreements are required in PAI cases, which has been a significant problem under the current rule (§1611.9(b)). Under the new NPRM, recipients are no longer required to seek approval from LSC for their retainers, a requirement that has caused unnecessary administrative burdens on both LSC and its grantees. Finally, the requirement has been streamlined and all that is now required in the retainer is a statement identifying the legal problem and the nature of the legal services to be provided (§1611.9(a)), although recipients are free to create more extensive retainers if appropriate under the circumstances of the particular case or where rules of professional responsibility or local practice suggest that a more detailed retainer is appropriate. Assuming retainers are to be required under certain circumstances, we support the formulation of the requirement that is contained in the NPRM.

We have attached as an Appendix to this comment a copy of the text of the regulation indicating the revisions that we would make to the NPRM before it is issued as a final rule. Changes that we propose in the preamble are described in footnotes.

NLADA appreciates the opportunity to share these comments with LSC. If you have any questions or concerns about any issues raised by these comments, please feel free to contact NLADA's Counsel, Linda Perle at CLASP (202-906-8002 or lperle@clasp.org).

APPENDIX TO NLADA COMMENT

SUGGESTED REVISIONS TO NPRM FOR PART 1611 (FINANCIAL ELIGIBILITY)

§1611.1 Purpose

§1611.2 Definitions

§1611.3 Financial Eligibility Policies

§1611.4 Financial Eligibility for Legal Assistance

§1611.5 Authorized Exceptions to the Recipient's Annual Income Ceiling

§1611.6 Representation of Groups

§1611.7 Manner of Determining Financial Eligibility

§1611.8 Changes in Financial Eligibility Status

Deleted: 1611.9 Retainer Agreements¶

§1611.1 Purpose

This Part sets forth requirements relating to the financial eligibility of individual applicants for legal assistance supported with LSC funds and recipients' responsibilities in making financial eligibility determinations. This Part is not intended to and does not create any entitlement to service for persons deemed financially eligible. This Part also seeks to ensure that financial eligibility is determined in a manner conducive to development of an effective attorney-client relationship. In addition, this Part sets forth standards relating to the eligibility of groups for legal assistance supported with LSC funds. Finally, this Part sets forth requirements relating to recipients' responsibilities in executing retainer agreements with clients.

§1611.2 Definitions

(a) "Advice and counsel" means legal assistance that is limited to the review of information relevant to the client's legal problem(s) and counseling the client on the relevant law and/or suggested course of action. Advice and counsel does not encompass drafting of documents or making third-party contacts on behalf of the client.¹

(b) "Applicable rules of professional responsibility" means the rules of ethics and professional responsibility generally applicable to attorneys in the jurisdiction where the recipient provides legal services.

(c) "Applicant" means an individual who is seeking legal assistance supported with LSC funds from a recipient. The term does not include a group, corporation or association.

¹ We suggest that LSC delete the sentence in the preamble for §1611.2(a) that states "LSC anticipates that advice and counsel would generally be characterized by a one-time or very short term relationship between the attorney and the client."

(d) “Assets” means cash or other resources of the applicant or members of the applicant’s household that are readily convertible to cash, which are currently and actually available to the applicant.

(e) “Brief services” means legal assistance in which the recipient undertakes to provide a discrete and time-limited service to a client beyond advice and consultation, including but not limited to activities, such as the drafting of documents or making limited third party contacts on behalf of a client.

(f) “Extended service” means legal assistance characterized by the performance of multiple tasks incident to continuous representation. Examples of extended service would include representation of a client in litigation, an administrative adjudicative proceeding, alternative dispute resolution proceeding, extended negotiations with a third party, or other legal representation in which the recipient undertakes responsibility for protecting or advancing a client’s interest beyond advice and counsel or brief services.

(g) “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.

(h) “Governmental program for persons with disabilities” means any Federal, State or local program that provides benefits of any kind to persons whose eligibility is determined on the basis of mental and/or physical disability.

(i) “Income” means actual current annual total cash receipts after taxes of all persons who are resident members and contribute to the support of an applicant’s household, as that term is defined by the recipient. Total cash receipts include, but are not limited to, money, wages and salaries; income from self-employment after deductions for business or farm expenses; regular payments from governmental programs for low income persons or persons with disabilities; social security payments; unemployment and worker’s compensation payments; strike benefits from union funds; veterans benefits; training stipends; alimony; child support payments; military family allotments; public or private employee pension benefits; regular insurance or annuity payments; income from dividends, interest, rents, royalties or from estates and trusts; and other regular or recurring sources of financial support that are currently and actually available to the applicant. Total cash receipts do not include the value of food or rent received by the applicant in lieu of wages; money withdrawn from a bank; tax refunds; gifts; compensation and/or one-time insurance payments for injuries sustained; non-cash benefits; and up to \$2,000 per year of funds received by individual Native Americans that is derived from Indian trust income or other distributions exempt by statute.

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§ 1611.3 Financial Eligibility Policies

(a) The governing body of a recipient shall adopt policies consistent with this part for determining the financial eligibility of applicants and groups. The governing body shall review its financial eligibility policies at least once every three years and make

adjustments as necessary. The recipient shall implement procedures consistent with its policies.

(b) As part of its financial eligibility policies, every recipient shall specify that only individuals and groups determined to be financially eligible under the recipient's financial eligibility policies and LSC regulations may receive legal assistance supported with LSC funds.

(c)(1) As part of its financial eligibility policies, every recipient shall establish annual income ceilings for individuals and households, which may not exceed one hundred and twenty five percent (125%) of the current official Federal Poverty Guidelines amounts. The Corporation shall annually calculate 125% of the Federal Poverty Guidelines amounts and publish such calculations in the Federal Register as a revision to Appendix A to this part.

(2) As part of its financial eligibility policies, a recipient may adopt authorized exceptions to its annual income ceilings consistent with §1611.5.

(d)(1) As part of its financial eligibility policies, every recipient shall establish reasonable asset ceilings for individuals and households. In establishing asset ceilings, the recipient may exclude consideration of assets such as a household's principal residence, vehicles required for work, assets used in producing income, and other assets which are exempt from attachment under State or Federal law.

(2) The recipient's policies may provide authority for waiver of its asset ceilings for specific applicants under unusual circumstances and when approved by the recipient's Executive Director, or his/her designee. When the asset ceiling is waived, the recipient shall record the reasons for such waiver and shall keep such records as are necessary to inform the Corporation of the reasons for such waiver.

(e) Notwithstanding any other provision of this Part or the recipient's financial eligibility policies, as part of its financial eligibility policies, every recipient shall specify that in assessing the income or assets of an individual applicant who is a victim of domestic violence, the recipient shall consider only the assets and income of the individual applicant and shall not include any assets jointly held with the perpetrator of the domestic violence.

(f) As part of its financial eligibility policies, a recipient may adopt policies that permit financial eligibility to be established by reference to an applicant's receipt of benefits from a governmental program for low-income individuals or families consistent with §1611.4(c).

(g) Before establishing its financial eligibility policies, a recipient shall consider the cost of living in the service area or locality and other relevant factors, including but not limited to:

- (1) the number of clients who can be served by the resources of the recipient;
- (2) the population that would be eligible at and below alternative income and asset ceilings; and

(3) the availability and cost of legal services provided by the private bar and other free or low cost legal services providers in the area.

§1611.4 Financial Eligibility for Legal Assistance

(a) A recipient may provide legal assistance supported with LSC funds only to individuals whom the recipient has determined to be financially eligible for such assistance. Nothing in this Part, however, prohibits a recipient from providing legal assistance to an individual without regard to that individual's income and assets if the legal assistance is wholly supported by funds from a source other than LSC, and is otherwise permissible under applicable law and regulation.

(b) Consistent with the recipient's financial eligibility policies and this Part, the recipient may determine an applicant to be financially eligible for legal assistance if the applicant's assets do not exceed the recipient's applicable asset ceiling established pursuant to §1611.3(d)(1), or the applicable asset ceiling has been waived pursuant §1611.3(d)(2), and:

(1) The applicant's income is at or below the recipient's applicable annual income ceiling; or

(2) The applicant's income exceeds the recipient's applicable annual income ceiling but one or more of the authorized exceptions to the annual income ceilings, as provided in §1611.5, applies.

(c) Consistent with the recipient's policies, a recipient may determine an applicant to be financially eligible without making an independent determination of income or assets, if the applicant's income is derived solely from a governmental program for low-income individuals or families, provided that the recipient's governing body has determined that the income standards of the governmental program are at or below 125% of the Federal Poverty Guidelines amounts and that the governmental program has eligibility standards which include an assets test.

§ 1611.5 Authorized Exceptions to the Annual Income Ceiling

(a) Consistent with the recipient's policies and this Part, a recipient may determine an applicant whose income exceeds the recipient's applicable annual income ceiling to be financially eligible if the applicant's assets do not exceed the recipient's applicable asset ceiling established pursuant to §1611.3(d), or the asset ceiling has been waived pursuant to §1611.3(d)(2), and:

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

(2) ~~The recipient has determined, on the basis of documentation received by the recipient, that the applicant's income is primarily committed to medical or nursing home expenses and that, excluding such portion of the applicant's income which is committed to medical or nursing home expenses, the applicant would otherwise be financially eligible for service; or~~

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(3) The applicant's income does not exceed 200% of the applicable Federal Poverty Guidelines amount and:

(i) The applicant is seeking legal assistance to obtain governmental benefits for low income individuals and families; or

(ii) The applicant is seeking legal assistance to obtain or maintain governmental benefits for persons with disabilities; or

(4) The applicant's income does not exceed 200% of the applicable Federal Poverty Guidelines amount and the recipient has determined that the applicant should be considered financially eligible based on consideration of one or more of the following factors as applicable to the applicant or members of the applicant's household:

(i) Current income prospects, taking into account seasonal variations in income;

(ii) Unreimbursed medical expenses and medical insurance premiums;

(iii) Fixed debts and obligations;

(iv) Expenses such as dependent care, transportation, clothing and equipment expenses necessary for employment, job training, or educational activities in preparation for employment,;

(v) Non-medical expenses associated with age or disability;

(vi) Current taxes²; or

(vii) Other significant factors that the recipient has determined affect the applicant's ability to afford legal assistance.³

(b) In the event that a recipient determines that an applicant is financially eligible pursuant to this section and is provided legal assistance, the recipient shall document the basis for the financial eligibility determination. The recipient shall keep such records as may be necessary to inform the Corporation of the specific facts and factors relied on to make such determination.

§1611.6 Representation of Groups

(a) A recipient may provide legal assistance to a group, corporation, association or other entity if it provides information showing that it lacks, and has no practical means of obtaining funds to retain private counsel and either:

(1) The group, or for a non-membership group, the organizing or operating body of the group, is primarily composed of individuals, who would be financially eligible for legal assistance under the Act; or

² We prefer that current taxes be deducted at the outset from an applicant's gross income in determining whether they meet either the 125% of poverty or the 200% of poverty line. If the Board does not support our position on this issue, we agree that "current taxes" should be stated as a separate exception. We also believe that the preamble to the rule should include examples of the kinds of current taxes that should be considered, including local State and federal income tax withholding, Social Security and Medicare taxes.

³ We believe that some basic level of utilities should be included as a "fixed debt or obligation" similar to rent or mortgage payments, which in some instances would include utilities. If the Board does not agree with this position, then we would ask that the preamble note that unusually high utility costs should be considered as a significant factor that the recipient could determine would affect the applicant's ability to afford legal assistance.

(2) The group has as a principal activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance and the legal assistance sought relates to such activity.

(b)(1) In order to make a determination that a group, corporation, association or other entity is eligible for legal services as required by paragraph (a) of this section, a recipient shall consider the resources available to the group, such as the group's income and income prospects, assets and obligations.

(2) A recipient shall collect information that reasonably demonstrates that the group, corporation, association or other entity meets the eligibility criteria set forth herein.

(c) The eligibility requirements set forth herein apply only to legal assistance supported by funds from LSC, provided that any legal assistance provided by a recipient, regardless of the source of funds supporting the assistance, must be otherwise permissible under applicable law and regulation.

§1611.7 Manner of Determining Financial Eligibility

(a)(1) In making financial eligibility determinations regarding individual applicants, a recipient shall make reasonable inquiry regarding sources of the applicant's income, income prospects and assets. The recipient shall record income and asset information in the manner specified in this section.

(2) In making financial eligibility determinations regarding groups seeking LSC-supported legal assistance, a recipient shall follow the requirements set forth in §1611.6(b) of this Part.

(b) A recipient shall adopt simple intake forms and procedures to obtain information from applicants and groups to determine financial eligibility in a manner that promotes the development of trust between attorney and client. The forms shall be preserved by the recipient.

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

(d) When one recipient has determined that a client is financially 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 financial eligibility determination. In such cases, the receiving recipient is not required to review or redetermine the client's financial eligibility unless there is a change in financial eligibility status as described in §1611.8 or there is substantial reason to doubt the validity of the original determination, provided that the referring recipient provides and the receiving recipient retains a copy of the intake form documenting the financial eligibility of the client.

§1611.8 Change in Financial Eligibility Status

Deleted: and either:¶

(i) for a group primarily composed of individuals who would be financially eligible for LSC-funded legal assistance under the Act, whether the characteristics of the persons comprising the group are consistent with financial eligibility under the Act; or¶

(ii) for a group having as a primary activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance under the Act whether the characteristics of the persons served by the group are consistent with financial eligibility under the Act and whether the legal assistance sought relates to the primary activity of the group.

(a) If, after making a determination of financial eligibility and accepting a client for service, the recipient becomes aware that a client has become financially ineligible through a change in circumstances, a recipient shall discontinue representation supported with LSC funds 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 responsibility.

(b) If, after making a determination of financial eligibility and accepting a client for service, the recipient later determines that the client is financially ineligible on the basis of later discovered or disclosed information, a recipient shall discontinue representation supported with LSC funds if the discontinuation is not inconsistent with applicable rules of professional responsibility.

Deleted: §1611.9 Retainer Agreements ¶

¶
(a) When a recipient provides extended service to a client, the recipient shall execute a written retainer agreement with the client. The retainer agreement shall be executed when representation commences or as soon thereafter as is practicable. Such retainer agreement must be in a form consistent with the applicable rules of professional responsibility and prevailing practices in the recipient's service area and shall include, at a minimum, a statement identifying the legal problem for which representation is sought, and the nature of the legal services to be provided.¶

¶
(b) No written retainer agreement is required for advice and counsel or brief service provided by the recipient to the client or for legal services provided to the client by a private attorney pursuant to 45 CFR Part 1614.¶

¶
(c) The recipient shall maintain copies of all retainer agreements generated in accordance with this section. ¶
¶