

(3) The results of the consultation as required below.

(b) The recipient shall consult with significant segments of the client community, private attorneys and bar associations, including minority and women's bar associations, in the recipient's service area in the development of its annual plan to provide for the involvement of private attorneys in the provision of legal assistance to eligible clients.

§1614.5 Prohibition of revolving litigation funds.

(a) The Office of Field Services shall not endorse or approve revolving litigation fund systems which systematically encourage the acceptance of fee-generating cases by advancing funds to private attorneys for costs, expenses and/or attorney fees.

(b) This prohibition does not prevent reimbursement or payment of costs and expenses incurred by private attorneys in normal situations in which litigation may result in attorney fees, such as case assignments through a *judicare* or *pro bono* panel.

Dated: May 15, 1984.

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45 CFR Part 1628

Procedures Governing Recipient Fund Balances

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This rule substantially adopts as a Corporation regulation Instruction 83-4: Recipient Fund Balances, published in the *Federal Register* on October 27, 1983, which requires Corporation approval of the disposition of any recipient fund balances that exceed specified limits. Certain technical amendments have been incorporated into this regulation to address this issue more fully. This rule also requires the prior written approval of the Corporation where a recipient seeks to use current year grant funds to liquidate operating fund balance deficits from a preceding period(s).

EFFECTIVE DATE: June 20, 1984.

FOR FURTHER INFORMATION CONTACT: Richard N. Bagenstos, Assistant General Counsel, Office of the General Counsel, (202) 272-4010.

SUPPLEMENTARY INFORMATION: The Legal Services Corporation published in the *Federal Register* a proposed rule concerning recipient fund balances on March 23, 1984 (49 FR 10953). Interested parties were given 30 days, until April

23, 1984, to submit comments on the proposed rule. Twenty-seven (27) comments, 18 of which were from programs, and 2 from support centers, were received and thoroughly considered. The rule as published is substantially similar to Corporation Instruction 83-4, Recipient Fund Balances, published in the *Federal Register* on October 27, 1983, (49 FR 49710), with the exception that the proposed rule contained a section, not previously published, concerning deficits.

Severe criticism has been leveled at Corporation management because of the accumulation by some recipients of significant fund balances. Specifically, the GAO in its *Review of Legal Services Corporation Activities Concerning Program Evaluation and Expansion*, issued on August 28, 1980 stated: "We recommend that the President of the Legal Services Corporation require regional offices to closely monitor the expenditures of funds by grantees to minimize year end fund carryovers and adjust subsequent year funding of grantees with excess fund balances."

Corporate directives, thereafter, were issued by internal memoranda dated December 18, 1980, and March 18, 1982, formalizing and expanding upon existing policies. On October 30, 1982, the Board instructed staff to take appropriate action consistent with its Resolution on Fund Balance Policy. A grant condition was attached to the 1983 refunding grants requiring adherence to the Fund Balance Instruction, 83-1, published in the *Federal Register* for comment on November 29, 1982 (47 FR 53805), and published as a final Instruction on January 5, 1983 (48 FR 560). The Corporation subsequently redrafted the Instruction, which was published in the *Federal Register* on October 27, 1983, as Instruction 83-4: Recipient Fund Balances.

Corporation policy regarding fund balances has remained substantially consistent since the aforementioned memoranda. The regulation continues to define an excess fund balance as a total fund balance amount in excess of 10% of the recipient's annual funding level.

Section 1628.2(a)(3) has been modified in response to comments received to clarify that the Corporation seeks to regulate by this section only those funds which are provided by the Corporation or flow from funds provided by the Corporation.

Minor changes have been made in §1628.3(a) to indicate that the waiver of the 10% excess fund balance and repayment plan shall be determined by the Director, Office of Field Services, as

the Corporation employee empowered to grant such a waiver.

Section 1628.3(d) has been rewritten to indicate that "attorney fees" mentioned in that section mean direct payments to attorneys by programs under their PAI program. Further, the waiver language with reference to programs with compensated private bar components has been clarified, without substantive change.

Sections 1628.4 (a) and (b) have been changed to indicate that the appropriate Corporation employee to whom a fund balance statement and application for a waiver is to be submitted is the Director, Office of Field Services.

Section 1628.4(b)(5) has been modified in response to comments by the addition of illustrative examples to provide guidance regarding the meaning of the term "extraordinary circumstances."

Section 1628.4(d) has been rewritten without substantive change to conform the language of this subsection with the section on Private Attorney Involvement. Subsection 1628.4(d)(3) has been added in response to comments which sought clarification of the criteria that the Corporation would consider when reviewing a request for a waiver submitted pursuant to this regulation.

The final section of this regulation includes explicit language with regard to deficit fund balances, a subject which was not addressed in the Instruction. Deficits may constitute a serious violation of the recipient's responsibility to safeguard and manage Corporation funds, often indicative of serious problems which can have a long-lasting impact on program operations and clients.

The heading of § 1628.5 has been changed from "Operating Deficits" to "Fund Balance Deficits" to clarify that the section deals with fund balance deficits.

A recipient is permitted to reduce a fund balance deficit incurred in one grant period by fund balance amounts qualifying under the regulation for carryover into a subsequent grant period(s), except those amounts which were carried over by a recipient under a specific waiver from the Corporation. A recipient may not, however unilaterally offset that deficit against funds awarded by LSC for a succeeding period. Legal Services Corporation awards grants for a twelve month period. These grants are not intended nor should they be expected to absorb the burden of prior costs. The Corporation, therefore, will require specific prior written approval for the carryover of those costs.

Section 168.5(a) is modified in the final rule in response to comments to

clarify the fact that the regulation deals with deficit fund balances in LSC funds and the use of LCS grant awards. A similar modification in the language of 1628.5(b) and 1628.5(d) was made for the same reason.

Section 1628.5(c) was modified to remove a redundant reference to the Standard Operating Procedure for Questioned Costs. Because the expenditure of current year LSC funds to liquidate a deficit from prior year without approval of the Corporation will be identified as a questioned cost, no further reference to such procedure is necessary.

In Section 1628.5(d), a technical amendment was made, changing "Board of Directors" to "governing body" to conform the section with Part 1607 of the regulations.

The Corporation is issuing the regulation pursuant to its mandate to ensure the delivery of high quality legal services in an effective and economical manner. Recovered fund balance amounts will be reprogrammed for the direct provision of legal services to eligible clients.

List of Subjects in 45 CFR Part 1628

Legal services, Fund balances.

For the reasons set out above a new 45 CFR Part 1628 is added as follows:

PART 1628—RECIPIENT FUND BALANCES

Sec.

- 1628.1 Purpose.
- 1628.2 Definitions.
- 1628.3 Policy.
- 1628.4 Procedure.
- 1628.5 Fund balance deficits.

Authority: Sections 1006(b)(1)(A), 1007(a)(3); 42 U.S.C. 2996e(b)(1)(A), 42 U.S.C. 2996i(a)(3).

§ 1628.1 Purpose.

(a) This part is designed to ensure the timely allocation of Legal Services Corporation (LSC) funds for the effective and economical provision of high quality legal assistance to eligible clients. To that end, recipients will be permitted to maintain and re-program from year to year fund balances of no more than 10% of their annualized LSC support.

(b) A waiver of this policy up to a maximum of 25% of the recipient's annualized grant amount may be obtained under certain conditions as described in § 1628.3(d). Funds carried over in excess of 10% or above the level permitted by a specific waiver will be recovered as set forth in Section 1628.3(a).

§ 1628.2 Definitions.

(a) LSC "support" for the reporting period shall be defined as the sum of: (1) The annualized LSC grant award(s); (2) any additional income derived from an LSC grant (interest, rents, etc.); and (3) that proportion of any reimbursement or recovery of direct payment to attorneys, proceeds from the sale of assets, or other compensation or income attributable to any Corporation grant.

(b) The LSC "fund balance amount" shall be determined solely by reference to the recipient's annual audit. (The fund balance reported in the recipient's annual audit is subject to review and approval by the Corporation's Audit Division. Noncompliance with provisions of the Corporation's *Audit and Accounting Guide for Recipients and Auditors* may result in an increase or decrease in the fund balance as reported in the audit.)

(c) The "fund balance percentage" shall be determined by expressing the fund balance amount as a percentage of the recipient's LSC support for the reporting period.

(d) "Recipient" as used in this Part, means any recipient as defined in section 1002(6) of the LSC Act and any grantee or contractor receiving funds from the Corporation under section 1006(a)(1) or 1006(a)(3) of the Act.

§ 1628.3 Policy.

(a) In the absence of a waiver from the Director, Office of Field Services, any fund balance amount in excess of 10% of LSC support shall be repaid to the Corporation in a lump sum or by pro rata deductions from the recipient's grant checks for a specific number of months. The Office of Field Services shall determine which of the specified methods of repayment is reasonable and appropriate in each case after consultation with the recipient.

(b) After the Corporation's receipt and review of the recipient's annual audit, the Corporation shall provide written notice to the recipient of the fund balance amount due and payable to the Corporation as well as the method for repayment 30 days prior to the effective date for repayment either to occur or to commence in accordance with § 1628.3(a).

(c) In no way shall any such reduction and/or deduction in LSC support be construed to affect permanently the annualized funding level of the recipient, nor shall any such reduction and/or deduction in LSC support be considered to be a termination or denial of refunding under 45 CFR 1606 and 1625 respectively.

(d) A waiver of the 10% ceiling may be granted at the discretion of the

Corporation in extraordinary circumstances; such a waiver may be granted by the Corporation to extend the ceiling for fund balance amounts established under this regulation to a maximum of 25% of LSC support. Further, in addition to the established 10% ceiling, the Corporation shall grant a waiver up to 25% of direct payment to attorneys in the last audit to recipients who operate compensated private bar programs or components to be utilized exclusively to fund a cash reserve or encumbrance system for direct payment to attorneys. Such recipients must submit a timely written request to the Office of Field Services to obtain this waiver. However, under no circumstances will a recipient be allowed to retain a fund balance in excess of 25% of support.

(e) All one-time or special purpose grants awarded by the Corporation shall have an effective date and termination date. Such grants are not subject to this fund balance policy. Revenue and expenses relating to such grants must be reflected separately in the audit report submitted to the Corporation. This may be done by establishing a separate fund or by providing a separate supplemental schedule of revenue and expenses related to such grants as a part of the audit report. No funds provided under a one-time or special purpose grant may be expended subsequent to the termination date of the grant without the prior written approval of the Corporation. All unexpended funds under such grants shall be returned to the Corporation.

§ 1628.4 Procedure.

(a) Any recipient whose audited fund balance exceeds the ceiling set forth in Section 1628.1 shall submit to the Director, Office of Field Services, within 120 days after the close of the recipient's fiscal year, a statement of the fund balance which occurred according to the annual audit required by section 1009(c)(1) of the Legal Services Corporation Act, as amended. The funds will be recovered as set forth in § 1628.3, unless excluded by a specific waiver.

(b) The recipient may, within 120 days after the close of its fiscal year, apply to the Director, Office of Field Services for a waiver of the 10% ceiling. Such application must specify:

- (1) The fund balance amount according to the recipient's annual audit;
- (2) The reasons such fund balance has been attained;
- (3) The recipient's plan for the disposition or reserve of such fund balance amount within the current grant period;

(4) The amount of fund balance projected to be carried forward at the close of the recipient's then current fiscal year; and,

(5) The extraordinary circumstances justifying the retention of the fund balance which include windfall receipts for which a recipient cannot reasonably plan, such as proceeds from the sale of property, receipt of direct payment to attorneys, and collection of insurance proceeds.

(c) Excess fund balance amounts shall not be expended by the recipient prior to approval of the waiver application by the Corporation.

(d) The decision of the Corporation regarding the granting of a waiver (other than the automatically granted waiver for a cash reserve for compensated bar programs) shall be guided by the statutory mandate requiring the recipient to provide high quality legal services in an effective and economical manner. In addition, the Corporation shall give special consideration to the following factors in reviewing a waiver request submitted pursuant to this regulation:

(1) Emergencies, unusual occurrences, or other extraordinary circumstances giving rise to the existence of a fund balance in excess of 10%, and the special needs of clients, and

(2) The recipient's financial management record.

(e) Excess fund balance amounts approved for expenditure must be separately reported in the current fiscal year audit. This may be done by establishing a separate fund or by providing a separate supplemental schedule as part of the audit report.

§ 1628.5 Fund balance deficits.

(a) Sound financial management practices such as those established in LSC's "Fundamental Criteria of an Accounting and Financial Reporting System," should preclude deficit spending. Use of current year LSC grant funds to liquidate deficit balances in the LSC fund from a preceding period(s) requires the prior written approval of the Corporation.

(b) The recipient may, within 120 days of the close of its fiscal year, apply to the Corporation for approval of the costs associated with the liquidation of the deficit balances in the LSC fund.

(c) In the absence of approval by the Corporation, expenditures of current year LSC grant funds to liquidate a deficit from a prior year shall be identified as questioned costs.

(d) The recipient's request must specify the same information relative to the deficit LSC fund balance as that set forth in sections 1628.4(b) (1), (2), (3),

and (4). Additionally, the recipient must develop and submit a plan approved by its governing body describing the measures which will be implemented to prevent a recurrence of a deficit balance in the LSC fund. The Corporation reserves the right to require changes in the submitted plan.

(e) The decision of the Corporation regarding acceptance of these deficit-related costs shall be guided by the statutory mandate requiring the recipient to provide high quality legal services performed in an effective and economical manner. Special consideration will be given for emergencies, unusual occurrences, or other extraordinary circumstances giving rise to this situation.

Dated: May 15, 1984.

Alan R. Swendiman,
General Counsel.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 63

[CC Docket No. 84-28; FCC 84-198]

Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for Its Cable Television and Other Non-Common Carrier Services Outside Its Telephone Service-Area

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Report and Order eliminates the Section 214 filing requirement for certain non-common carrier offerings. This action decreases unnecessary regulatory burdens and increases competition.

DATE: Effective June 25, 1984.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Warren Lavey, Common Carrier Bureau, (202) 632-6910.

List of Subjects in 47 CFR Part 63

Cable television, Communications common carriers, Extension of lines.

Report and Order; Proceeding Terminated

In the matter of blanket Section 214 authorization for provision by a telephone common carrier of lines for its Cable Television and other Non-Common Carrier Services outside its telephone service area: CC Docket No. 84-28.

Adopted: May 10, 1984.
Released: May 17, 1984.

By the Commission.

I. Introduction

1. The Notice of Proposed Rulemaking in this proceeding¹ discussed the costs and benefits of having common carriers or their affiliates file applications for certain lines under section 214 of the Communications Act of 1934, 47 U.S.C. 214. Broadly interpreted, this section requires common carriers and their affiliates to obtain Commission authorization prior to construction, acquisition, or operation of any line. The *Notice* tentatively concluded that separate, individual applications under section 214 are not in the public interest for lines provided by a telephone common carrier or its affiliate outside of the carrier's telephone service area which are (a) channels used for its own cable television service, or (b) used to provide non-common carrier services. The Commission proposed to eliminate the section 214 filing requirement for these lines.

2. Fifteen parties filed comments on the proposal.² Thirteen parties, including the U.S. Department of Justice and the National Telecommunications and Information Administration, support the proposal. These parties view section 214 applications for these lines as unnecessary regulatory burdens which can impair competition, delay service to consumers, and increase costs. One other party, National Cable Television Association, does not oppose the proposal, recognizing that the dangers of exclusionary conduct and cross-subsidization are low when a telephone company operates a cable system outside its telephone service area. Finally, California Cable Television Association would support the proposal only if the commission adopts structural

¹49 FR 3213 (January 26, 1984).

²Parties filing comments are the U.S. Department of Justice; National Telecommunications and Information Administration; United States Telephone Association; Rural Telephone Coalition; National Cable Television Association; California Cable Television Association; Centel Corp.; Michigan Public Service Commission; The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Companies, The Diamond State Telephone Company, Nevada Bell, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, Pacific Bell, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, and Southwestern Bell Telephone Company; The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company; Telephone and Data Systems; Schaffer Telephone Company; CP National Corp.; Centery Telephone Enterprises, Inc., and Continental Telecom Inc. Reply comments were filed by the U.S. Department of Justice, various Bell Operating Companies, Rural Telephone Coalition, National Cable Television Association, Telephone and Data Systems, and California Cable Television Association.