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7050-01-P

LEGAL SERVICES CORPORATION

45 CFR Part 1611

Financial Eligibility
AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: The Legal Services Corporation ("LSC" or "Corporation") is amending its regulations relating to financial eligibility for LSC-funded legal services and client retainer agreements. The revisions are intended to reorganize the regulation to make it easier to read and follow; simplify and streamline the requirements of the rule to ease administrative burdens faced by LSC recipients in implementing the regulation and to aid LSC in enforcement of the regulation; and to clarify the focus of the regulation on the financial eligibility of applicants for LSC-funded legal services.

DATES: This final rule is effective [insert date 30 days from date of publication].

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SUPPLEMENTARY INFORMATION: Section 1007(a) of the Legal Services Corporation Act requires LSC to establish guidelines, including setting maximum income levels, for the determination of applicants' financial eligibility for LSC-funded legal assistance. Part 1611 implements this provision, setting forth the requirements relating to determination and documentation of client financial eligibility. Part 1611 also sets forth requirements related to client retainer agreements.

Procedural Background

On June 30, 2001, LSC initiated a Negotiated Rulemaking and appointed a Working Group comprised of representatives of LSC (including the Office of Inspector General), the National Legal Aid and Defenders Association, the Center for Law and Social Policy, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants and a number of individual LSC recipient programs. The Negotiated Rulemaking Working Group met three times throughout 2002 and developed a Draft Notice of Proposed Rulemaking (NPRM) which was the basis for the NPRM published by LSC on November 22, 2002 proposing significant revisions to Part 1611 (67 FR 70376).[1] Futher action on the rulemaking was suspended, in deference to a request by Representative James Sensenbrenner, Chairman of the

[1] For additional discussion of the Negotiated Rulemaking Working Group, see 67 FR 70376 (November 22, 2002).

U.S. House of Representatives Judiciary Committee, that LSC suspend action on the rulemaking pending the confirmation of new LSC Board of Directors members appointed by President Bush.

After the confirmation of nine new board members and the appointment of a new LSC President, the reconstituted Operations and Regulations Committee resumed consideration of the Part 1611 rulemaking in early 2004. At the meeting of the full Board of Directors on April 30, 2005, the Board approved the republication of a revised NPRM for public comment. That NPRM was published on May 24, 2005 (70 FR 29695).

LSC received thirteen (13) comments on the NPRM, including nine comments from individual LSC grant recipients, one comment from a senior attorney with a recipient commenting in his personal capacity, one comment from a member of the public, and comments from the Center for Law and Social Policy on behalf of the National Legal Aid and Defenders Association, and the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants. With minor exceptions (discussed in greater detail below), the commenters strongly supported the proposed revisions. Upon receipt of the comments, LSC prepared a Draft Final Rule discussing the comments and making permanent the proposed revisions. The Draft Final Rule was considered by the Operations and Regulations Committee of the Board of Directors at its meeting of July 28, 2005, and the Final Rule was adopted by the Board of Directors at its meeting of July 30, 2005.

Revisions to Part 1611

While specific revisions are discussed in greater detail in the Section-by-Section analysis below, it should be noted that the revisions reflect several overall goals of the original Negotiated Rulemaking Working Group: reorganization of the regulation to make it easier to read and follow; simplification and streamlining of the requirements of the rule to ease administrative burdens faced by LSC recipients in implementing the regulation, facilitate compliance and aid LSC in enforcement of the regulation; and clarification of the focus of the regulation on the financial eligibility of applicants for LSC-funded legal services as an issue separate from decisions on whether to accept a particular client for service. In particular, LSC is significantly reorganizing and simplifing the sections of the rule which set forth the various requirements relating to establishment of recipient annual income and asset ceilings, authorized exceptions and determinations of eligibility. These changes are intended to clarify the regulation and include substantive changes to make intake simpler and less burdensome and render basic financial eligibility determinations easier for recipients to make. LSC is also moving the existing provisions on group representation, with some amendment, to a separate section of the regulation. Finally, LSC is simplifying and clarifying the retainer agreement requirement.

Title of Part 1611

LSC is changing the title of Part 1611 from "Eligibility" to "Financial Eligibility and Retainer Agreements." This change is intended, first, to make clear that with respect to individuals seeking LSC-funded legal assistance, the standards of this part deal only with the financial eligibility of such persons. LSC believes this change will help clarify that a finding of

financial eligibility under Part 1611 does not create an entitlement to service. Rather, financial eligibility is merely a threshold question and the issue of whether any otherwise eligible applicant will be provided with legal assistance is a matter for the recipient to determine with reference to its priorities and resources. In addition, this part does not address eligibility based on citizenship or alienage status; those eligibility requirements are set forth in Part 1626 of LSC's regulations, Restrictions on Legal Assistance to Aliens. Finally, while LSC received one comment suggesting that because this Part contains LSC's requirements pertaining to when and how recipients must execute retainer agreements with clients (a subject not directly related to financial eligibility determinations), that the title of this Part should refer to retainer agreements. While the requirements for retainer agreements are included in this Part, it primarily adresses financial eligibility and LSC disagrees that retainer agreements should be specifically included in the title of this Part.

Section-by-Section Analysis

Section 1611.1 – Purpose

LSC is revising this section to make clear that the standards of this part concern only the financial eligibility of persons seeking LSC-funded legal assistance and that a finding of financial eligibility under Part 1611 does not create an entitlement to service. In addition, LSC is removing the language in the current regulation referring to giving preferences to "those least able to obtain legal assistance." Although the original LSC Act contained language indicating that recipients should provide preferences in service to the poorest among applicants, that language was deleted when the Act was reauthorized in 1977 and has remained out of the legislation ever since. Moreover, section 504(a)(9) of the FY 1996 appropriations act, Pub. L. 104-134 (incorporated by reference in the current appropriations act and implemented by regulation at 45 CFR Part 1620) provides that recipients are to make service determinations in accordance with written priorities, which take into account factors other than the relative poverty among applicants. Thus, as there is no statutory basis for a preference for those least able to afford assistance and because LSC believes that the regulation should focus on financial eligibility determinations without reference to issues relating to determinations by a recipient to provide services to a particular applicant, LSC has determined that such language should be removed from the regulation. LSC is also adding language specifying that this Part also sets forth financial standards for groups seeking legal assistance supported by LSC funds. Finally, LSC is adding a reference to the retainer agreement requirement in the purpose section to provide a notice at the beginning of the regulation that this subject is included in Part 1611. LSC received several comments specifically supporting and no comments objecting to these changes. LSC adopts the revisions as proposed.

Section 1611.2 – Definitions

LSC is adding definitions for several terms and amending the definitions for each of the existing terms currently defined in the regulation. LSC believes that the new definitions and the amended definitions will help to make the regulation more easily comprehensible.

Section 1611.2(a) – Advice and Counsel

LSC is adding a definition of the term "advice and counsel" as that term appears in proposed section 1611.9, Retainer Agreements. Under the new definition, "advice and counsel" is defined as limited legal assistance that involves the review of information relevant to the client's legal problem(s) and counseling the client on the relevant law or action(s) to take to address the legal problem(s). Advice and counsel does not encompass drafting of documents or making third-party contacts on behalf of the client. Thus, for example, advising a client of what notice a landlord is required to provide to a tenant before evicting the tenant would fall under "advice and counsel," but making a phone call to a landlord to prevent the landlord from evicting a tenant would not be considered "advice and counsel." Several commenters specifically supported this proposed definition, and no commenters opposed the proposed definition. Accordingly, LSC adopts the definition as proposed.

Three of the commenters who specifically supported this proposed definition did express a concern, however, about the statement in the preamble to the NPRM in which LSC stated that LSC anticipates that advice and counsel will generally be characterized by a one-time or very short term relationship between the attorney and the client. These commenters noted that there are any number of situations in which a recipient attorney has to do some research in order to properly advise a client or in which the attorney provides advice and counsel to a client on a limited number of occasions, but over a somewhat extended period of time. These commenters suggested deleting any reference to an anticipated time period in relation to the intended meaning of "advice and counsel."

The use of the word "generally" in the sentence the commenters objected to was intended to convey that LSC is aware that there are circumstances in which a case would qualify as "advice and counsel" notwithstanding that the advice and counsel may be provided over a somewhat extended time period. Nonetheless, it is the case that many, if not most, advice and counsel cases involve a short-term relationship between the attorney and the client. Even if the attorney must do some research prior to providing advice, LSC does not expect that the need to do research will create a relationship which extends for a significant period of time in most cases. Indeed, part of the justification for exempting advice and counsel cases from the retainer agreement requirement has been the fact that such relationships are of generally short duration, such that requiring the recipient to ensure an executed retainer agreement is obtained may take longer than the time it takes for the attorney to provide the advice and counsel to the client. If, instead, it was the case that advice and counsel cases typically last for a long time, the opportunity to obtain retainer agreements would not be lacking. Thus, LSC continues to anticipate that in most cases "advice and counsel" will be characterized by a one-time or short term relationship between the attorney and the client, but recognizes that this may not always be

the case. Whether a particular case meets the definition of "advice and counsel" or not will continue to be determined on a case-by-case basis, considering the facts and circumstances.

Section 1611.2(b) - Applicable Rules of Professional Responsibility

LSC is adding a definition of the term "applicable rules of professional responsibility" as that term appears in proposed sections 1611.8, Change in Financial Eligibility Status and 1611.9, Retainer Agreements. This definition is intended to make clear that the references in the regulation refer to the rules of ethics and professional responsibility applicable to attorneys in the jursidiction where the recipient either provides legal services or maintains its records. LSC received no comments objecting to this definition and adopts the definition as proposed.

Section 1611.2(c) – Applicant

Consistent with the intention to keep the focus of the regulation on the standards and criteria for determining the financial eligibility of persons seeking legal assistance supported with LSC funds, LSC has decided to use the term "applicant" throughout the regulation to emphasize the distinction between applicants, clients, and persons seeking or receiving assistance supported by other than LSC funds. Accordingly, LSC is adding a definition of applicant providing that an applicant is an individual seeking legal assistance supported with LSC funds. Groups, corporations and associations are specifically excluded from this definition, as the eligibility of groups is addressed wholly within section 1611.6.

Recipients currently may provide legal assistance without regard to a person's financial eligibility under Part 1611 when the assistance is supported wholly by non-LSC funds. LSC is not changing this (in fact, this principle is restated in section 1611.4(a)) and believes that the use of the term applicant as adopted herein will help to clarify the application of the rule.

LSC received no comments objecting to these changes and adopts the revisions as proposed.

Section 1611.2(d) - Assets

LSC is adding a definition of the term assets to the regulation. The new definition, "cash or other resources that are readily convertible to cash, which are currently and actually available to the applicant," is intended to provide some guidance to recipients as to what is meant by the term assets, yet provide considerable latitude to recipients in developing a description of assets that addresses local concerns and conditions. The key concepts intended in this definition are (1) ready convertibility to cash; and (2) availability of the resource to the applicant.

Although the term is not defined in the regulation, current section 1611.6(c) states that "assets considered shall include all liquid and non-liquid assets. . . ." The intent of this requirement is that recipients are supposed to consider all assets upon which the applicant could draw in obtaining private legal assistance. While there was no intent to change the underlying requirement, in discussing the issues of assets and asset ceilings in the Working Group it became

apparent that the terms "liquid" and "non-liquid" were obscuring understanding of the regulation. To some, the term "non-liquid" implied something not readily convertible to cash, while to others the term implied an asset that was simply something other than cash, without regard to the ease of converting the asset to cash. Thus, the Working Group agreed that the terms "liquid" and "non-liquid" should be eliminated and that the regulation should focus instead on the ready convertibility of the asset to cash.

The other key concept in the definition of asset is the availability of the resource to the applicant. Although the current regulation notes that the recipient's asset guidelines "shall take into account impediments to an individual's access to assets of the family unit or household," the Working Group was of the opinion that this principle could be more clearly articulated. LSC believes that the proposed language accomplishes that purpose.

LSC received numerous comments specifically supporting the proposed definition of assets. LSC, however, also received one comment expressing concern that defining assets as resources "readily convertible to cash" could preclude recipients from deeming all non-primary residence real estate as an asset and require a more lengthy inquiry into the property's ready convertibility to cash. LSC notes at the outset that under the current rules, recipients are already required to "take into account impediments" to access to the resources. Thus, to the extent that the monetary value of a particular applicant's real property is not available to an applicant, recipients should already be taking that inaccessibility into account in reviewing the applicant's resources. Nonetheless, LSC believes that recipients currently have sufficient discretion to establish a rebuttable presumption that an applicant's non-primary residence real property is a resource readily convertible to cash and countable toward the recipient's asset ceiling and also to determine that a particular piece of property is not readily convertible to cash and, as such, should not be considered a resource available to the applicant for the purpose of the asset ceiling. Nothing in the rule being adopted today disturbs that discretion. Accordingly, LSC adopts the definition as proposed.

Section 1611.2(e) – Brief Services

LSC is adding a definition of the term "brief services" as it is used in section 1611.9, Retainer Agreements. LSC notes that brief services is legal assistance characterized primarily by being distinguishable from both extended service and advice and counsel. Under the new definition, brief service is the performance of a discrete task (or tasks) which are not incident to continuous representation in a case but which involve more than the mere provision of advice and counsel. Examples of brief services include activities such as the drafting of documents or personalized assistance with the completion of pleadings being prepared and filed by *pro se* litigants, and making limited third-party contacts on behalf of a client in a short time period.

LSC received two comments specifically supporting the proposed definition. LSC received one comment noting that the proposed definition does not address the relative simplicity or brevity of documents which may be drafted by a recipient within the scope of brief service. This commenter was concerned that the definition was contrary to the Case Service Reporting (CSR) definition of "brief services." This commenter suggested changing the

definition or adding a statement that the definition in the regulation should not apply to the CSR. LSC notes that this definition of "brief services" is specifically intended, while not identical, to be fully consistent with the definition of "brief services" in the CSR. As such, LSC disagrees that the definitions are inconsistent and LSC adopts the definition as proposed.

Section 1611.2(f) - Extended Service

LSC is adding a definition of the term "extended service" as that term is used in section 1611.9, Retainer Agreements. As defined, extended service means legal assistance characterized by the performance of multiple tasks incident to continuous representation in which the recipient undertakes responsibility for protecting or advancing the client's interests beyond advice and counsel or brief services. Examples of extended service include representation of a client in litigation, administrative adjudicative proceeding, alternate dispute resolution proceeding, or extended negotiations with a third party. LSC received no comments objecting to the proposed definition and adopts the definition as proposed.

Section 1611.2(f) – Governmental Program for Low Income Individuals or Families

LSC is changing the term that is used in the regulation from "governmental program for the poor" to "governmental program for low income individuals and families." This change is not intended to create any substantive change in the current definition, but merely reflect preferred nomenclature. LSC received no comments objecting to this change and adopts the revision as proposed.

Section 1611.2(g) – Governmental Program for Persons with Disabilities

LSC is adding a definition of the term "governmental program for persons with disabilities." LSC is including in the authorized exceptions to the annual income ceilings an exception relating to applicants seeking to obtain or maintain govermental benefits for persons with disabilities. Accordingly, it is appropriate to include a definition for this term. The definition, "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," is intended to be similar in structure and application to the definition of the term "governmental program for low income individuals and families." LSC received no comments objecting to the proposed definition and adopts the definition as proposed.

Section 1611.2(h) – Income

LSC is revising the current definition of income to refer to the total cash receipts of a "household," instead of a "family unit" and to make clear that recipients have the discretion to define the term household in any reasonable manner. Currently, the definition of income refers to "family unit," while the phrase "household or family unit" appears in the section on asset ceilings. It appears that there is no difference intended by the use of different terms in these sections and LSC believes that it is appropriate to simplify the regulation to use the same single term in each provision, without creating a substantive change in the meaning of either term.

LSC has decided to use "household" instead of "family unit" because it is a simpler, more understandable term.

As noted above, LSC does not intend the use of the term "household" to have a different meaning from the current term "family unit." Under current guidance from the LSC Office of Legal Affairs, recipients have considerable latitude in defining the term "family unit." Specifically, OLA External Opinion No. EX-2000-1011 states:

> Neither the LSC Act nor the LSC regulations define "family unit" for client eligibility purposes. The Corporation will defer to recipient determinations on this issue, within reason. Recipients may consider living arrangements, familial relationships, legal responsibility, financial responsibility or family unit definitions used by government benefits agencies, amongst other factors, in making such decisions.

LSC intends that this standard would also apply to definitions of "household" and the definition makes this clear.

LSC received one comment specifically supporting the change from "household or family unit" to "household." This commenter suggested that the change would provide "more flexibility" to recipients. LSC notes that the change in the terminology used in the regulation in this instance is not creating any substantive change. As noted above, recipients already have considerable discretion and flexibility to determine the scope of an applicant's household; the change in terminology being adopted with this final rule neither increases nor decreases that discretion and flexibility. LSC adopts the change in terminology as proposed.

Throughout the course of the rulemaking field representatives have suggested deleting the words "before taxes" from the definition of income. Five commenters reiterated this position in comments on the NPRM, while one commenter specifically opposed deleting "before taxes" from the definition of income. Such a change is desirable, the proponents contend, because automatically deducted taxes are not available for an applicant's use and the failure to take current taxes into account in determining income has an adverse impact on the working poor. While it is undoubtedly true that automatically deducted taxes are not available to an applicant, LSC agrees with the other commenter that the definition of income is the appropriate place in the regulation to deal with this issue.

Taking the phrase "before taxes" out of the definition of income would effectively change the meaning of income from gross income to net income after taxes. The term income has meant gross income since the original adoption of the financial eligibility regulation in 1976. See 41 FR 51604, at 51606, November 23, 1976. The maximum income guidelines are based on the Department of Health and Human Services (DHHS) Federal Poverty Guidelines amounts. DHHS' Federal Poverty Guidelines are, by law, based on the Census Bureau's Federal Poverty Thresholds, which are calculated using gross income before taxes. 42 U.S.C. §9902(2); Office of Management and Budget Directive No. 14 (May 1978). Changing the definition of income effectively from gross to net after taxes would introduce two different uses of the term income into the regulations (one use in the income guidelines published annually by LSC in Appendix A to Part 1611 and another use in the text of the regulation). This is problematic in two ways.

First, with respect to the annual income ceiling limits, changing the standard from gross to net income after taxes would arguably exceed LSC's authority to do unilaterally. LSC is required by the LSC Act to set its maximum income guidelines in consultation with the Office of Management and Budget and the Governors of the states. 42 U.S.C. §2996f(a)(2)(A). The annual income ceiling agreed to by LSC, OMB and the Governors (set at 125% of the Federal Poverty Guidelines amounts) was arrived at based on gross income; changing to a net income after taxes standard would effectively increase the annual ceiling amounts beyond what was agreed. LSC is concerned that it could only undertake such an action in consultation with OMB and the Governors, which consultation has not happened.

Second, adopting a net income after taxes standard would, as one commenter noted, increase the upper income limit as well. This would have the effect of further increasing the potential eligible applicant pool. Although LSC believes that the slight increase in the eligible applicant pool which will result from increasing the upper income limit from 187.5% to 200% of the Federal Poverty Guidelines amounts is justifiable (see discussion of section 1611.5, below), LSC is concerned that an additional increase in the eligible applicant pool is not necessary to effectively deal with the practical problem that taxes, indeed, represent funds unavailable to the applicant.

It was suggested in several comments that adopting a net income after taxes standard is preferable because it would be easier for recipients as they would only have to consider "take home pay" in computing income at intake. However, as one commenter noted, take home pay is often not simply pay net of taxes; there are other deductions from gross pay which an applicant could have (e.g., 401(k) deductions, medical savings account deductions, insurance premium deductions, child support, garnishments). In such cases, the recipient would not be able to simply determine that income equaled take home pay, but would have to identify and add amounts for such deductions from gross pay back in when determining the applicant's income. In addition, some, but not all, of such other deductions from pay could qualify as factors under the allowable exceptions to the annual income ceiling amounts. LSC is concerned that this would add confusion in the income determination process, contrary to the intent of this rulemaking.

None of the comments supporting removal of "before taxes" from the definition of income addressed the problems discussed above. Moreover, LSC believes that the practical problem (that taxes, indeed, are funds unavailable to the applicant), is better addressed by treating taxes as a separate factor which can be considered by the recipient in making financial eligibility determinations. (This matter is presented in greater detail in the discussion of section 1611.5, below.) Further, although LSC does not consider defining income as gross income (rather than net after taxes) as presenting any "apparent preference" for non-working applicants, permitting current taxes to be a factor to be considered by the recipient in making financial eligibility determinations eliminates any such apparent preference that may be perceived as existing. Accordingly, LSC declines to remove the words "before taxes" from the definition of income.

In addition, LSC is moving the information on what is encompassed by the term "total cash receipts" into the definition of income. LSC believes that having this information in the definition of income, rather than in a separate definition will make the regulation easier to understand, particularly as the term "total cash receipts" is used only in the definition of income. In incorporating the language on "total cash receipts," LSC is retaining the current definition of the term without any substantive amendment, but reorganizing it to make it easier to understand. Specifically, LSC is separating the definition into two sentences, one of which sets forth those things which are included in total cash receipts and one which sets forth those things which are specifically excluded from the definition of total cash receipts. It is worth noting that the list of items included is not intended to be exhaustive, while the list of items to be excluded is intended to be exhaustive. LSC received no comments objecting to these changes and adopts the revisions as proposed.

Finally, LSC wishes to restate in this preamble guidance on the treatment of Indian trust fund monies in making income determinations. Several provisions of Federal law regulate whether or not income or interests in Indian trusts are taxable or should be considered as resources or income for federal benefits. See 25 U.S.C. §§1407 – 1408; 25 U.S.C. §§117a-117c. Under the terms of those laws, LSC has determined that recipients may disregard up to $2000 per year of funds received by individual Native Americans that are derived from income or interests in Indian trusts from being considered income for the purpose of determining financial eligibility of Native American applicants for service, and that such funds or interests of individual Native Americans in trust or restricted lands should not be considered as a resource for the purpose of LSC financial eligibility. *See* LSC Office of Legal Affairs External Opinion 99-17, August 27, 1999.

As noted in External Opinion 99-17, the exclusion applies only to funds and other interests held *in trust* by the federal government and investment income accrued therefrom. The following have been found to qualify for the exclusion from income in determining eligibility for various government benefits: income from the sale of timber from land held in trust; income derived from farming and ranching operations on reservation land held in trust by the federal government; income derived from rentals, royalties, and sales proceeds from natural resources of land held in trust; sales proceeds from crops grown on land held in trust; and use of land held in trust for grazing purposes. On the other hand, per capita distributions of revenues from gaming activity on tribal trust property are not protected because such funds are not held in trust by the federal government. Thus, such distributions are considered to be income for purposes of determining LSC financial eligibility.

Total Cash Receipts

LSC is deleting the definition of "total cash reciepts," currently at section 1611.2(h), as a separately defined term in the regulation. Rather, LSC has reorganized the information contained in the definition and moved it directly into the definition of "income." As noted above, the only place the term "total cash reciepts" is used is in the defintion of "income" and LSC believes that having a separate definition for "total cash reciepts" is cumbersome and unnecessary. LSC received no comments objecting to this change and adopts the revision as proposed.

Section 1611.3 Financial Eligibility Policies

LSC is creating a new section 1611.3, Financial Eligibility Policies, based on requirements currently found in sections 1611.5(a), 1611.3(a)-(c) and 1611.6. The comments generally supported these revisions, although LSC received a few comments suggesting some changes to what was proposed. LSC adopts the revisions as proposed, with certain amendments, as discussed below.

The new section 1611.3 addresses in one section recipients' responsibilities for adopting and implementing financial eligibility policies. Under the new section, the current requirement that recipients' governing bodies have to adopt policies for determining financial eligibility is retained. However, LSC is changing the current requirement for an annual review of these policies and instead will now require recipients' governing bodies to conduct triennial reviews of policies. The Working Group agreed that an annual review was unnecessary and has tended to result in rather *pro forma* reviews of policies. LSC believes that a triennial review requirement will be sufficient to ensure that financial eligibility policies remain relevant and will encourage a more thorough and thoughtful review when such review is undertaken. The section also adds an express requirement that recipients adopt implementing procedures. While this is already implicit in the current regulation, LSC believes it is preferable for this requirement to be expressly stated. Such implementing procedures may be adopted either by a recipient's governing body or by the recipient's management. LSC received several comments supporting these changes and no comments objecting to them. Accordingly, LSC adopts the revisions as proposed.

Section 1611.3 also contains certain minimum requirements for the content of recipient's financial eligibility policies. Specifically, LSC is requiring that the recipient's financial eligibility policy must:

- specify that only applicants for service determined to be financially eligible under the policy may be further considered for LSC-funded service;
- establish annual income ceilings of no more than 125% of the current DHHS Federal Poverty Guidelines amounts;
- establish asset ceilings; and
- specify that, notwithstanding any other provisions of the regulation or the recipient's financial eligibility policies, in assessing the financial eligibility of an individual known

to be a victim of domestic violence, the recipient shall consider only the income and assets of the applicant and shall not consider any assets jointly held with the abuser.

In establishing income and asset ceilings, the recipient will have to consider the cost of living in the locality; the number of clients who can be served by the resources of recipient; the potentially eligible population at various ceilings; and the availability of other sources of legal assistance. With respect to assets of domestic violence victims jointly held with their abusers, this requirement applies when the applicant has made the recipient aware that he or she is a victim of domestic violence.

In addition, this section permits recipients to adopt financial eligibility policies which provide for authorized exceptions to the annual income ceiling pursuant to section 1611.5 and for waiver of the asset ceiling for an applicant in a particular case under unusual circumstances and when approved by the Executive Director or his/her designee. Finally, LSC will permit recipients to adopt financial eligibility policies which 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 section 1611.4(b).

These provisions are, with two exceptions, based directly on current requirements with a few substantive changes. First among the changes, recipients will no longer be required to routinely submit their asset ceilings to LSC. This requirement appears to serve little or no purpose, as compliance with this requirement has been spotty and LSC has taken no action to obtain the information from recipients which have not automatically submitted it. Moreover, the information collected is not being put to any routine use. In addition, LSC has not had a parallel requirement for the submission of income ceilings. LSC has determined that this requirement can be eliminated without any adverse effect on program compliance with or Corporation enforcement of the regulation. LSC received several comments supporting this change and no comments objecting to it. Accordingly, LSC adopts the revision as proposed.

Another substantive change is that recipients will be permitted to provide in their financial eligibility policies for the exclusion of (in addition to a primary residence, as provided for in the existing regulation) vehicles used for transportation, assets used in producing income (such as a farmer's tractor or a carpenter's tools) and other assets excluded from attachment under State or Federal law from the calculation of assets. In identifying other assets excluded from attachment under State or Federal law, LSC has in mind assets that are excluded from bankruptcy proceedings or other assets that may not be attached for the satisfaction of a debt, etc.

Most of the comments received reiterated the position that field representatives had expressed during the Working Group discussions and in comments to the November 2002 NPRM, that the list of excludable assets should be illustrative, rather than exhaustive. The commenters argue that having an illustrative rather than an exhaustive list will provide recipients with greater flexibility in developing asset policies and note that many recipients already exclude certain other assets. Commenters alternatively suggested some specific assets be added to the list, such as household furnishings, computers, and such assets which are excluded from other governmental benefit programs for which the applicant is eligible. A few comments also

specifically suggested that the exclusion for vehicles should not be limited to vehicles needed for work. One of these commenters noted that the Social Security Administration has recently changed its rules on eligibility for Supplemental Security Income (SSI) to exclude from an SSI applicant's assets one vehicle used for transportation, without specific regard to the particular transportation use (as was previously the case), provided it is not strictly a recreational vehicle such as a dune buggy. *See* 70 FR 6340, at 6342-43 (February 7, 2005).

LSC believes that some of the comments indicate that LSC was not clear in the NPRM about the relationship between the asset ceiling adopted by a recipient and the list of excludable items. Under the current regulation recipients are required to adopt asset ceilings based on the economy and the relative cost of living in the service area. Recipients are also to take into account special needs of the elderly, institutionalized and persons with disabilities, along with the reasonable equity value in work-related equipment used to provide income. Implicit in the requirement is the expectation that the recipient will set its ceiling at a level as to cover the value of such things as household furnishings, clothing and other personal affects of applicant (and members of applicant's households) and other such assets as applicants may reasonably be expected to have without liquidating in the attempt to secure legal assistance. Once the asset ceiling has been set, the recipient is expected to consider all of the applicant's assets against that ceiling, except for the value of a principle residence. The exclusion of a principle residence is intended to ensure that homeowners do not exceed the asset ceiling just on the value of the home.

With the NPRM, LSC proposed to allow recipients to exclude from the asset computation a limited number of additional assets which would be likely to cause an applicant to exceed the applicable asset ceiling without liquidation of that or other significant household assets. As such, LSC continues to prefer to retain the approach in the current regulation in which the list of excludable assets is set forth *in toto*. LSC believes that this approach emphasizes the policy that most assets are to be considered and maintains a basic level of consistency nationally with respect to this issue. LSC continues to expect that recipients will set asset ceilings and asset ceiling waiver policies so as to permit applicants to have reasonable amounts of assets which will not count against them in eligibility determinations and believes that the new language does afford recipients some additional flexibility in developing asset ceilings, consistent with the policy articulated above particularly in light of the amendment to the asset ceiling waiver standard discussed below.

Turning to comments on the specific proposed excludable assets, LSC agrees that it is neither necessary nor desirable to restrict the exclusion for vehicles to those used for work only. There are many situations in which a vehicle is an applicant's only reliable, accessible method of transportation for vital life activities other than work, such as education and training activities, reaching medical appointments, grocery shopping, transporting children to school or activities, etc. As such, it is reasonable to consider such vehicles as among the significant assets that a recipient should be able to own and not have counted towards the applicant's applicable asset ceiling. Accordingly, LSC is amending the language in proposed 1611.2(d)(1) which read "vehicles required for work" and adopting instead the language "vehicles required for transportation." Under this formulation, the value of vehicles which are not used for

transportation, such as vehicles used purely for recreational activities (e.g., dune buggies, golf carts, go-karts, and the like) would have to be included in determining whether an applicant's assets exceed the recipient's applicable asset ceiling.

LSC declines, however, to expand the list to include the exclusion of any assets excluded under benefits programs for low income persons for which the applicant is eligible. There are myriad benefit programs with a widely varying range of excludable assets. Some programs have relatively low asset ceilings, but exclude more assets from the calculation, while other programs exclude fewer assets, but have higher asset ceilings. If LSC were to include all assets excludable under all benefits program for low-income individuals, the relative national consistency which LSC believes is important would be impeded. As noted above, LSC believes that the revised language does afford recipients sufficient additional flexibility in developing asset ceiling policies.

As noted above, LSC is changing the asset ceiling waiver standard slightly. The current regulation permits waiver in "unusual or extremely meritorious situations;" the new rule permits waiver in "unusual circumstances." The Working Group determined that the current language is unnecessarily stringent and that it is unclear what the difference is intended to be between "unusual" and "extremely meritorious." It was suggested in the Working Group that the standard should be "where appropriate." LSC, however, felt that the regulation should continue to reflect the policy that waivers of the asset ceilings should only be granted sparingly and not as a matter of course. The Working Group agreed that the revised language accomplishes this goal, while providing some additional appropriate discretion to recipients. In addition, where the current rule requires all waiver decisions to be made by the Executive Director, LSC proposes to permit those decisions to be made by the Executive Director or his/her designee. LSC believes it is important that a person in significant authority be involved in making asset ceiling waiver decisions, but recognizes that, especially as more recipients have consolidated and now serve larger areas, it is important for recipients to have the discretion to delegate certain authority to regional or branch office managers or directors to increase administrative efficiency. LSC received several comments supporting this change and no comments objecting to it. Accordingly, LSC adopts the revision as proposed.

The first totally new element is the language regarding victims of domestic violence. This new language implements LSC's FY 1998 appropriations law. Specifically, section 506 of that act provides:

> In establishing the income or assets of an individual who is a victim of domestic violence, under section 1007(a)(2) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(2)), to determine if the individual is eligible for legal assistance, a recipient described in such section shall consider only the assets and income of the individual and shall not include any jointly held assets.

Pub. L. 105-119, 111 Stat. 2440 (November 26, 1997). Although this law has been in effect since 1997, it has never been formally incorporated into Part 1611. Nevertheless, this provision of law applies regardless of whether it appears in the regulation. However, incorporating this

language into the regulation is appropriate, particularly in light of the goal of this rulemaking to clarify the requirements relating to financial eligibility determinations.[2]

LSC received one comment asking whether this proposal means that the financial eligibility of an applicant who is the victim of domestic violence is to be determined solely on the basis of the applicant's income and assets, without regard to the income and assets of other members of the household (beyond the perpetrator of the domestic violence). LSC intended that the income of the perpetrator and assets jointly held by the applicant with the perpetrator must be disregarded in assessing the financial eligibility of the applicant, but that income and assets not jointly held with the perpetrator of other members of the household (as defined by the recipient) would have to be considered in the financial eligibility assessment. LSC acknowledges that the language of the statute (and LSC's originally proposed implementation thereof) could be read so as to suggest that only the applicant's individual income and assets may be counted. However, LSC believes that such a reading would require a substantive change to the financial eligibility requirements that Congress did not intend.

In 1998 the regulation permitted recipients to take into account an applicant's ability to access certain assets (including assets of perpetrators of domestic violence) and permitted recipients to consider the applicant's lack of access to the perpetrator's income as an "other significant factor related to the inability to afford legal assistance." 45 CFR §§1611.6(d); 1611.5(b)(1)(E). However, in some cases, the victim's household income including the income of the perpetrator was above the upper income limit, such that the recipient was not able to even apply the "significant other factors" factor to make a determination of eligibility and in some cases there was a problem related to the extent to which the victim could access household assets over which the perpetrator had joint control. Thus, the practical problem addressed by section 506 is that in many cases a victim of domestic violence cannot draw upon the income or assets of the perpetrator (including jointly held assets) as a source of funds with which to obtain private legal assistance.

As the report language accompanying Pub. L. 105-119 notes, Congress was "aware that the current statute and regulations . . . already provide for such determinations to be made" but "given concerns regarding access to the legal system for victims of domestic violence, the conferees have included this provision to provide greater clarity regarding this matter." H. Rpt. 105-405, p. 186. This indicates that Congress did not intend to require significant changes to LSC's regulations on financial eligibility, but rather only that Congress, in adopting section 506, wanted to ensure that the income and assets of the perpetrator (which are generally under the control of the perpetrator and which the victim cannot readily access) not render the victim financially ineligible for legal assistance. As the regulation did not then provide for disregarding the income and assets of other members of the victim's household not jointly held with the perpetrator in the assessment of the victim's financial eligibility, LSC does not believe Congress

[2] This point is demonstrated by the fact that LSC received one comment specifically supporting the implementation of section 506 into Part 1611 on the basis that the new language in 1611 would provide recipients with enhanced ability to provide legal assistance to victims of domestic violence. Rather, the incorporation of this statutory mandate into the regulation at this time does not create any substantive change in the authority and responsibility recipients have had with respect to this issue since 1997.

was attempting to change the general requirement that LSC consider the income and assets of other members of the victim's household in making financial eligibility determinations as long as they are available to the victim.

In light of the foregoing, LSC is amending section 1611.3(e) to make this clearer by revising it to read:

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

LSC also received a comment requesting clarification of whether the special rule applies in all cases involving a victim of domestic violence or only in cases in which the request for assistance is related to alleviating the domestic violence or involves the perpetrator as an adverse party. Neither the statute (nor the accompanying report language) specify that the request for legal assistance must relate to alleviating the domestic violence or require the perpetrator to be an adverse party. As such, as noted above, the special rule applies at any time when the applicant has made the recipient aware that he or she is a victim of domestic violence. LSC does not find it likely that applicants who are victims of domestic violence identify themselves as such in seeking legal assistance in matters wholly unrelated to the domestic violence. However, if an applicant seeking assistance with an unrelated matter self-identifies as a victim, LSC believes that this would likely be done as a way of explaining why certain income and/or assets are unavailable for use in obtaining private legal assistance. As such, the rationale of the special rule would appear to be satisfied and recipients should have the ability to disregard the perpetrator's income and assets (including jointly held assets) in such situations. LSC does not believe the risk that a domestic violence victim would self-identify as a way of circumventing the financial eligibility requirements is significant and is confident a recipient would explore the situation further if the recipient suspected the claims of the applicant were specious.

Finally, LSC has decided to permit recipients to adopt financial eligibility policies which 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 section 1611.4(b). This issue is discussed in greater detail below.

Section 1611.4 – Financial Eligibility for Legal Assistance

This section sets forth the basic requirement that recipients may provide legal assistance supported with LSC funds only to those individuals whom the recipient has determined are financially eligible for such assistance pursuant to their policies, consistent with this Part. This

section also contains a statement that nothing in Part 1611 prohibits a recipient from providing legal assistance to an individual without regard to that individual's income and assets if the legal assistance is supported wholly by funds from a source other than LSC (regardless of whether LSC funds were used as a match to obtain such other funds, as is the case with Title III or VOCA grant funds) and the assistance is otherwise permissible under applicable law and regulation. This section further provides that a recipient may find an applicant to be financially eligible if the applicant's assets are at or below the recipient's applicable asset ceiling level (or the ceiling has been properly waived) and the applicant's income is at or below the recipient's applicable income ceiling, or if one or more of the authorized exceptions to the ceiling applies. These provisions are based on existing provisions found in sections 1611.3, 1611.4 and 1611.6. As revised, the new provisions do not represent a substantive change, but LSC believes having the basic statements as to who may be found to be financially eligible for assistance in one section makes the regulation much clearer. In addition, where the existing regulation uses a construction that speaks to when a recipient may provide legal assistance, the new language emphasizes the point that the requirements speak only to determinations of financial eligibility and not to decisions regarding whether or not to actually provide legal assistance. LSC received several comments supporting these changes and no comments opposing these changes. Accordingly, LSC adopts the revisions as proposed.

LSC is also incorporating into this section a significant substantive change to the regulation. Consistent with section 1611.3 as discussed above the regulation will now permit recipients to determine an applicant to be financially eligible because 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. For many recipients, a significant proportion of applicants rely on governmental benefits for low-income individuals and families as their sole source of income. In order to qualify for these benefits, such persons have already been screened by the agency providing the benefits (using an eligibility determination process that is at least as strict as the one required under LSC regulations) and determined to be financially eligible for those benefits. In Working Group discussions, many representatives of the field noted that if they could rely on the determinations made by these agencies without having to otherwise make an independent inquiry into financial eligibility, it would substantially ease the administrative burden involved in making financial eligibility determinations.

The Working Group also noted that current LSC practice permits recipients to determine that an applicant's assets are within the recipient's asset ceiling level without additional review if the applicant is receiving govermental benefits for low-income individuals and families, eligibility for which includes an asset test. Key to this practice is that the recipient's governing body has to take some identifiable action to recognize the asset test of the governmental benefit program being relied upon. This ensures that the eligibility standards of the govermental program have been carefully considered and are incorporated into the overall financial eligibility policies adopted and regularly reviewed by the recipient's governing body. As this practice has proved efficient and effective, it was determined that a parallel process could also be adopted for income screening and that these practices should be expressly included in the regulations. It is

important to note that this provision would only apply to applicants whose sole source of income is derived from such benefits. Applicants who also have income derived from other sources would be subject to an independent inquiry and assessment of financial eligibility.

LSC received several comments supporting these changes and one comment suggesting expanding this authority to permit recipients to make a determination that an applicant is financially eligible on the basis of receipt of governmental benefits for low income persons even when the applicant has another source of income, provided that the applicant's additional income was counted in determining eligibility for a governmental benefit program for low income persons (such as supplemental security income (SSI), in which the benefit is decreased as an offset to the other income). LSC is concerned that in such situations it cannot be guaranteed that an applicant's income would of necessity remain below the recipient's applicable income ceiling. The SSI program, for example, does not offset all other income dollar for dollar. Thus, an individual living alone whose income is solely derived from SSI will have an income of $579/month, while an individual living alone receiving Social Security income of $99 will receive an SSI payment of $500/month, for a total income of $599/month, and an individual living alone, with a monthly earned income of $317 and a state governmental benefit payment of $15/month, will receive an SSI benefit of $463/month, for a total monthly income of $795/month. *See, Understanding Supplemental Security Income*, Social Security Administration website, http://www.ssa.gov/notices/supplemental-security-income/text-income-ussi.htm. With the streamlined financial eligibility determination requirements LSC is adopting, LSC believes that performing a full financial eligibility screen on persons having income derived from sources in addition to governmental benefits for low income persons does not present an undue administrative burden and is necessary to ensure that only those who meet the recipient's financial eligibility criteria (based on applicable LSC laws and regulations) are determined to be financially eligible for LSC-funded legal assistance. Accordingly, LSC declines to expand the scope of §1611.4(c) and adopts the revisions as proposed.

LSC received one additional comment about the basic financial eligibility criteria for LSC-funded legal assistance. This commenter suggested that the determination of an applicant's financial eligibility be conditioned somehow upon the financial circumstances of the adverse party(ies) with whom the applicant has the problem for which the legal assistance is sought. LSC's financial eligibility requirements are based upon the statutory mandate that the eligibility of clients be based upon the assets and income of the applicant, the fixed debts, medical expenses and other factors which affect the applicant's ability to afford legal assistance, and the cost of living in the locality. *See* 42 U.S.C. §2996f(a)(2)(B). With the exception of the cost of living in the locality, all of the criteria set forth in the LSC Act relate to the ability of the *applicant* to afford legal assistance. There is no suggestion in either the Act itself or in its legislative history, that the financial circumstances of adverse parties are at all relevant to the determination of an financial eligibility of the applicant. Moreover, LSC believes that conditioning a determination of financial eligibility upon the financial situation of adverse parties would unfairly discriminate against some persons who are otherwise unable to afford private legal assistance and would be inconsistent with LSC statutory mission of fostering equal access to justice. *See* 42 U.S.C. §2996. Accordingly, LSC declines to add as a criteria for

determining financial eligibility an assessment of the financial situation of potential or actual adverse parties.[3]

Section 1611.5 – Authorized Exceptions to the Annual Income Ceiling

This section provides for authorized exceptions to the annual income ceiling. The language, like the current language of sections 1611.4 and 1611.5, on which it is based, is permissive. A recipient is at liberty to include some, none, or all of the authorized exceptions discussed below in its financial eligibility policies. Thus, to the extent a recipient chooses to avail itself of the authority provided in this section, a recipient is permitted to determine a particular applicant is financially eligible for assistance, notwithstanding that the applicant's income is in excess of the recipient's applicable income ceiling, if the applicant's situation fits within one or more of the authorized exceptions. In making such determinations, however, the recipient will also have to detemine that the applicant's assets are at or below the recipient's applicable asset ceiling (or the ceiling would have had to have been waived). This requirement is consistent with the current regulation, but is affirmatively stated for greater clarity. LSC received one comment specifically supporting this clarification and LSC adopts the language as proposed.

Under the revised section, there are two situations in which an applicant's income could exceed the recipient's income ceiling without an absolute upper limit: (1) where the applicant is seeking to maintain governmental benefits for low-income individuals and families; and (2) where the executive director (or his/her designee) determines, on the basis of documentation received by the recipient, that the applicant's income is primarily committed to medical or nursing home expenses and, in considering only that portion of the applicant's income which is not so committed, the applicant would otherwise be financially eligible.

The first instance represents a new addition to the regulation. Currently, an applicant seeking to *obtain* governmental benefits for low income persons may be deemed financially eligible if the applicant's income does not exceed 150% of the LSC national eligibility level. The existing regulation, however, does not specifically address applicants seeking to *maintain* such benefits. Thus, under the current regulation, an applicant whose income is over the income ceiling but under 150% of the LSC national eligibility level may be deemed financially eligible for assistance in obtaining benefits, but not for assistance in maintaining them. Thus, the applicant seeking assistance to maintain benefits would have to be turned down, but that same applicant could then be found financially eligible for assistance to re-obtain such benefits once the benefits were lost. Accordingly, LSC is addressing this problem in the regulation. However, unlike the situation in obtaining the benefits, in seeking to maintain benefits LSC considers an upper limit on income unnecessary since in such cases the applicant's income will necessarily be rather limited (for the applicant to have been eligible in the first place for the benefits he or she is

[3] This commenter also suggested that LSC adopt requirements relating to the regular sharing among the various parties to a case of information about costs expended by all parties (including hours and costs for attorney time) during the course of a recipient's representation of a client. This suggestion does not address financial eligibility determinations or the retainer agreement requirements. As such, it is outside the scope of this rulemaking and is not further addressed.

seeking to maintain). LSC received several comments supporting these changes and no comments opposing them. Accordingly, LSC adopts the revisions as proposed.

The second instance is taken from section 1611.5(b)(1)(B) of the current regulation addressing instances in which the applicant's income is primarily devoted to medical or nursing home expenses and does not represent a substantive change in the current regulation. LSC is now specifying in the regulation, however, that in such cases the recipient is required to make a determination of financial eligibility with regard to the applicant's remaining income. The existing regulation could be read to permit an applicant with an income of $300,000 to be deemed financially eligible if $250,000 of the income is devoted to nursing home expenses, notwithstanding that the applicant's remaining income is $50,000 – substantially in excess of the income ceiling. This situation is not intended, and, indeed, LSC has no reason to believe recipients are serving such persons. However, consistent with the overall goal of clarifying the regulation, LSC believes that a requirement that an applicant must be otherwise financially eligible considering only that portion of the applicant's income which is not devoted to medical or nursing home expenses should be clearly set forth in the regulation.

LSC received several comments generally supporting this change (and none opposing it) but asking LSC to delete the requirement that the determination that the applicant's income is primarily committed to medical or nursing home expenses be made by the Executive Director or his/her designee. These commenters argued that removing this requirement would afford recipients greater administrative flexibility in making financial eligibility determinations. The existing rule, however, does requires that the Executive Director make determinations regarding whether an applicant's income is primarily committed to medical or nursing home expenses. LSC believes it is important to continue this requirement in this instance because a recipient is making a determination of financial eligibility for an applicant whose income exceeds the otherwise absolute upper limit of the income ceiling, and such a determination should be made by a person in significant authority.[4] This is similar to the LSC view regarding decisions to waive the asset ceiling. LSC does understand, however, that it is important for recipients to have the discretion to delegate certain authority to regional or branch office managers or directors to increase administrative efficiency. This is why LSC proposed broadening the existing rule to permit the Executive Director to designate a responsible individual to make such determinations. LSC believes that this approach provides additional administrative flexibility to recipients yet is consistent with the underlying policy. Accordingly, LSC adopts the revision as proposed.

LSC is also permitting exceptions for certain situations in which the applicant's income is in excess of the recipient's applicable income ceiling, but does not exceed 200% of the applicable Federal Poverty Guidelines amount. At the outset, LSC notes that this section changes the current upper income limit of 150% of the LSC national income guidelines amount, which is 150% of 125% of the Federal Poverty Guidelines amounts, or 187.5% of the Federal

[4] This situation is distinguishable from the other exception to the absolute income limit relating to applicants seeking to maintain governmental benefits for low income persons. As noted above, in those instances, the applicant's income will already be rather limited, even if exceeding the absolute income ceiling. In the medical/nursing home expenses situation, this may not be the case and the applicant's income may be considerably in excess of the ceiling.

Poverty Guidelines amounts. Under the new regulation, the maximum upper limit increases to 200% of the Federal Poverty Guidelines amounts. Consequently, recipients will be able to consider applicants having slightly higher incomes than was previously possible. (For example, the 2005 LSC income guideline for a applicant in a three member household in the 48 contiguous states and the District of Columbia is $20,113. Under the existing rule, the maximum upper income limit for an applicant with a three member household is $30,170; under the new rule the maximum income limit for that household will be $32,180.) This action will slightly increase the pool of potential applicants for service. However, LSC believes that this slight increase in the eligible applicant pool will not have a negative impact on the quantity or quality of services delivered. Rather, this change recognizes the changing demographic of the legal services client base, which now increasingly includes the working poor. Moreover, amending the rule to increase the upper limit to 200% of the Federal Poverty Guidelines amounts will further simplify the regulation, which will aid grantees and their staff in making financial eligibility determinations. LSC received several comments strongly supporting this change, including one comment which noted that the change will allow for significant improvement in facilitating service collaboration and referrals among LSC and non-LSC service providers in many states because 200% of the Federal Poverty Guidelines amounts is used as an upper limit for income eligibility for a wide variety of programs providing services to low income persons. LSC received no comments opposing this change. LSC accordingly adopts this revision as proposed.

Turning to the exceptions, LSC is retaining the current exception for individuals seeking to obtain governmental benefits for low-income individuals and families. Second, LSC is adding an exception for individuals seeking to obtain or maintain governmental benefits for persons with mental and/or physical disabilties. Many disability benefit programs provide only subsistance support and those individuals should be treated the same way as those seeking to obtain benefits available on the basis of financial need. However, many persons with disabilties who are eligible for disability benefits may not be particularly economically disadvantaged and should not be eligible for legal assistance simply by virtue of eligibility for such disability benefits. Therefore, those applicants must have incomes below 200% of the applicable poverty level in order to be considered financially eligible for LSC-funded services. LSC received several comments supporting these provisions and no comments opposing them. Accordingly, LSC adopts these exceptions as proposed.

Finally, the revised regulation maintains the current authorized exceptions found in the factors listed in current section 1611.5. Specifically, the recipient will be permitted to determine an applicant whose income is below 200% of the applicable Federal Poverty Guidelines amount to be financially eligible for legal assistance supported with LSC funds based on one or more enumerated factors that affect the applicant's ability to afford legal assistance. As in the current regulation, recipients will not be required to apply these factors in a "spend down" fashion. That is, although recipients are permitted to do so, they are not required to determine that, after deducting the allowable expenses, the applicant's income is below the applicable income ceiling before determining the applicant to be financially eligible. The regulation is also amended to clarify that the factors apply to the applicant and members of the applicant's household. The

factors proposed are identical to the ones in the current regulation, with the following exceptions:

- the factor relating to medical expenses is restated to make clear that it refers only to unreimbused medical expenses, but that medical insurance premiums are included;
- the factor relating to employment expenses is reorganized for clarity and would expressly include expenses related to job training or educational activities in preparation for employment;
- the factor relating to expenses associated with age or disability no longer refers to resident members of the family as a reference to the applicant or members of the applicant's household has been incorporated elsewhere in this section of the regulation;
- the factor relating to fixed debts and obligations is amended to read only "fixed debts and obligations;"
- a new factor, "current taxes" is added to the list.

With regard to "fixed debts and obligations," the current regulation provides little guidance as to what is meant by this term, except to specifically include unpaid taxes from prior years. LSC has decided to simply use the term "fixed debts and obligations," while providing guidance in the preamble as to what is encompassed by the term. LSC believes that this approach will provide recipients with flexibility in applying the rule, while providing more guidance than could easily be contained in regulatory text.

Prior guidance from the LSC Office of Legal Affairs has stated that, "in the absence of any regulatory definition or guidance as to the meaning of 'fixed debts and obligations,' the common meaning of the term applies" and that it encompasses debts fixed as to both time and amount. See Letter of November 1, 1993 from J. Kelly Martin, LSC Assistant General Counsel, to Stephen St. Hilaire, Executive Director, Camden Regional Legal Services, Inc. Examples of such "fixed debts and obligations" would include mortgage payments, rent, child support, alimony, business equipment loan payments, and unpaid taxes from prior years. LSC intends that this term also include rent in addition to mortgage payments. Previous OLA opinions have addressed mortgage payments but not rent and rent has, heretofore, not been considered a fixed debt. LSC now sees no rational distinction between the two for the purposes of this regulation; in addition, LSC received several comments supporting the inclusion of rent as a fixed debt or obligation and no comments opposed. Therefore LSC will treat rent and mortgage expenses in a similar manner.

The term "fixed debts and obligations," however, is not without limit. It is not intended to include expenses, such as food costs, utilities, credit card debt, etc. These types of debts are usually not fixed as to time and amount. The Working Group considered whether there were additional factors which should be enumerated in this section and several members of the Working Group proposed adding other factors, such as utilities, to the list. Several commenters supported adding utilities to the overall list of factors. Although, as the commenters note, applicants must pay for some measure of utilities, the same can be said for clothing and food, which are also certainly basic necessary expenses. However, these sorts of costs have never been covered by the types of expenses which recipients are generally permitted to consider in

determining the ability of an applicant to afford legal assistance. With the exception of housing expenses (which fall under the heading of fixed debts and obligations, a category which does not generally include utilities because utility bills are not typically fixed as to time and amount), the other factors represent expenses for items which may not be particularly extraordinary, but which are for things other than the most basic necessities. Accordingly, LSC declines to add utilities to the list of fixed debts and obligations.

Related to the treatment of utilities, two commenters supported the idea LSC clarify that recipients have the flexibility to consider unusually high utility costs as an "other significant factor" under section 1611.5(a)(vii). LSC agrees that, under certain unusual circumstances, utility bills could be considered an "other significant factor" affecting an applicant's ability to afford legal assistance. LSC does not intend that section 1611.5(a)(vii) be used to routinely consider applicants' utility costs. This is true even if utility costs are typically high for an applicant because, for example, the applicant lives in a very hot or very cold area of the country. However, there may be circumstances in which an area of the country suffers a period of unusually hot or cold weather, or perhaps a discreet time period in which heating oil or gas prices are significantly higher than the normal range of prevailing prices. In addition, an individual applicant may have unusually high utility bills because of a malfunctioning furnace or some other problem with their home that they cannot get their landlord to fix or that they cannot afford to fix themselves. In such unusual circumstances, it could be appropriate for a recipient to take into account the extra amount of utility costs incurred by an applicant as an "other significant factor" in making a financial eligibility determination.

As noted above, another issue is whether to include current taxes within the scope of the term "fixed debts and obligations." Prior to 1983, Part 1611 included current taxes along with past due unpaid taxes as a fixed debt. When the regulation was changed in 1983, the reference to taxes was amended to refer only to unpaid prior year taxes. This change was justified on the basis that the 1611.5 factors were intended to account only for "special circumstances" affecting the ability to afford legal assistance. See 48 FR 54201 at 54203 (November 30, 1983). However, given that other types of expenses included in the list do not seem to be particularly "special" (e.g., mortgage payments; child care expenses), LSC no longer finds this explanation persuasive. Rather, LSC believes that the exclusion of current taxes, but not prior unpaid taxes, from the list of factors which recipients' may consider under exceptions to the income ceiling has the effect of punishing those persons who are in compliance with the law in favor of persons who are delinquent in their legal responsibility to pay taxes. Moreover, as noted above, applicants for legal services are increasingly the working poor. Excluding current taxes has a disproportionate effect on applicants who work versus applicants who do not work. Consequently, in the November 2002 NPRM, LSC proposed including current taxes within scope of the term "fixed debts and obligations" (as they had been prior to 1983).

When the Operations and Regulations Committee once again addressed this issue, field representatives reiterated their recommendation that the term "income" should be defined as income after taxes. LSC continues to believe, as noted above, that effectively defining income as net income, while the LSC income guidelines (and the underlying DHHS Federal Poverty Guidelines amounts on which the LSC guidelines are based) are calculated on the basis of gross

income would make the regulation internally inconsistent. Rather, LSC believes that considering taxes as a factor which can be considered by the recipient in making financial eligibility determinations addresses the practical problem raised by the commenters. However, the Committee considered current taxes as a fundamentally different kind of expense than the other expenses falling within the scope of "fixed debts or obligations." Instead, the Committee recommended, and the Board agreed, that current taxes should be a separate category of authorized exception to the annual income ceiling. Accordingly, LSC proposed adding a new subsection (iv) to section 1611.5(a)(4) and specifically invited comment on the proposed addition of an authorized exception for current taxes and on the appropriate scope and specific terminology which LSC should use to describe and define this proposed exception.

LSC received numerous comments reiterating the position that "income" should be defined as net after taxes, but that in the alternative (should LSC retain income as gross income) supported the proposal to include current taxes as a separate factor which recipients may consider as an authorized exception to the income ceiling. The one comment LSC received supporting LSC's proposal to retain the phrase "before taxes" in the definition of income expressly supported also treating current taxes as a separate factor which recipients may consider as an authorized exception to the income ceiling. All of these commenters also supported including a discussion in the preamble of what taxes should be included in the scope of the term "current taxes" rather than specifying a particular list in the text of the regulation. LSC agrees that such an approach is preferable. LSC believes that permitting some flexibility in the scope of the term "current taxes" is appropriate and in keeping with the intent of this rulemaking, although LSC also believes that the term "current taxes" should not be without limits. Thus, LSC intends that "current taxes" should include local, State and Federal income and employment taxes, Social Security and Medicare taxes, and local property taxes (including special property tax assessments) but not sales taxes or excise fees, such as airline ticket fees, hotel occupancy taxes, gas taxes, cigarette taxes, etc. Past tax debts, having become fixed debts owing, remain a fixed debt or obligation which recipients may consider under that factor.

Section 1611.6 – Representation of Groups

The eligibility of groups for legal assistance supported with LSC funds was a subject of extensive discussion among both the members of the Working Group and at the 2004 and 2005 meetings of the current Operations and Regulations Committee. Prior to 1983, the regulation permitted representation of groups that were either primarily composed of eligible persons, or which had as their primary purpose the furtherance of the interests of persons in the community unable to afford legal assistance. In 1983, the regulation was amended to preclude the use of LSC funds for the representation of groups unless they were composed primarily of individuals financially eligible for service.

During the Working Group meetings, representatives from the field proposed that LSC revise the regulation to once again permit the representation of groups which, although not primarily composed of eligible persons, have as a primary function the delivery of services to, or furtherance of the interests of, persons in the community unable to afford legal assistance. Examples of such a group might be a food bank or a rural community development corporation

working to develop affordable housing in an isolated community. Field representatives noted that in such cases, there may not be local counsel willing to provide *pro bono* representation and that the group might not otherwise be able to afford private counsel. Further, the field representatives noted that restricting recipients to representing with LSC funds only those groups primarily composed of eligible individuals prevents them from providing legal assistance in the most efficient manner possible as other groups may be better able to accomplish results benefitting more members of the eligible community than would representation of eligible individuals or groups composed primarily of such individuals. Field representatives also noted that the rule requires that the group would have to provide information showing that it lacks and has no means of obtaining the funds to retain private counsel, so that the rule would not permit representation of well funded groups.

The LSC representatives were concerned that allowing the use of LSC funds to support the representation of groups not composed primarily of eligible clients would be problematic. In the examples given, the "primary function" of the group is easily discernable. It may be, however, that there is or can be a wide variety of opinion on what the "primary function" of any group is and on what is "in the interests" of the eligible client community. The LSC representatives were concerned that the risk and effort related to articulating and enforcing a necessarily subjective standard would be inappropriate. Rather, LSC representatives were of the opinion that already scarce legal services resources would be better devoted to providing assistance to eligible individuals or groups of eligible individuals. In the end, the Working Group did not achieve consensus on this issue and the Draft NPRM did not propose to permit the representation of groups other than those primarily composed of eligible individuals.

In its deliberations on the Draft NPRM, the prior Board's Operations and Regulations Committee acknowledged the legitimacy of the concerns of the LSC representatives, but determined that the value of permitting the representation of groups having a primary function of providing services to, or furthering the interests of, those who would be financially eligible outweighed any risks attendant upon such representation. In approving the recommendation of the Committee, the Board directed that the Draft NPRM be amended to propose permitting such representation (including any conforming amendments necessary) prior to publication of the NPRM for comment. The NPRM published in November 2002 reflected this direction.

When the new Operations and Regulations Committee considered this issue, field representatives once again supported changing the regulation to permit the representation of groups having as their primary function the provision of services to, or furthering the interests of, those who would be financially eligible (providing the group could demonstrate its inability to afford to retain private counsel), while LSC Management initially once again supported permitting only the representation of groups primarily composed of eligible individuals. However, upon further reflection and consideration of the arguments made by the field and the comments made by members of the Operations and Regulation Committee, LSC Management ultimately recommended that the regulation could be broadened to permit the representation, in addition to groups primarly composed of eligible individuals, groups which have as a primary activity the delivery of services to persons who would be eligible. Management continued to

recommend that the regulation not permit the representation of groups whose primary activity is the "furtherance of the interests of" persons who would be eligible.

The Board agreed that permitting LSC recipients to use LSC funds for the representation of groups which provide services to low income persons is consistent with the LSC mission and could be an efficient use of LSC resources, provided that the legal assistance is related to the services the group provides. The Board also agreed that extending the permissible use of LSC funds for the representation of groups whose primary activity is the "furtherance of the interests of" low income persons would not be appropriate because of the necessarily subjective nature of determining what is in the "furtherance of the interests of" low income persons.

Accordingly, LSC proposed to permit a recipient to provide legal assistance supported with LSC funds to a group, corporation, association or other entity if the recipient has determined that the group, corporation, association or other entity lacks and has no practical means of obtaining private counsel in the matter for which representation is sought 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) 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.

The first instance, relating to the eligibility and representation of groups composed primarily of eligible individuals, represents the practice under the current section 1611.5(c). The new rule is intended to have the same interpretation of "primarily composed" that has developed and been adopted in practice over the years since 1983. In the case of membership groups, at least a majority of the members would have to be individuals who would be financially eligible; in the case of non-membership groups, at least a majority of members of the governing body would have to be individuals who would be financially eligible. LSC received no comments opposing this proposal and adopts it as proposed.

The latter instance represents a variation on one of the situations permitted by the pre-1983 rule, although the language has been revised to focus on "principal activity" rather than "primary purpose" (or "primary activity") and the rule permits only the representation of groups which have as a principal activity the delivery of services to low income persons. Limiting permissible represention to groups which have as a "principal activity" the provision of services to low income persons and the exclusion of groups which act in the "furtherance of the interest of the poor" are intended to make the analysis required in determining the permissibility of the representation more objective.

All but one of the comments strongly supported the addition of groups having as a principal activity the delivery of services to those persons in the community who would be financially eligible for legal assistance.[5] The commenters stated that this change, if adopted, will

[5] The remaining comment did not address this aspect of the proposed rule.

provide recipients with much needed flexibility to address pressing legal needs of low income persons in their communities. One comment noted in particular that providing legal assistance to human services organizations results in positive benefits to thousands of low income individuals and is generally very much supported by local communities. Examples cited by the commenter include helping a domestic violence shelter keep its residents' information confidential and providing legal assistance in the creation of an indigent health care plan providing free medical services to low income persons.

Although the Office of Inspector General (OIG) did not file separate comments on the NPRM, the OIG has previously raised a question as to whether permitting the representation of groups not comprised of eligible clients is problematic because, in its view, neither the LSC Act itself nor the legislative history endorse the premise that LSC may permit the representation of groups that are not composed of eligible clients. Although LSC appreciates the OIG's comments, LSC believes that the proposed regulatory requirements are consistent with the applicable laws. The LSC Act, on its face, does not prohibit the representation of groups other than those composed of otherwise eligible individuals. The Act only speaks to "eligible clients" and there is nothing in the text of the Act which suggests that a group which has as its principal activity the provision of services to persons who would be eligible for LSC-funded legal assistance is necessarily excluded from the scope of the term "eligible clients." In addition, LSC believes that the legislative history of the Act and the 1977 LSC Act amendments is not dispositive on the issue of whether the statute was intended to prohibit the representation of groups other than those comprised of eligible individuals. Rather, support for the notion that Congress contemplated the provision of legal assistance to groups providing services to eligible clients can be seen in the comments Senator Riegle made in discussing an amendment relating to the prohibition by recipients on organizing:

> A similar clarification is made in section 9(c)[of the Senate Reauthorization Bill] regarding the prohibition on organizing activities. Legal Services should not directly organize groups. *However*, it should provide full representation, education and outreach to those organized groups who are made up of *or which represent* eligible clients.

Congressional Record of October 10, 1977, p. S 16804. (emphasis added).

Accordingly, LSC is adopting the proposal to permit recipients to provide legal assistance to groups having as a principal activity the delivery of services to those persons who would be eligible for LSC-funded legal assistance. In addition, LSC is adopting the proposed further limitation that the legal assistance must be related to the services delivered by the group. One commenter objected to this limitation. This commenter stated that legal assistance in an unrelated matter, such as an employment dispute, could have a significant impact on an organization's ability to provide its services. LSC notes that although there may be instances in which an unrelated legal matter could have an impact on the organization's delivery of services, there are instances in which unrelated legal matters would not have any impact on the delivery of services. In addition, LSC believes that this limitation, along with the limitation relating to the group's "principal activity," will avoid creating a potential situation whereby recipients might

feel free to undertake broad based, systemic social change activities, but will permit recipients to provide legal assistance that will enable a group to pursue its goals of service to the eligible client community. LSC believes that these limitations will help ensure that LSC funds will be used to provide financially eligible groups with the day-to-day legal services which are the hallmark of LSC-funded legal assistance. Finally, LSC notes that if a recipient wishes to provide legal assistance to a group whose principal activity is the delivery of services to low income persons in a legal matter not related to that service, the recipient may provide that legal assistance with non-LSC funds.

LSC is adding a provision to the regulation specifying the manner of determining the eligibility of groups. Although the practice has been that recipients must collect information that reasonably demonstrates that the group meets the eligibility requirements set forth in the regulation, standards for determining and documenting the eligibility of groups has not previously been specifically addressed in the regulation. LSC Management does not believe that recipients are representing ineligible groups, but the Working Group was nevertheless in agreement that it is important and appropriate for the regulation to expressly state the Corporation's expectations in this area. The November 2002 NPRM would have required a recipient to collect information reasonably demonstrating that the group meets the eligibility requirements set forth in the regulation.

In written comments filed in response to the November 2002 NPRM, and again in the course of the new Operations and Regulation Committee's 2004 and 2005 deliberations, the OIG expressed concern that the proposed rule should provide eligibility criteria sufficient to ensure that groups seeking LSC-funded legal assistance qualify for such legal assistance and should require grantees to retain adequate documentation of such group eligibility. Although LSC believes that the November 2002 proposed financial eligibility standards for groups effectuated the principal criterion in the Act that those seeking LSC-funded legal assistance must be financially unable to afford legal assistance and were in no way inconsistent with the LSC Act, LSC does agree with the OIG that the standards for determining the eligibility of groups can and should be more specific than those set forth in the November 2002 NPRM.

Accordingly, in assessing the eligibility of a group, LSC proposed to require recipients to consider the resources available to the group, such as the group's income and income prospects, assets and obligations. LSC also proposed that for a group primarily composed of individuals who would be financially eligible for LSC-funded legal assistance under the Act, the recipient would also have to consider whether the characteristics of the persons primarily composing the group are consistent with financial eligibility under the Act. LSC further proposed that for a group having as a principal activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance under the Act, the recipient would also have to consider 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 principal activity of the group. Finally, LSC proposed to require a recipient to document group eligibility determinations by collecting information that reasonably demonstrates that the group meets the eligibility criteria set forth in the rule.

All but one of the commenters supported the proposal to require recipients to consider the resources available to the group, such as the group's income and income prospects, assets and obligations.[6] Several of the commenters, however, opposed the proposed requirement that the recipient must determine whether the characteristics of the group (or the characteristics of the persons receiving the services of the group) are consistent with financial eligibility for LSC-funded legal assistance. These commenters suggested that these proposals were not clear and could lead to disputes between LSC and recipients over whether the articulated standard was met. These commenters suggested that it would be sufficient only to require that recipients consider and collect information that "reasonably demonstrates" that the group meets the eligibility criteria.

As discussed above, LSC believes that it is important that the regulation specify what information recipients must consider in order to make determinations that the eligibility criteria are met. In the case of individual applicants, the eligibility criteria are that applicants must have income and assets valued at below the set levels and the regulation expressly requires recipients specifically consider the applicant's income and assets. Similarly, since the group eligibility criteria include that the group or the persons served by the group must be those who would be financially eligible, it is appropriate for the regulation to expressly require that recipients consider whether the group or the persons served by the group are those who would be financially eligible.

In discussions during the Operations and Regulations committee meetings on this subject, it was noted that the November 2002 NPRM standards for determining the eligibility of a group (which the commenters essentially suggest LSC adopt) were intended to reflect the current, unwritten practice with regard to determinations of eligibility of groups primarily composed of eligible individuals. The information adduced during those discussions indicated that recipients generally consider the nature and characteristics of the group in making group eligibility determinations, particularly in cases in which the group was sufficiently large as to make individualized screening a majority of the members of the group impracticable. For example, if the group seeking legal assistance is a tenants' association for a public housing project, the recipient often looks at the fact that the residents had to meet some financial eligibility screening to obtain public housing as a way of satisfying itself that the group meets the eligibility criteria that it be primarily composed of those who would be financially eligible for LSC-funded legal assistance. LSC believed (and still believes) that the standard set forth in the proposed rule (regarding whether the characteristics of the group or the persons being served by the group are consistent with financial eligibility for LSC-funded legal assistance) fairly reflects the current practice. Contrary to the concern expressed by the commenters, this practice has not proved to be problematic to date, nor is there any suggestion in the comments that LSC is currently "second guessing" recipients' determinations of group eligibility. LSC does not anticipate that incorporating the currently unwritten standard into the regulation will change this situation.

In addition, the revised rule retains and restates the current provision of the rule that these requirements apply only to a recipient providing legal assistance supported by LSC funds,

[6] The other comment did not address the proposal regarding group eligibility.

provided that regardless of the source of funds used, any legal assistance provided to a group must be otherwise permissible under applicable law and regulation.

LSC notes that, as with other aspects of this rule, section 1611.6 does not speak to eligibility of groups for legal assistance under other applicable law and regulation. For example, the eligibility of a group under proposed section 1611.6 does not address issues related to the eligibility of the group under Part 1626 of LSC's regulations, concerning citizenship and alien status eligibility. Similarly, the fact that a recipient may determine a group to be eligible for legal assistance under this Part, does not address other questions relating to permissibility of the representation (i.e., this Part does not confer authority for the representation of a group on restricted matters, such as class action lawsuits or redistricting matters, etc.)

Finally, LSC notes that in the November 2002 NPRM, this section was numbered 1611.8 and placed at the end of that proposed regulation. LSC is now placing this section before the sections on Manner of Determining Financial Eligibility and Change in Financial Eligibility Status as both of those sections are applicable to both groups and individual applicants and clients.

Section 1611.7 – Manner of Determining Financial Eligibility

LSC is making several revisions to this section. First, LSC is including a requirement that in making financial eligibility determinations a recipient shall make reasonable inquiry regarding sources of the applicant's income, income prospects and assets and shall record income and asset information in the manner specified for determining financial eligibility in section 1611.4. This requirement replaces the process currently required by section 1611.5, whereby a recipient is effectively required to conduct a lengthy and often cumbersome inquiry as to the applicant's income, assets and income prospects, including inquiry into a detailed list of factors relating to an applicant's specific financial situation and ability to afford private counsel. The Working Group discussed this issue at length and representatives of the field noted that conducting such a detailed inquiry in most cases is a task which is often difficult to accomplish efficiently at the point of intake, especially as much of intake is performed by volunteers, interns or receptionists. Rather, many recipients, in practice, conduct a somewhat abbreviated version of the otherwise required process, inquiring into current income, assets, income prospects and probing for additional information based on the responses provided, the requirements of the regulation and their knowledge of local circumstances. This approach, the field representatives noted, is less prone to error and assists in fostering an appropriate attorney-client relationship with individuals accepted as clients. As LSC is not finding widespread instances of service being provided to financially ineligible persons, it was agreed that that the process required by the existing regulation is unduly complicated and that the simplified requirement proposed would be adequate to ensure that recipients are making sufficient inquiry into applicants' financial situations to determine financial eligibility status under the regulation while being less adminstratively burdensome for recipients and more conducive to the development of the attorney-client relationship. LSC also believes that adoption of the streamlined financial eligibility determination process will aid the Corporation in conducting compliance reviews.

As noted above, LSC originally proposed in the November 2002 NPRM, to include this provision in proposed section 1611.4, Financial Eligibility for Legal Assistance. Upon reflection, LSC believes that as this requirement is really a requirement as to how financial eligibility determinations are to be made, it is better included in this section on the manner of determining financial eligibility. LSC believes that this will improve the organization and clarity of the regulation.

Second, LSC is deleting the requirement in existing paragraph (a) of this section that LSC eligibility forms and procedures must be approved by the Corporation. It has been LSC's experience that receiving the forms has not enhanced its ability to conduct oversight of recipients. These documents are readily available to LSC from recipients when needed. This requirement appears only to create unnecessary work for recipients and LSC staff without serving any policy purpose.

LSC is also adding a provision to the regulation making clear that a recipient agreeing to extend legal assistance to a client referred from another recipient may rely upon the referring recipient's determination of financial eligibility, provided that the referring recipient provides and the receiving recipient retains a copy of the eligibility form documenting the financial eligibility of the client. This is the currently accepted practice, but is addressed nowhere in the existing regulation.

LSC received several comments supporting these changes and no comments opposing them. Accordingly, LSC adopts the revisions as proposed.

Section 1611.8 – Change in Financial Eligibility Status

LSC is adding language to this section to provide that if a recipient later learns of information which indicates that a client never was, in fact, financially eligible, the recipient must discontinue the representation consistent with the applicable rules of professional responsibility. This addition is being adopted because sometimes, after an applicant or group has been accepted as a client, the recipient discovers or the client discloses information that indicates that the client was not, in fact, financially eligible for service. This situation is not covered by the existing regulation because the client may not have experienced a change in circumstance but rather, the recipient has discovered new pertinent information about the client. LSC notes that the new language, like the current regulation, is not intended to require a recipient to make affirmative inquiry after accepting an applicant or group as a client for information that would indicate a change in circumstance or the presence of additional information regarding the client's financial eligibility.

The regulation requires that when a client is found to be no longer financially eligible on the basis of later discovered information, the recipient shall discontinue representation supported with LSC funds, if discontinuing the representation is not inconsistent with applicable rules of professional responsibility. This language is parallel to the current requirement regarding discontinuation of representation upon a change in circumstance. LSC wishes to note that, to the extent that discontinuation of representation is not possible because of professional responsibility

reasons, a recipient may continue to provide representation supported by LSC funds. This is currently the case and LSC intends to make no change in the regulation on this point.

In addition, LSC is changing the name of this section from "change in circumstances" to "change in financial eligibility status" to reflect the addition of the later discovered information provision.

LSC received several comments supporting these changes and no comments opposing them. LSC accordingly adopts the revisions as proposed.

Section 1611.9 – Retainer Agreements

The retainer agreement requirement, found at section 1611.8 of the existing regulation, was the subject of significant discussion in the Working Group. Representatives of the field agreed with the LSC representatives that a retainer agreement may be appropriate under certain circumstances, but argued that this regulatory requirement is not required by statute, is not justified under applicable rules of professional responsibility, may be unnecessarily burdensome in some instances and is not related to financial eligibility determinations. They contended that, barring a statutory mandate, decisions about the use of retainer agreements, like those involving many other matters relating to the best manner of providing high quality legal assistance, should be determined by a recipient's Board, management and staff, with guidance from LSC. They urged LSC to delete this requirement. The LSC representatives, however, were of the opinion that the existing provision in the regulations requiring the execution of retainer agreements is professionally desirable, authorized in accordance with LSC's mandate under Section 1007(a)(1) of the Act to assure the maintenance of the highest quality of service and professional standards, and appropriate to assure that there are no misunderstandings as to what services are to be rendered to a particular client. Retainer agreements protect the attorney and recipient in cases of an unfounded malpractice claim and protect the client if the attorney and the recipient should fail to provide legal assistance measuring up to professional standards. In the end, the Working Group was unable to reach consensus on this issue and the Draft NPRM retained a provision generally requiring the execution of retainer agreements, along with proposing requirements for client service notices and PAI referral notices in lieu of retainer agreements under certain circumstances.

After deliberations on the Draft NPRM, the Board determined to propose elimination of the retainer agreement requirement altogether and the November 2002 NPRM published by LSC reflected this determination. With the exception of the comments of the LSC OIG, all of the comments LSC received on the November 2002 NPRM supported the elimination of the retainer agreement requirement.

With the appointment of the new members of the Board of Directors and the new LSC President, LSC had the opportunity to reconsider this proposal. Field representatives reiterated their support for elimination of the retainer agreement requirement from the regulation, while LSC Management reiterated its support for retention of a retainer agreement requirement for extended service in the regulation, with certain amendments intended to clarify and streamline

the requirement. The Board agrees with Management. LSC is committed to keeping a retainer agreement requirement in the regulations. LSC considers the practice of providing retainer agreements to be professionally desirable and in accordance with its mandate under Section 1007(a)(1) of the Act to assure the maintenance of the highest quality of service and professional standards and to assure that there are no misunderstandings as to what services are to be rendered to a particular client. Retainer agreements protect the attorney and recipient in cases of an unfounded malpractice claim and protect the client if the attorney and the recipient should fail to provide legal assistance measuring up to professional standards.

LSC agrees, however, that there are changes that can be made in the retainer agreement requirement to clarify the application of the requirement and to lessen the burden on recipients, without interfering with the underlying goals of the requirements. First, LSC believes that it is not necessary for LSC to approve retainer agreements and proposes to remove the requirement at current section 1611.8(a) that retainer agreements be in a form approved by LSC. Instead, LSC is requiring the retainer agreements must be in a form consistent with the local rules of professional responsibility and must contain statements identifying the legal problem for which representation is being provided and the nature of the legal services to be provided. LSC believes that this simplification will eliminate possible sources of confusion for recipients in drafting retainer agreements, yet will continue to foster the essential communication between the recipient and the client.

Second, LSC is clarifing the circumstances in which retainer agreements are required. Under current section 1611.8(b) a recipient is not required to execute a retainer agreement "when the only service to be provided is brief advice and consultation." Although the plain language of this provision would seem to encompass situations in which the attorney is providing only some information and guidance on a suggested course of action to the client, it has over the years, come to include brief services such as drafting simple documents or making limited contacts (by phone or in writing) with third parties, such as a landlord, an employer or a government benefits agency, on behalf of the client. LSC has determined that the discrepancy between the plain language and the practical meaning of the exception must be corrected.

During the public deliberations on this matter in the 2004 and 2005 Operations and Regulations Committee meetings, LSC considered different approaches to resolving the discrepancy between the regulation as written and the prevailing practice. Field representatives suggested in the event that a retainer agreement requirement remains in the rule (although still preferring the elimination of any such requirement) that the language of the exception should reflect the current practice by expressly including brief service type activities along with advice and counsel. They asserted that the proposed rule should add no new administrative or regulatory burdens on recipients. While recognizing the value of retainer agreements in some circumstances, the field representatives also argued that the rules of professional responsibility in most jurisdictions do not require that a retainer agreement be executed or that any other form of notice be provided in the brief service context. Although LSC Management expressed the belief that while some form of written communication between the attorney and the client in brief services cases about the nature of the relationship and a clear understanding as to what services are to be rendered is important to achieving the highest quality of legal service and professional

standards, it ultimately recommended against requiring grantees to provide specific written communications to clients when only brief services are being provided.

Most of the comments LSC received on the NPRM reiterated the arguments previously made by field representatives. At the same time, however, the commenters noted that if LSC was going to remain committed to maintaining a retainer agreement requirement in the regulation, that the proposed revisions were an appropriate and helpful change from the current requirement. In particular, several comments supported proposals to exclude PAI attorneys from the scope of the requirement and to delete the requirement for LSC prior approval of retainer agreement forms.

After considering all of the various arguments on this matter in LSC has determined that, on balance, written communications in brief services cases represents a "best practice" and, for the purposes of a regulatory requirement, the current practice by which retainer agreements are only required when the recipient is providing extended service to the client is appropriate. Accordingly, LSC is adopting the revisions as proposed. Under the new rule, recipients will only be required to execute retainer agreements when providing extended services to clients. Extended service is characterized by the performance of multiple tasks incident to continuous representation in a case. Examples of extended service include representation of a client in litigation, an administrative adjudicative proceeding, alternative dispute resolution proceeding, and more than brief representation of a client in negotiations with a third party. In addition, LSC is retaining the provision in the current regulation that the retainer agreement must be executed when representation commences or as soon thereafter as is practicable.

To further clarify the regulation, LSC is including express language specifying that recipients are not required to execute retainer agreements if the only services being provided are advice and counsel or brief service. Advice and counsel is characterized by a limited relationship between the attorney and the client in which the attorney does no more than review information and provide information and guidance to the client. Advice and counsel does not encompass drafting of documents or making third-party contacts on behalf of the client. LSC notes also that it proposes to use the term "advice and counsel" instead of "advice and consultation" because the term "advice and counsel" is a widely understood case reporting term throughout the legal services community and LSC believe that use of the standard term will be simpler and clearer. Brief service is the performance of a discrete task (or tasks) which are not incident to continuous representation in a case but which involve more than the mere provision of advice and counsel. Examples of brief service include activities, such as the drafting of documents such as a contract or a will for a client or the making of one or a few third-party contacts on behalf of a client in a narrow time period. In advice and counsel and brief service cases, the interaction between the recipient and the client is generally limited in nature and duration so that executing a retainer agreement is administratively burdensome. In these situations it may take more time and effort for the recipient to prepare the retainer and ensure that the client has signed and returned an executed copy of the retainer agreement to the recipient than it takes for the recipient to provide the service to the client. At that point, the benefit of having the executed retainer agreement is outweighed by the effort required to comply with the requirement.

Finally, LSC is adding a statement to the regulation providing that no written retainer agreement is required for legal services provided to the client by a private attorney pursuant to 45 CFR Part 1614. Until now, LSC has consistently interpreted the retainer agreement requirement as applying to cases handled by private attorneys pursuant to a recipient's PAI program and OLA has advised recipients that the best course of action is to have the client execute retainer agreements with both the recipient and with the private attorney (OLA Opinion 99-03, August 9, 1999). Recipients have reported that entering into retainer agreements with clients with whom it does not have on-going direct relationships does not further the goal of the retainer agreement requirement and that ensuring that retainer agreements be executed between clients and private attorneys is unduly administratively burdensome. LSC agrees.

The application of the retainer agreement requirement comes from the current structure of the text of the regulation. Under the current regulation, a recipient is required to execute a retainer agreement (unless otherwise excepted) "with each client who receives legal services from the recipient." Cases referred to private attorneys pursuant to a recipient's PAI program remain cases of the recipient and the clients in those cases remain clients of the recipient and the client is considered to be receiving some legal services from the recipient. However, by amending the language of the text of the regulation to say that the recipient is only required to execute a retainer agreement "when the recipient is providing extended service to the client" the necessity of applying the requirement to PAI cases is removed. In cases handled by PAI attorneys, although the client can be said to be receiving some legal services from the recipient, the recipient is not providing *extended* services. Although this change to the language alone could arguably be sufficient to remove the necessity of applying the retainer agreement requirement to cases being handled by PAI attorneys, LSC believes the text of the regulation should be further clarified to explicitly so state.

Other

LSC received numerous comments supporting LSC's decision not to incorporate the requirements of section 509(h) of LSC's FY 1996 appropriations act. Pub. L. 104-134, 110 Stat. 1321 (carried forward in each successive appropriation, including the current appropriation, Pub. L. 108-447, 118 Stat. 2809) with respect to records covered by this Part. Section 509(h) provides that, among other records, eligibility records "shall be made available to any auditor or monitor of the recipient . . . except for such records subject to the attorney-client privilege." During the prior stages of this rulemaking, there had been some discussion and consideration of having this language expressly incorporated into Part 1611. LSC continues to believe that, as 509(h) covers significantly more than eligibility records, having a full discussion of the meaning of 509(h) in the context of 1611, which addresses only financial eligibility issues, is not appropriate. LSC is making final its decision not to address 509(h) requirements in this rule. For a fuller discussion of this issue, see the preamble to the November 22, 2002 NPRM, 67 FR 70376.

List of Subjects in 45 CFR Part 1611

Legal services.

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

PART 1611—FINANCIAL ELIGIBILITY

Sec.
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
1611.9 Retainer Agreements

Authority: 42 U.S.C. 2996e(b)(1), 2996e(b)(3), 2996f(a)(1), 2996f(a)(2); Section 509(h) of Pub.L. 104-134, 110 Stat. 1321 (1996); Pub. L. 105-119, 111 Stat. 2512 (1998).

§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.

(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.

(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 before 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, wages and salaries before any deduction; 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.

§ 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 a household's principal residence, vehicles used for transportation, 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 other provision of the recipient's financial eligibility policies, every recipient shall specify as part of its financial eligibility policies that in assessing the income or assets of an applicant who is a victim of domestic violence, the recipient shall consider only the assets and income of the applicant and members of the applicant's household other than those of the perpetrator of the domestic violence and shall not include any assets held by the perpetrator of the domestic violence, jointly held by the applicant with the perpetrator of the domestic violence, or assets jointly held by any member of the applicant's household 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 Executive Director of the recipient, or his/her designee, 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

(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 taxes; or

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

(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) 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 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 principal 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 such activity of the group.

(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

(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.

§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.

Appendix A--Legal Services Corporation Poverty Guidelines

Note: Appendix A: The Corporation is not requesting comments on the current Appendix. The Appendix is revised annually, after the Department of Health and Human Services issues the new Federal Poverty Guidelines for that year.

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Victor M. Fortuno
Vice President & General Counsel